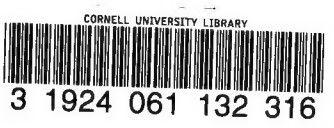
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THE

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REPLEVY—REPLEVY BOND—(See also FORTHCOMING BOND, vol. 8, p. 565; REPLEVIN).—The term replevy means to redeliver goods, which have been distrained, to the original possessor of them on his giving pledges.[1] A replevy bond is unknown to the common law, being wholly of statutory origin. It is merely a bond with security to pay the rent within a certain time,[2] whereupon the goods distrained were redelivered to the owner, it being merely a device to give the owner a breathing space. It is to be distinguished, therefore, from the replevin bond, which obliged the obligor to contest the legality of the distress by the writ of replevin.[3] It bears a close resemblance to a forthcoming or delivery bond, and is properly made payable to the sheriff.[4]

1. Kirk *v.* Morris, 40 Ala. 220, *quoting* Bouvier's L. Dict. See also Bell *v.* Thomas, 8 Ala. 527; Colorado Nat. Bank *v.* Lester (Tex.), 11 S. W. Rep. 626.

Recognizance Must be Attested by the Justice of the Peace.—A recognizance of replevy bail of a judgment recovered before a justice of the peace, if not attested by the justice, is wholly void. Fentriss *v.* State, 44 Ind. 271. See also Hougland *v.* State, 43 Ind. 537. But these cases were *overruled* on this point by Miller *v.* McAllister, 59 Ind. 491.

In a suit upon the bond of a constable, where the only breach alleged is a failure to levy upon the property of the replevy bail, if the undertaking of the replevy bail be void there can be no recovery. Hougland *v.* State, 43 Ind. 537.

The liability of a defendant upon a bond executed to the plaintiff according to the provisions of *Kentucky* Civil Code, § 215, "to perform the judgment of the court in the action, extends only to such judgment as the court may render on the claim for possession of the property sued for." McKee *v.* Pope, 18 B. Mon. (Ky.) 548.

Sureties on a replevy bond are bound only for the value of the property not forthcoming on demand. And as the sheriff's valuation of the property levied on in this case was not in accordance with law, he having made an aggregate valuation of real and personal property, the sureties should have been allowed on their injunction bill to prove the value of the property not forthcoming and to enjoin the execution as to the residue of the demand. Miles *v.* Davis, 36 Tex. 690.

Where an attachment has been levied on both real and personal property and the property attached has been replevied, the replevy bond will be regarded as applying to the personal property only. Miles *v.* Davis, 36 Tex. 690.

2. In *Virginia* three months. 4 Minor's Insts. (2d ed.) 125.

3. 4 Minor's Insts. (2d ed.) 126.

4. Adkins *v.* Allen, 1 Stew. (Ala.) 130; Sartin *v.* Weir, 3 Stew. (Ala.) 421; Whittemore *v.* Jones, 5 N. H. 362; Benham *v.* Collins, 23 La. Ann. 222. But see Miles *v.* Davis, 36 Tex. 690.

All the defendants in an execution

REPLICATION—(See generally COVENANT, vol. 4, p. 556; EQUITY PLEADINGS, vol. 6, p. 804; PLEADING, vol. 18, p. 467; REPLEVIN).—At law, the replication is the plaintiff's reply to the defendant's plea; in equity, the plaintiff's avoidance or denial of the answer or defense.[1]

REPORT.—1. An official or formal statement of facts or proceedings. For the reports of various officers see such titles as MASTER IN EQUITY, REFEREE, etc.

2. A printed or written collection of accounts or relations of cases judicially argued and determined.[2]

should join in giving a replevy bond; but, where only part join, such bond is valid until quashed at the motion of the plaintiffs. Kouns *v.* Bank of Ky., 2 B. Mon. (Ky.) 303. See also Com. *v.* Fisher, 2 J. J. Marsh. (Ky.) 137.

The plaintiff in an attachment cannot sue in his own name on a replevy bond made payable to the constable. Agnew *v.* Leath, 63 Ala. 345.

A bond to replevy attached property taken by an improper officer is void. Lawrence *v.* Featherston, 10 Smed. & M. (Miss.) 345.

1. Bouv. L. Dict.

2. Bouv. L. Dict. See also COPYRIGHT, vol 4, p. 154.

Reports.—"A printed or written collection of accounts or relations of cases judiciously argued and determined. In the jurisprudence of nearly every civilized country, the force of adjudicated precedents is to a greater or less degree acknowledged. . . . The European systems are composed, much more than either ours or the English, of codes; and their courts rely far more than ours upon the opinions of eminent text-writers. With us we pay no implicit respect to anything but a 'case in point;' and, supposing the case to be by an authoritative court, when that is cited, it is generally taken as conclusive on the question in issue. Hence both the English and American jurisprudence is filled with books of reports; that is to say, with accounts of cases which have arisen, and of the mode in which they have been argued and decided. These books, which until the last half century were not numerous, have now become, as will be seen in the list appended, or are becoming, almost infinite in number—so much so that the profession has taken refuge in the system of leading cases, which, in the forms of Smith's Leading Cases, The American Leading Cases, and White & Tudor's Leading Cases in Equity, and many others, have now obtained a place in most good libraries. Of these late years, in the *United States* at least, it is usual for the courts to write out their opinions and to deliver them to the reporter; so that usually the opinion of the court is correctly given. At the same time, the volumes of different reporters, even of quite modern times, are very different in character—the accounts of what the cases were being often so badly presented as to render the opinion of the courts, even when the opinions themselves are good, comparatively worthless.

"In addition to this, an immense proportion of the reports—especially of the American—are by courts of no great eminence or ability, while in *England*, with their system of rival reporters, we have at times been borne down with such a multitude of 'Reports' that the cases are fairly buried in their own masses. A late writer estimates the entire number of reports published on April 1, 1882, exclusive of numerous periodicals, at 5232. See 16 Am. L. Rev. 429. We are speaking here of the business of reporting as practiced, say, since the year 1800. Prior to this date there were only one or two American Reports. In *England*, however, there were even then very many, and among the English reports prior to the date of which we speak are many of the highest authority, and which are constantly cited at this day, both in *England* and *America*." Bouv. L. Dict. 541.

Reported.—Mailing a letter, prepaid and properly addressed, to an insurance company, if done by general direction of their agent, satisfies a condition in a policy that the facts stated in the letter shall be "reported" to the company. Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

REPORT AND CASE MADE.[1]

1. For the practice of reserving cases by the court at *nisi prius* for the determination of full court upon a report and statement of the case, and reporting cases to a supreme court for information on questions of law, see TRIAL. For cases certified or reported to a supreme court upon division of opinion of the judges of a lower court, see TRIAL; UNITED STATES COURTS. For the submission of a controversy upon a case made, see SUBMISSION OF CONTROVERSY; and for case made for the purpose of appeal, see SETTLED CASE ON APPEAL.

Rockland *v.* Farnsworth, 85 Me. 228, was an action of debt to recover a tax assessed upon personal property. In such an action the averment that the defendant is an inhabitant of the town is material, and where the action is submitted on a report to the law court and no testimony was given to prove the averment, it was held that no injustice would result from allowing the plaintiff town an opportunity to supply the omission if such evidence existed.

On trial of a writ of entry brought in the superior court under *Massachusetts* Gen. Sts., ch. 103, § 48, to recover an undivided portion of a parcel of land set out to the demandant by levy of an execution, the return of which omitted to recite the parcel could not be divided without damage to the whole, it is ruled by the judge that such levy was invalid by reason of the omission, and directed a verdict for the tenant. The rule was reported to the supreme judicial court, together with the motion of the demandant made after the verdict for an amendment of the levy. It was held that the question whether the verdict should be set aside and the levy amended should be heard and decided in the superior court before a decision in the supreme judicial court on the ruling made at the trial. McCormack *v.* Carroll, 103 Mass. 151.

A judge of the superior court reported a case before verdict by consent of the parties, under *Massachusetts* Statute of 1869, ch. 438, for the determination of the supreme judicial court as to the following questions: "Has the plaintiff, upon the evidence set forth, a case for the jury in any form of action? If he has, can he maintain an action upon his personal declaration? Upon what rule of damages is he entitled if he can maintain his personal action?" It did not appear from the report that the defendant had waived any objection to the pleadings, or that the plaintiff had been refused leave to amend, and it was held that the report should be dismissed. Murphy *v.* Boston, etc., R. Co., 110 Mass. 465.

Equity Cases Reported for a Court of Law.—Where a question of law arises incidentally in the course of a suit in equity, the case may be directed to be stated for the opinion of a court of law. "If a question of mere law arises in the course of an equity cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or executory devise, it is the practice of the equity court to refer it to the opinion of the judges of the court of king's bench or common pleas upon a case stated for that purpose, wherein all the material facts are admitted and the point of law submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides and certify their opinion to the chancellor, and upon such certificate the decree is usually founded." 3 Bl. Com. 453; Morrice *v.* Langham, 11 Sim. 260.

"The direction is not made necessary by any want of jurisdiction, for subject to any restraint which its own discretion may impose, the court has jurisdiction to decide every question whether of law or fact incidentally brought before it. If, however, a doubtful question of law arises which can be effectually separated from the equitable matter, its ordinary practice is to direct, upon the application of either party, that a case may be made for the common-law court, reserving its decision on the consequent equities until after the judges shall have given their certificate." Adams' Equity, p. 375.

The court of equity, however, is not bound by the certificate of the judges to whom the case has been referred, but may if it sees fit return the matter to the same or another court, or decide contrary to such certificate. Northam Bridge, etc., Co. *v.* London, etc., R. Co., 11 Sim. 42; Spry *v.* Bromfield, 12 Sim. 75; Muddle *v.* Fry, Mad. & G. 270.

In *Massachusetts* Gen. Stat., ch. 113, § 12, it is provided that if upon making an interlocutory decree order, the justice is of the opinion that it so affects

REPRESENT—(*Compare* REPRESENTATIONS).—See note 1.

REPRESENTATION.—See CONTRACT, vol. 3, p. 926; DECEIT, vol. 5, p. 319; ESTOPPEL, vol. 7, p. 12; FALSE PRETENSES, vol. 7, p. 699; FRAUD, vol. 8, p. 635; FRAUDULENT SALES, vol. 8, p. 786; MISREPRESENTATIONS, vol. 15, p. 623; SALES, vol. 21, p. 360; WARRANTY. In insurance law, see INSURANCE, vol. 11, p. 296; LIFE INSURANCE, vol. 13, p. 632; MARINE INSURANCE, vol. 14, p. 351. In agency and partnership, see AGENCY, vol. 1, p. 331; PARTNERSHIP, vol. 17, p. 1074; PUBLIC OFFICERS, vol. 19, p. 379. *Compare* REPRESENTATIVE.

REPRESENTATIONS (as to Character and Credit, as affected by Statutes of Frauds)—(See also DECEIT, vol. 5, p. 318; FALSE PRETENSES, vol. 7, p. 699; FRAUD, vol. 8, p. 635; MISREPRESENTATION, vol. 15, p. 623).

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the merits of the controversy that the matter ought to be determined by a court of law before further proceedings are had, he may report the case for that purpose and stay all further proceedings, except such as are necessary to preserve the rights of the parties. Matters of discretion, such as the refusal of a judge to grant issues, may be reviewed when a case in equity is reported for the consideration of the full court. Harris *v.* Mackintosh, 133 Mass. 228.

Under Maine Rev. Stat., ch. 77, § 23, equity cases should not be reported to the law court without a hearing before a single justice, until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits; and, in a case thus reported, if the bill does not contain sufficient allegations, it must be dismissed without any consideration of the evidence. Merrill *v.* Washburn, 83 Me. 189. In this case Emery, J., said: "We take this occasion to repeat what we have said in our former opinions, that in our present system of equity procedure, the law court is an appellate court, the court of last resort. Parties desiring a speedy adjudication of a cause in equity should not present it to the law court until it is in such shape that the opinion of the law court would be a final decision. The court held by a single justice is now the equity court of original jurisdiction, where the sufficiency of the pleadings can be formally considered, amendments readily made, and the cause then speedily heard on its merits. In this case the plaintiffs were advised by the answer that their bill of sale was defective in the statement. Instead of making proper amendments they have submitted their cause to this court of last resort upon their original allegations. These allegations, for the reasons before given, are clearly insufficient to justify the exercise of the court's equity powers."

This practice cannot exist in those States where the Code procedure has been adopted, and has been abolished by statute in England. 15 and 16 Vict., ch. 86, §§ 61, 62; 25 and 26 Vict., ch. 42, § 1; 2 Dan. Ch. Pl. & Pr. (5th ed.) 982.

1. When a vendor is sued for making statements, in respect to the quality of the articles sold by him, which are not according to the truth, if the vendee desires to charge him in tort he alleges that a false representation was made by him; but if he desires to charge him in contract he alleges a

I. THE STATUTE; ITS ORIGIN, SCOPE AND PURPOSE.—In *Great Britain*, *Canada*, and many of the States of the *United States*, no action can be brought whereby to charge any person by reason of any representation relating to the ability, conduct, credit, character, solvency, trade, or dealings of another, made with the intent that the other shall obtain credit thereby, unless such representation is in writing.[1]

The statutes are an absolute bar to any action by which it is sought to charge the defendant for false representations relating to the character, ability, credit, trade, or dealings of a third person, made in order that the latter may obtain credit, money or goods.[2] The form of the action is immaterial.[3] The statutes establishing this requirement as law were passed to remedy what was considered a defect in the Statute of Frauds,[4] and follow in substance the terms of the *English* statute, known as Lord

promise that was broken. To allege a contract he uses the word "warranted," "promised," "undertook," "agreed," or some equivalent word. To allege a tort he uses the phrase "falsely represented," or something equivalent to it, implying fraud. But the word "represent" does not import a promise, and does not give notice to the opposite party that a mere promise is relied upon. On the contrary, it gives notice that a fraud is alleged, and that the pleader has taken upon himself the burden of proving a *scienter*. Cooper *v.* Landon, 102 Mass. 60. See generally WARRANTY.

1. This is the law in *England*, *Ireland*, *Scotland*, *Upper* and *Lower Canada*, *Alabama*, *Indiana*, *Kentucky*, *Maine*, *Massachusetts*, *Missouri*, *Oregon*, *South Carolina*, *Vermont*, *Virginia*, *West Virginia* and *Wyoming*.

The statute applies only to representations as to credit in *California*, *Idaho* and *Utah;* and in *Michigan* only to "favorable" representations.

In *Massachusetts* the principle of the statute is extended to criminal proceedings, and no prosecution for the purchase of property by means of a false pretense relating to the purchaser's means or ability to pay, if payment is not to be made upon or before the delivery, can be maintained unless the pretense is in writing and signed by the party to be charged. *Massachusetts* Pub. St., ch. 203, § 59; Com. *v.* Parmenter, 121 Mass. 354; Com. *v.* Stevenson, 127 Mass. 446.

2. Haslock *v.* Fergusson, 7 A. & E. 86; 34 E. C. L. 41; Leddell *v.* McDougal, 29 W. R. 403; Pearson *v.* Seligman, 48 L. J., N. S. 842; McLean *v.* Dun, 1 Ont. App. 153; Cook *v.* Churchman, 104 Ind. 141; Hearn *v.* Waterhouse, 39 Me. 96; Hunter *v.* Randall, 62 Me. 423; 16 Am. Rep. 490; Kimball *v.* Comstock, 14 Gray (Mass.) 508; Wells *v.* Prince, 15 Gray (Mass.) 562; Mann *v.* Blanchard, 2 Allen (Mass.) 386; McKenney *v.* Whiting, 8 Allen (Mass.) 207; Bates *v.* Youngerman, 142 Mass. 120; Rawlings *v.* Bean, 80 Mo. 614; Clark *v.* Edgar, 84 Mo. 106; 12 Mo. App. 345; 54 Am. Rep. 84; Weil *v.* Schwartz, 21 Mo. App. 372.

3. The form of action is immaterial.

In the following cases it was in tort for the false and fraudulent misrepresentations, deceit: Leddell *v.* McDougal, 29 W. R. 403; Pearson *v.* Seligman, 48 L. J., N. S. 842; McLean *v.* Dun, 1 Ont. App. 153; Cook *v.* Churchman, 104 Ind. 141; Hearn *v.* Waterhouse, 39 Me. 96; Kimball *v.* Comstock, 14 Gray (Mass.) 508; Mann *v.* Blanchard, 2 Allen (Mass.) 386; McKenney *v.* Whiting, 8 Allen (Mass.) 207; Rawlings *v.* Bean, 80 Mo. 614; Clark *v.* Edgar, 84 Mo. 106; Weil *v.* Schwartz, 21 Mo. App. 372.

In the following, money had and received: Haslock *v.* Fergusson, 7 A. & E. 86; 34 E. C. L. 41; Hunter *v.* Randall, 62 Me. 423; 16 Am. Rep. 490.

In Bates *v.* Youngerman, 142 Mass. 120, tort for conversion.

While in Wells *v.* Prince, 15 Gray (Mass.) 562, counts in deceit and money had and received were joined under the *Massachusetts* Practice Act.

4. St. 29 Ch. II, ch. 3, § 4.

Tenterden's Act.[1] It was early decided[2] that the provisions of section four of the Statute of Frauds in relation to promises to answer for the debt, default, or miscarriage of another, did not apply to false and fraudulent representations as to the ability, credit, and conduct of another; and that an action would lie upon such representations, though not made in writing. To meet this decision Lord Tenterden's Act was passed. Its purpose seems to have been to put misrepresentations in mercantile cases upon the same footing with guaranties.[3]

1. St. 9 Geo. IV, ch. 14, § 6.

2. Pasley *v.* Freeman, 3 T. R. 51. This case has been followed steadily in *England*, and very generally in the *United States*. Eyre *v.* Dunsford, 1 East 318; Haycraft *v.* Creasy, 2 East 92; Tapp *v.* Lee, 3 B. & P. 367; Foster *v.* Charles, 6 Bing. 396; 19 E. C. L. 113; Russell *v.* Clark, 7 Cranch (U. S.) 69; Lahay *v.* City Nat. Bank, 15 Colo. 339; Wise *v.* Wilcox, 1 Day (Conn.) 22; Adams *v.* Anderson, 4 Har. & J. (Md.) 558; Upton *v.* Vail, 6 Johns. (N. Y.) 181; Addington *v.* Allen, 11 Wend. (N. Y.) 374; Ewins *v.* Calhoun, 7 Vt. 79; Fitzsimmons *v.* Joslin, 21 Vt. 129; 52 Am. Dec. 46; Lyons *v.* Briggs, 14 R. I. 222; Lang *v.* Lee, 3 Rand. (Va.) 410.

The case was severely condemned by Lord Eldon in Evans *v.* Bicknell, 6 Ves. Jr. 183, and has been harshly criticized in the *United States*. See Savage *v.* Jackson, 19 Ga. 305; Newsom *v.* Jackson, 26 Ga. 241; 71 Am. Dec. 206; Hopkins *v.* Cooper, 28 Ga. 392; Ward *v.* Center, 3 Johns. (N. Y.) 270.

3. 3 Reed's St. of Fr., § 1113.

Alderson, B., in Lyde *v.* Barnard, 1 M. & W. 107. In this case Abinger, C. B., summarized as follows the circumstances leading up to the act: "The statute of 9 Geo. IV, ch. 14, commonly called Lord Tenterden's Act, was introduced to supply a defect which had been found by experience to exist in the 29 Car. II, ch. 3, § 4, the material part of which, as it applies to this case, is in these words: 'That no action shall be brought whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person, unless . . .' The obvious policy of this statute was to prevent that fraud and perjury which had been found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable. . . . This statute seems to have successfully accomplished its object, till a mode was discovered of evading it, by shaping the demand, not upon a special promise, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false or fraudulent representation of the defendant, to induce him to contract with another person.

"The first case of this kind was that of Pasley *v.* Freeman. In that case Mr. Justice Grose differed from the other judges; he treated it as a case entirely new, for which there was no precedent, and, as a means of evading the Statute of Frauds, so obvious, that he predicted an abundant succession of actions of the same sort as a result of that determination. The other judges, Lord Kenyon, Mr. Justice Ashhurst, and Mr. Justice Buller, admitted that there was no precedent for such an action, but thought there were principles to be found in the law to support it; and Lord Kenyon in particular, with that high tone of moral feeling which ever distinguished his judgments, pronounced that the law would be very deficient if it had not given a remedy for an injury resulting from a gross breach of the plainest rules of morality. Whatever may have been the merit of this decision, it is certain that the prediction of Mr. Justice Grose has been fully accomplished. The case of Pasley *v.* Freeman, has been the foundation of a numerous class of cases of the like kind, some few of which only have found their way into the printed reports, the great majority having passed without further notice after the struggle for the verdict ceased. It was to remedy the inconvenience resulting from the frequency of those actions that Lord Tenterden introduced the statute 9 Geo. IV, ch. 14, § 6. . . ."

In Tatton *v.* Wade, 18 C. B. 381; 86

II. SIGNATURE.—Generally, it is sufficient if the writing is signed by the party to be charged or by any one authorized to act for him; but in some jurisdictions a signature by an agent is not sufficient.[1]

III. NATURE OF REPRESENTATIONS—1. Must Relate to Another.—The operation of the statutes is confined to cases where the representation is made in order that a third person may obtain money, goods, or credit upon the strength of it.[2]

E. C. L. 370, Pollock, C. B., said: "Lord Tenterden told me that his motive for introducing that provision into the bill was, that he was struck with the remarkable fact, that, numerous as actions of the sort were—actions for false representations as to the character and credit of third persons—the plaintiff almost invariably succeeded; which induced him to think there was some latent injustice which required a remedy. That is the true history of that enactment."

1. See generally for analogous matter, FRAUDS, STATUTE OF, vol. 8, p: 717.

Agent.—A signature by an agent is not sufficient in *England*. Williams *v.* Mason, 21 W. R. 386; 28 L. J., N. S. 232; Swift *v.* Jewsbury, L. R., 9 Q. B. 301; Bishop *v.* Balkis Consolidated Co., 25 Q. B. Div. 512. Nor in the following States: *Alabama* (Code 1876, § 2123); *California* (Civil Code (1872) § 1974); *Idaho* (Civil Code, § 939); *Oregon* (Hill's Annotated Laws, § 786); *Utah* (Civil Code, § 1210).

Partnership.—A partnership is not bound, although its signature is affixed by a partner; and the other partners are not liable although they know of and ratify the act of the signing partner. Williams *v.* Mason, 28 L. J., N. S. 232.

In this case A. Mason, carrying on business with his father, Charles Mason, as Mason & Son., wrote to the plaintiffs falsely representing G to be solvent. He showed the letter to Charles Mason (who assented tacitly), and signed it, "Mason & Son." The court held that Charles Mason could not be charged by the plaintiffs.

2. Lyde *v.* Barnard, 7 M. & W. 104; in Medbury *v.* Watson, 6 Met. (Mass.) 249; 39 Am. Dec. 726. The court by Hubbard, J., said: "A fraudulent representation, not affecting the title of a third person to credit is not within the statute, and need not therefore be in writing;" and this, although the words "to the intent or purpose that such person may obtain credit, money, or goods thereupon," contained in the early *Massachusetts* statute, were omitted in the revised statutes, ch. 74, § 3.

In that case the defendant had represented orally to the plaintiff that a third person was a shrewd man and had bought a mill, which the plaintiff desired, for $4,000; and that he could get it from him for the plaintiff at $4,000. In fact only $3,000 had been paid, as defendant knew. The defendant, by combination with the third party, induced the plaintiff to pay $4,000 for the mill, and received part of the extra $1,000. In a suit to recover for the false representations it was held that the statute did not apply.

This decision was approved and followed in Norton *v.* Huxley, 13 Gray (Mass.) 285, where it appeared that Thompson had a contract for burning coal with the defendant, and needing help to carry it out, went to the plaintiff in regard to it. The latter asked the defendant as to the state of the contract, who stated orally that there was no risk in carrying it on; that he had funds due Thompson in his hands and would retain the amount. Relying on this the plaintiff took an assignment of the contract. In fact the representations were untrue to the defendant's knowledge.

The court by Dewey, J., said: "The representations alleged to have been made by the defendant, it is true, in one sense, are representations as to the dealings of Thompson, but not to the intent that thereby money or goods should be paid or delivered to Thompson, or that the plaintiff should give him a credit for any goods or money lent or advanced, but in reference merely to the plaintiff's taking an assignment of the contract and becoming interested as a party thereto in the place of Thompson."

So, too, where false representations were made in regard to a firm in order to induce the plaintiff to invest in it. St. John *v.* Hendrickson, 81 Ind. 350.

A representation as to one's own credit is not within the statutes.[1]

A representation by a partner in regard to the credit of his firm is within the statutes;[2] and so of an officer of a corporation in regard to its credit.[3]

2. Representations as to Particular Property.—A representation, to be within the statutes, must relate to the general ability, character, credit, trade, or dealings of the third person; a representation as to particular property is not within the statutes.[4]

The same principle was upheld on substantially the same facts as in Norton *v.* Huxley, 13 Gray (Mass.) 285, in Daniel *v.* Robinson, 66 Mich. 296. See also Lebby *v.* Ahrens, 26 S. Car. 275; Hunter *v.* Randall, 62 Me. 423; 16 Am. Rep. 490.

Misrepresentations as to Credit or Solvency of the Maker of a Note.—Representations as to the credit, or solvency of the maker of a note made to induce a seller to take it in payment, are not within the statute. Hopper *v.* Lisk, 1 Ind. 176; Hassinger *v.* Newman, 83 Ind. 124; 23 Am. Rep. 64; Belcher *v.* Costello, 122 Mass. 189; Horner *v.* Perkins, 124 Mass. 431; 27 Am. Rep. 679; Cabot Bank *v.* Morton, 4 Gray (Mass.) 156; Huntington *v.* Wellington, 12 Mich. 10; Lenheim *v.* Fay, 27 Mich. 70; Taylor *v.* Soper, 53 Mich. 96; Watson *v.* Picket, 2 Mill (S. Car.) 222; Foster *v.* Swasey, 2 Woodb. & M. (U. S.) 217.

As to Solvency and Dealings of a Corporation.—The law is the same in regard to representations made in relation to the dealings, solvency, or credit of a corporation to induce the plaintiff to purchase its stock, or invest in the company. Bush *v.* Sprague, 51 Mich. 41; Kryger *v.* Andrews, 65 Mich. 405; French *v.* Fitch, 67 Mich. 492; Hess *v.* Culver, 77 Mich. 598; Clark *v.* Edgar, 84 Mo. 106; 54 Am. Rep. 84.

Intent for Jury.—The question of intent may be for the jury. Iasigi *v.* Brown, 17 How. (U. S.) 183. In this case the evidence showed that Iasigi, a merchant of Boston, applied to Curtis, a friend of his, agent in Boston of the defendant, who resided in New York, for information in regard to two manufacturing corporations in Connecticut. He made the inquiry with a view to further transactions with these corporations, but did not disclose his object. Curtis wrote to the defendant, and received an answer marked "confidential," containing representations in regard to these corporations which the defendant knew were false. This answer Curtis showed to the plaintiff and a close friend and adviser of the plaintiff. The plaintiff relied upon the representations, and suffered loss in consequence.

A majority of the court held that the question whether the defendant intended that his letter be exhibited was for the jury, and that the defendant was liable. From this, Curtis, Nelson, and Campbell, JJ., dissented.

In McLean *v.* Dun, 1 Ont. App. 153, where a person not a subscriber to a mercantile agency, obtained information of the agency through a subscriber in regard to the credit of a third person, and suffered loss by relying upon it, the court held that the knowledge of the agency that the representation might be used as a basis of credit, was sufficient to bring the case within the statute, Hagarty, C. J. C. P., dissenting. *Compare* Baker *v.* Ashe (Tex. 1891), 16 S. W. Rep. 36.

1. Hinchman *v.* Weeks, 85 Mich. 553. In this case the representation was made by the defendant to Dun's Mercantile Agency. City Bank *v.* Phillips, 22 Mo. 85; 64 Am. Dec. 254; Fisher *v.* Brown, 1 Tyler (Vt.) 387; 4 Am. Dec. 726; Hodgeden *v.* Hubbard, 18 Vt. 504; Best *v.* Smith, 54 Vt. 617.

2. **Partner.**—Devaux *v.* Steinkeller, 6 Bing. N. Cas. 84; 37 E. C. L. 290. The court by Coltman, J., said: "The representation was, no doubt, a representation as to the credit of the defendant; but it was also a representation as to others, to the intent that they might obtain credit for goods purchased." See also St. John *v.* Hendrickson, 81 Ind. 350; Fowler *v.* Benjamin, 16 U. C., Q. B. 174.

3. **Corporation.**—Wells *v.* Prince, 15 Gray (Mass.) 562; McKinney *v.* Whiting, 8 Allen (Mass.) 207; Clark *v.* Dunham Lumber Co., 86 Ala. 220.

4. **Particular Property.**—The law is well settled as laid down in the text;

3. Ultimate Purpose Immaterial.—In *England* and generally, in the *United States*, if the immediate object is to obtain credit for a third person, it is immaterial that the ultimate purpose of the defendant is to obtain an advantage for himself, or that the transaction is absolutely fraudulent on his part.[1]

but some difference of opinion appears in the decisions in regard to what constitutes a representation as to general pecuniary ability, and what a representation as to a specific portion of a third person's property.

This is best shown in Lyde *v.* Barnard, 7 M. & W. 101, where the action was for a false representation, that the life interest of T in the dividends, income, etc., of certain trust funds, of which the defendant was one of the trustees, was charged only with three annuities. The defendant knew that it was charged also with a mortgage for £20,000. Relying upon the representation, the plaintiff advanced money to T. The evidence showed that the representation was oral, and the plaintiff was non-suited. On a motion to strike off the non-suit, the court was equally divided.

Abinger, C. B., and Gurney, B., thought the representation related to the general ability of T to meet his liabilities, and the non-suit proper, Lord Abinger, laying down as the rule, "that the true construction of the statute is that the representation or assurance should concern or relate to the ability of the other person, effectually to perform and satisfy the engagement of a pecuniary nature into which he has proposed to enter, and upon the faith of which he is to obtain money, credit, or goods."

Barons Alderson and Parke, however, regarded the representation as relating to particular property, and not to the general ability of T, and thought the non-suit wrong, thinking the question, whether or not it related to general ability, should have gone to the jury.

Baron Alderson considered the test to be that the representation, " . . . to be within the act, must be one by which the value of the personal responsibility of the third person is increased in the judgment of the individual from whom he is about to obtain credit, money, or goods." . . .

The court granted a new trial in order to give an opportunity for an opinion in a court of error.

In Swann *v.* Phillips, 8 A. & E. 457; 35 E. C. L. 436, the representation declared upon was "that she, the plaintiff, might safely lend and advance to the said W J J, the said sum of £300, and take no further security for the repayment thereof than [his] promissory note . . . because the title deeds to a certain estate, which he, the defendant, then asserted and represented that the said W J J had just bought, were in the possession of him, the defendant, and that nothing could be done without the knowledge of the defendant, and the plaintiff would be perfectly safe in making such loan and advance to the said W J J upon the terms aforesaid." This the court held to amount to a representation that the general credit of W J J was good, which was within the statute.

A false certification by the transfer clerk of a corporation, that a stock certificate has been lodged with the company, on the faith of which the plaintiff received a transfer of the stock, is not a representation as to the ability of the holder to transfer the shares to the intent that he may obtain money of the plaintiff, but merely of a particular fact. Bishop *v.* Balkis Consolidated Co., 25 Q. B. Div. 512.

A representation by the president of a lumber company that his company was pressed by so many orders that it must buy lumber of the plaintiff and ship direct to the purchaser in order to fill them, was made to induce the plaintiff to let his company have lumber on credit. In fact, the company was in failing circumstances and needed the lumber for itself. This was held within the statute. Clark *v.* Dunham Lumber Co., 86 Ala. 220.

To the same effect are St. John *v.* Hendrickson, 81 Ind. 350; Cook *v.* Churchman, 104 Ind. 141; Belcher *v.* Costello, 122 Mass. 189; Homer *v.* Perkins, 124 Mass. 431; 27 Am. Rep. 677; Bush *v.* Sprague, 51 Mich. 41; Daniel *v.* Robinson, 66 Mich. 296; French *v.* Fitch, 67 Mich. 492; Crown *v.* Brown, 30 Vt. 707.

1. In Hasslock *v.* Fergusson, 7 A. &

E. 86, 34 E. C. L. 41, the action was for money had and received. The evidence showed a representation as to the character and credit of Mrs. B, on the strength of which the plaintiff sold goods to her on credit, and suffered loss in consequence. The court by Lord Denman, C. J., said: "The question is, whether the action is brought according to the terms of the statute 'to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person?' . . . Such, then, being the question, the plaintiff says that the action is not upon the representation, but for money had and received; that the representation is a mere medium of proof, the case being that a fraud was committed, in the course of which this representation was made, and that the produce of the goods obtained by such fraud belongs to the plaintiff. But the only fact on which the case of fraud rested at the time of offering the evidence was that the defendant had authorized Hobson to give Mrs. Barnes a fair character. We think that a representation made under those circumstances is within the very terms of stat. 9 Geo. IV, ch. 14, and therefore could not be received in evidence, unless put into writing."

In Pearson *v.* Seligman, 48 L. J., N. S. 842, the defendant was charged with making oral representations in regard to the solvency of one B in order to induce the plaintiff to advance money to him and embark in transactions with him, as a result of which the defendant expected to reap a benefit for himself through B's ability to repay debts due the defendant. The action was for the false representation, and the court held the statute a complete defense, saying, by Cotton, L. J.: "Where false representation is one of the essential parts of the plaintiff's claim, if it is a false representation as to the character of another, with whatever purpose that representation may be made, it comes within the words of the statute." . . . [The case is] "no less within the statute, because the party making that false representation as to the character of another may think he will get a benefit if it is acted upon."

But see Canham *v.* Barry, 15 C. B. 597; 80 E. C. L. 596; Ramshire *v.* Bolton, L. R., 8 Eq. 294. In the first of these cases the action was brought for damages for breach of contract in refusing to assign a lease. One of the pleas set up oral fraudulent representations as to the character of a proposed tenant made by the plaintiff to induce the defendant to agree to assign the lease. The court held the plea good.

Ramshire *v.* Bolton, L. R., 8 Eq. 294, was a bill in equity alleging that the defendant, a manager of a hotel, represented that he was about to advance £500 to R and L on a bill for £500 drawn by R and accepted by L. The defendant said he had had similar transactions which had turned out right, and that R and L were "quite safe and responsible persons and had ample means." He proposed that the complainant advance one-half, while he advanced one-half himself. The complainant agreed, and gave defendant £250, receiving a written acknowledgment from him stating that he held an acceptance of L for £500, owned one-half by complainant and one-half by himself. In fact these representations were untrue. The defendant did not advance one-half, and made the representations as to L and R to enable them to get money to discharge gambling debts and hotel bills due himself. L and R failed to pay the bill when due; and the complainant prayed that the defendant be ordered to repay the money. The defendant demurred for want of equity; but Malins, V. C., held that the bill set out a clear case of fraud by false representations which equity would retain. Nothing was said in regard to the statute, though there was nothing to show that the representations were in writing.

A leading case in support of the statement in the text is Cook *v.* Churchman, 104 Ind. 141. This was an action for damages for false and fraudulent representations as to the solvency, credit, and ability of Thomas Cottrell, by means of which the plaintiffs were induced to sell T. G. Cattrell $9,000 worth of goods on credit. The plaintiffs, merchants in New York, alleged that T. G. Cattrell, a merchant in Indianapolis, was largely indebted to the defendants, firm bankers in that city, and the defendant conspired with Thomas Cattrell to represent T. G. Cattrell of good credit, so as to induce the plaintiff to sell to him, taking Thomas Cattrell as guar-

antor, and, then, instead of paying, to have the proceeds turned over to the defendant's firm by T. G. Cattrell. T. G. Cattrell applied for goods on credit, and Thomas Cattrell offered himself as guarantor, referring the plaintiffs to Churchman, who represented him to be solvent and of good credit, owner of valuable property and good above all his indebtedness for these goods. This was false; was known to be so to Churchman, and was made with the intent to cheat the plaintiffs. The defendant demurred; the demurrer was sustained; and this was assigned as error. It was conceded the representations were oral.

The court by Mitchell, J., said: "It may, therefore, be considered that when representations are made concerning the credit, ability, etc., of another, by one not a party to the transaction, but with the intent that the person concerning whom they are made shall obtain credit upon such representations, then, even though fraudulent, they are nevertheless within the statute. . . .

"That the complaint contains averments charging a conspiracy cannot affect the question. The purpose of the statute cannot be disappointed by the form of complaint. The necessity that the representations should have been made in writing is the same where conspiracy is set up as where it is not. Where the action is to recover damages for false representations, made by a stranger to the contract, concerning any of the subjects enumerated in the statute, it must fail, unless the representations were made in writing duly signed, etc. This must be so whether the representations were made as the result of a conspiracy, and with the intent to perpetrate a fraud or otherwise. The question of liability must be determined by the inquiry, Were the representations made concerning the character, conduct, ability, etc., of 'any other person,' with the intent that the person concerning whom they were made, should obtain goods on credit, thereby? If they were, then, without regard to the fact that they may have been made by a preconcerted arrangement, or that the credit resulting from the fact that they were made inured incidentally to the advantage of the person making them, they are within the protection of the statute.

"The true test whether the cause of action, in whatever form alleged, comes within the statute, is, whether the action can be maintained without proof of other representations, and whether the representations relate to some one or more of the subjects enumerated in the statute, and were made with the purpose to establish the credit, or pecuniary ability of another. If such proof is essential, and if, when made, it establishes representations which relate to the subjects enumerated, then the statute applies. It is immaterial that the person making the representations may have had some design of obtaining some incidental advantage to himself, as a result of the credit intended to be secured thereby. . . .

"The statute we are now considering is in all respects the equivalent of what is commonly known as Lord Tenterden's Act. This act was introduced to supply a defect, found to exist in the Statute of Frauds, which was rendered conspicuous by the decision in Pasley *v.* Freeman, 3 T. R. 51, notwithstanding the provision that no action should be maintained whereby to charge another upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement was in writing, signed, etc. The decision referred to pointed out a mode of evading the statute, by shaping the action so as to make it count upon a tort or wrong by some fraudulent representation to the defendant, in order to induce him to contract with another, instead of upon a special promise. The intent and purpose of the statute was to cut off all such actions and to place representations of the character therein referred to upon the same basis as special promises to answer for the debt of another. It would hardly be contended that if the action was to recover on an oral promise to answer for the debt, default or miscarriage of another, the case would be taken out of the operation of the statute by averring a conspiracy, or that the promise was made by preconcert or prearrangement of two or more. Nor could the operation of the statute be avoided by averring that the special promise was fraudulently made, or that the promisor had some ulterior design looking to his own advantage in making it. That the promise was oral, and that it was to answer for the debt, default or miscarriage of another would be sufficient to end the inquiry.

"So, in this case, when it is admitted that the representations were by parol,

4. Effect of Actual Fraud.—In some of the *United States* actual

that they related to the credit and ability of a third person, and were made with the intent that money, goods or credit should be obtained by such third person. The case falls within the statute, and the motive with which they were made beyond that of obtaining credit is immaterial." . . .

"Our conclusion upon the whole matter is:

"1. That representations made concerning the character, conduct, credit, ability, etc., of any other person, by one not a party to the transaction, with the intent that such other person will obtain credit thereby, are within the statute.

"2. That such representations, made by one so situate, for the purpose above mentioned, are equally within the statute, whether made as the result of a conspiracy or not.

"3. That they are none the less within the statute for having been fraudulently made, with an expectation that some incidental advantage may flow to the person making them from the credit induced thereby.

"4. That representations concerning the particular property and assets of another, when made as above, with a view to establish the general credit and pecuniary ability of the other, are also within the statute."

Hunter *v.* Randall, 62 Me. 423; 16 Am. Rep. 490, was an action for money had and received, the plaintiff claiming that the defendant represented Oliver to be of good credit, to induce the plaintiff to lend to him, getting the benefit himself on loans he had made to Oliver. The court by Peters, J., said: "The language of the act is that 'no' action shall be maintained 'by reason of' any representation. It does not require that the plaintiff must, in terms, declare upon the representation. The true test whether the cause of action in whatever form alleged, comes within the statute, is, whether the action can be sustained without proof of the representation. If such proof is essential to the action, the statute applies. It is immaterial that the defendant may have had some design of obtaining an advantage to himself in consequence of the loan to Oliver, or that such a thing resulted from the transactions provided the primary object of the representations was to induce the procurement of a credit to Oliver, and the loans were obtained thereby. In such case the protection extended by the statute is absolute and complete.

"This view of the case does not necessarily deprive the plaintiff of all remedy. . . . The statute was evidently intended to bar only actions for verbal representations, made with the intent that the person concerning whom they are made may obtain money or goods thereupon."

On substantially similar facts, the court in Kimball *v.* Comstock, 14 Gray (Mass.) 508, by Merrick, J., said: "Any other object or purpose wholly distinct from an intent to enable a third person to obtain money, goods, or credit, of the party who makes representations concerning the character, conduct, or credit of another, cannot be considered as of any importance, since the statute expressly declares that no action shall be brought to charge any person by reason of such representations, unless it be made in writing and signed by him or by some person duly authorized in his behalf. This rule, being made peremptory and absolute by the statute, the motive of the party making verbal representations upon these subjects is wholly immaterial in reference to anything except such intent."

And in Mann *v.* Blanchard, 2 Allen (Mass.) 386, the court by Hoar, J., lays down the rule: "Where the benefit to be obtained by the defendant is to be gained wholly through the credit given to another in consequence of the alleged representation, the primary object of those representations must be regarded as the procurement of the credit."

In Bates *v.* Youngerman, 142 Mass. 120, the action was brought by the plaintiff for the conversion of his goods. He offered to prove oral representations made by the defendant Rubinouvz, in regard to the pecuniary responsibility of the defendant Youngerman, in order to show that the plaintiff was fraudulently induced to make the sale to Youngerman. This was excluded; and the court, on appeal, held rightly excluded, as within the prohibition of the statute.

Compare Fitzsimmons *v.* Joslin, 21 Vt. 129; 52 Am. Rep. 46.

fraud on the part of the defendant removes the case from the operation of the statute.[1]

1. The leading case in support of this view of the law is Warren *v.* Barker, 2 Duv. (Ky.) 155, where the action was brought against Warren for a fraudulent introduction of a third person to Barker & Co., on the faith of which they bought a bill of exchange from him. A demurrer because the representation was not in writing was sustained, but on appeal the court by Robertson, J., said: "Had the original petition intended to charge only a false representation the appellees would not be suable for it, as there was no written memorial of it. Our statute, like the Tenterden Act of *England*, should be construed as embracing every false representation untinged by a fraudulent intent, but it does not constructively include any case of actual fraud in wantonly misrepresenting a man's credit or identity more than any other kind of fraud in fact. Written evidence is not, therefore, required by our statute if the petition be sufficient to charge actual fraud."

As, in the opinion of the court, the evidence offered in support of an amended petition charging a combination on the part of the defendants, did not sustain the charge, the judgment of the lower court was affirmed.

This principle has been adopted in *Alabama*, in Ball *v.* Farley, 81 Ala. 288; and stated in Clark *v.* Dunham Lumber Co., 86 Ala. 224, by Somerville, J., as follows: "In other words, no representation made by a defendant as to the character, conduct, ability, trade, or dealings of a third person, even though false, can be made the basis of an action unless reduced to writing and signed by the party sought to be charged, or unless it is fraudulently made. In the latter case such right of action exists outside of and independently of the Statute of Frauds, the restriction of the statute having no reference to such cases."

It is also law in *Michigan*. In Bush *v.* Sprague, 51 Mich. 41, the declaration set out false representations in regard to the solvency of a corporation, made to induce the plaintiff to invest $2,000 in it, and alleged conspiracy and fraud. The first count set out the purpose to have been to gain a benefit for the defendants personally; the second count, to gain a benefit for the corporation. The court by Campbell, J., said:

"If we hold the statute applicable so strictly as it is claimed here, and hold that all unwritten representations must be disregarded, it needs very little reflection to see that the statute would operate as a most convenient cover for fraud, and could seldom fail to further it. And I am not prepared to hold that it reaches the multifarious contrivances of conspirators, or any cases where the fraud is not confined, at least substantially, to tangible verbal misrepresentations in which the defendants unite. Wherever any substantial gain accrues to the wrongdoers by the machinery of conspiracy, it cannot be said that the parties sued are charged upon mere representations or assurances. Neither can this be said where they have acted in concert, but by each one's choice of means, verbal or acted, to reach damaging results to the party defrauded. If mere words are sued upon, the words may come within the statute. But if they are but a part of the evil I cannot think the statute meant that they should lend cover to the fraud." All the justices held that upon the first count the action was not within the statute; and a majority (Campbell and Cooley, JJ.) held that it was not within the statute on the second count, Graves, C. J., dissenting.

This was followed in Hess *v.* Culver, 77 Mich. 598, where the suit was for fraudulent misrepresentations in inducing the plaintiff to give his notes for "Bohemian Oats;" one of the representations being in regard to the solvency of a corporation alleged to exist. The court by Campbell, J., said: "The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it."

The case is the more important because the *Massachusetts* decisions already referred to in this note, were

5. Representations Partly Oral.—Where the representations are partly oral and partly in writing, there can be no recovery unless the jury is satisfied that the plaintiff relied substantially on the written representations.[1]

cited in argument, but were ignored in the decision.

In Clark *v.* Hurd, 79 Mich. 130, the action was brought on the false representation that one Mary A. Smith, was a partner in a firm doing business at Jackson, in reliance upon which the plaintiff sold goods to the firm on credit. The defendant, a brother of said Mary, was alleged to have made the representation in order to obtain from the firm money due himself. The court held that, under Hess *v.* Culver, 77 Mich. 598, the case was not within the statute.

The law in *Vermont* seems to be the same. In Fitzsimmons *v.* Joslin, 21 Vt. 129; 52 Am. Dec. 46, the plaintiff brought trover against a sheriff to obtain goods held by him under an attachment, alleging that he sold the goods to the debtor in reliance upon false representations as to the purchaser's credit, made orally by the attaching creditor. The evidence showed that the attaching creditor was aware of the purchaser's insolvent condition, and after the latter had obtained the goods, immediately caused them to be attached in a suit to recover money due himself. The judge at the trial ruled that an action could be maintained against the attaching creditor for his false representations, but that the sale was not voidable since the purchaser himself made no false representations, and the defendant obtained a verdict. On exceptions, the court, by Redfield, J., held that the purchaser was in effect an agent of the attaching creditor and was bound by his acts, saying: "We think, that, as a general rule, it is safe to say, that one who obtains credit upon the recommendation of some third party, whether written or verbal, must himself be held responsible for the extent of that recommendation, the same as if he made it himself; and if it be false in material points, and this be known to the purchaser, the seller may, upon obtaining knowledge of such falsehood, rescind the sale and recover the goods, so long as they remain in the hands of the vendee, or not passed from him upon any new and valuable consideration."

The judgment was reversed and a new trial granted.

1. **Representations Partly Oral.**—Tatton *v.* Wade, 18 C. B. 371; 86 E. C. L. 370. In this cause Wade sued Tatton for false representations as to the character and credit of Case whereby Wade was induced to let certain furniture to Case, and, as a result, lost the hire, and was put to expense. The evidence showed a letter from Tatton to Wade in regard to Case and subsequent oral representations. On cross-examination Wade testified that she relied on the oral statements; that they induced her to trust Case; that she should have refused him had not the defendant made the oral statements; and that it was the oral representations that induced her to part with her furniture. On re-direct, she stated that she relied on the defendant's letter also, and would not have let Case have the furniture without the letter. The judge (Crawder, J.) told the jury "that the result of the evidence was that the plaintiff was induced partly by the letter of the defendant aforesaid, and partly by the oral representations of the defendant aforesaid; but that, if they were of opinion, and believed that the plaintiff was substantially and mainly induced by the letter of the defendant aforesaid to part with her furniture aforesaid, the plaintiff was entitled to their verdict." The plaintiff obtained a verdict, and on the exceptions being brought by writ of error to the exchequer chamber, that court, Pollock, C. B., Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., and Bramwell, B., unanimously sustained the judge's ruling at the trial.

Clark *v.* Edgar, 84 Mo. 106; 12 Mo. App. 345; 54 Am. Rep. 84. The action in this case was against directors of a corporation for false representations as to the solvency of the corporation to induce the plaintiff to purchase its bonds, and also in printing on the bonds the words, "First Mortgage Bonds," when in fact they were not secured by the first lien on the property.

The court by Black, J., held: "If written representations are the substantial inducements, recovery can be had,

Although no action can be brought under the statute to charge a person on oral representations, it has been held that oral misrepresentations as to character and credit may be given in evidence in defense against a claim based on a contract which the defendant was induced to make in reliance upon the false representations.[1]

6. Miscellaneous Matters—*a.* ACTED FRAUD.—It has been held that "such acted fraud and by-play as produce false impressions more by action than by words, cannot be covered by the statute."[2]

b. REPRESENTATIONS PART OF CONTRACT.—The statute is held to be confined to cases where the representations form no part of a contract.[3]

although some reliance was placed upon oral assurances," and cited Tatton *v.* Wade with approval.

In Weil *v.* Schwartz, 21 Mo. App. 372, however, the court by Phillips, P. J., commented unfavorably on Tatton *v.* Wade, saying: "I am persuaded that the doctrine of that case is so suggestive of a mischievous precedent that I am unwilling to extend it in the least degree." The facts here were that Isaacson applied to the plaintiff for credit, who telegraphed to the defendant: "How is J. B. Isaacson, 507 M. St., Kansas City. Is he good for a bill, say $500, four months. Telegraph at our expense," and received in reply: "Consider J. B. Isaacson good for all the goods he wants," signed by the defendant. Further inquiries were made by the plaintiffs, and the defendant offered to guarantee Isaacson for the usual commission as he was "O. K. and solid." Prior to any of these inquiries, one of the plaintiffs met the defendant in Kansas City and was told by him that Isaacson was soon to marry a relative of the defendant and that money would be given him. The representations as to Isaacson's solvency were false to the defendant's knowledge. Evidence was also given of false representations made by the defendant to mercantile agencies as to Isaacson's credit.

The jury was instructed, *inter alia*, that it must appear to their satisfaction "that the telegram was sent, as it was, for the purpose of deceiving the plaintiffs, and that the plaintiffs were thereby, in connection with what had previously transpired between them and defendant, induced to make the sale to Isaacson."

The verdict was for the plaintiffs and the defendant appealed. The court by Philips, P. J., said: "The instruction in the case at the bar simply told the jury that they could consider both the telegram and what had previously transpired verbally in determining the inducing cause. There is no qualification whatever. The jury were not advised on the authority of the case, *supra* (Tatton *v.* Wade, 18 C. B. 371), that if there had been verbal representations made by the defendant conspiring with the letter to induce the credit, yet, before the plaintiff could recover, the jury must believe that plaintiff mainly and substantially relied upon the telegram. If the verbal statements had an influence upon the minds of the plaintiffs, the defendant was entitled to the benefit thereof, and to any advantage in argument springing from this circumstance. If he could persuade the jury that plaintiffs, in extending the credit relied mainly and substantially on the verbal representations rather than the telegram, the converse of the proposition would follow, that the plaintiffs could not recover. But the instructions, as framed, did not embody this principle. It cut the defendant off entirely, and, without regard to the question of the main and substantial fact on which the plaintiffs relied, told the jury, in effect, that plaintiffs could rely on one in connection with the other, *i. e.*, on both taken together. This, it does seem to me, would practically nullify the statute."

1. Lenheim *v.* Fay, 27 Mich. 70.

The cases of Canham *v.* Barry, 15 C. B. 597; 80 E. C. L. 596, and Ramshire *v.* Bolton, L. R., 8 Eq. 294, cited at length *supra*, this title, note 1, p. 9, seem to support this position.

2. Bush *v.* Sprague, 51 Mich. 54.

3. Huntington *v.* Wellington, 12 Mich. 14.

c. NON-EXISTENT PERSON.—Where the third person in regard to whose credit the representation is made, in fact, does not exist, the statute does not apply.[1]

REPRESENTATIVE—(See also EXECUTORS, vol. 7, p. 165; STATUTES OF DESCENT AND DISTRIBUTION; WITNESSES).—One who represents or is in the place of another.[2]

1. So held in Hess *v.* Culver, 77 Mich. 598, where the representation was in regard to an alleged corporation. The court, by Campbell, J., said: "The false showing was not concerning the responsibility of an existing person, whose personality was known, but concerning an alleged corporation that was no corporation, and whose pretense of legal existence was itself a fraud."

2. Bouv. L. Dict., *followed* in Delauney *v.* Bennett, 9 Ill. 494.

The word "representatives," as used in the articles of association of a mutual benefit society, designating the persons whom the member may appoint beneficiaries, was held to include any person whatsoever whom the member may designate. The court by Mitchell, J., said: "This word 'representative' means one who represents or stands in the place of another. It has, however, many applications. An executor or administrator is called the representative of the deceased person because he stands in his place as to personalty; while an heir is sometimes called his representative, because he stands in his place as to realty. While the word may mean almost anything, especially in wills, which the context evidencing the intention of the parties demands, yet primarily, and in the absence of some reason for putting some other meaning upon it to be found in the context, it ordinarily means the executor or administrator. There is nothing in these articles limiting it to the heirs at law of a deceased member, much less to the members of his family. The word here used may include heirs, but it certainly does not include personal representatives, that is, administrators and executors." Walter *v.* Odd Fellows' Mut. Ben. Soc., 42 Minn. 204.

Representative in the Sense of Agent.—"A representative, as we understand it, is one chosen by a principal to exercise for him a power or perform for him a trust. In that sense the mayor of Detroit is a representative for some purposes, the members of the common council for others, and the members of the board of education for still others. But the idea of a representative implies not merely a person chosen for some purpose, but a person chosen for a particular purpose, and confided in to represent his principal therein. One person may be thought suited to one duty, and another to another; and the right to be represented implies a right not merely to name the person, but also to designate the trust that shall be confided to him. That government would be but a mockery of republican institutions, which, while leaving to the people a choice of officers, should afterwards determine whether any particular officer who had been selected by the people should be a legislator or a judge, a governor or a policeman." Board of Park Com'rs *v.* Common Council, 28 Mich. 244, 15 Am. Rep. 202.

The *English* Bankruptcy Act of 1883, § 17, subsec. 4, enacts, with reference to the public examination of a debtor under that act, "that any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs, and the causes of his failure." *Held*, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that subsection. The court by Brett, M. R., said: "A counsel cannot act for his client out of court. He can only act for him in court; but in court he has the whole conduct of the case, and I always desire to express this most firmly—he has power to act without asking his client what he shall do. He has no master, but he is the conductor and regulator of the whole thing. Therefore it seems to me counsel is not the representative of the creditor, and therefore he does not want any authority in writing. But a solicitor is his client's representative. That is his normal character. He represents his client in court, and he represents him out of court. He acts for him, and in his own name, and

A representative is one who stands in the place of another as heir, or in the right of succeeding to an estate of inheritance; one who takes by representation. One who occupies another's place and succeeds to his rights and liabilities. Executors and administrators represent, in all matters in which the personal estate is concerned, the person of the testator or intestate, as the heir does that of his ancestor. Representatives of a deceased person are real or personal; the former being heirs at law, and the latter ordinarily, executors or administrators.[1]

therefore, in ordinary legal language, he is the representative of his client. If, then, he is the representative of his client, he is within the words of the statute, and must be authorized in writing." See generally ATTORNEY AND CLIENT, vol. 1, p. 954.

"Representatives," "Legal Representatives" and "Personal Representatives," Describing a Class of Beneficiaries in a Will.—See WILLS.

Representative in Congress.—See IN, vol. 10, p. 323.

1. Lee *v.* Dill, 39 Barb. (N. Y.) 520, *affirmed* 41 N. Y. 619, *citing* Webster's Dict.; Burrill's L. Dict.; 2 Stephen's Com. 428. That case was a contest between the heir and the executor touching the validity of an alleged will. At the trial the executor was permitted to testify, notwithstanding the objection and exception of the heir, to transactions and circumstances had personally between himself and the deceased. By § 399 of the *New York* Code Civ. Proc., as amended in 1860, it was provided that a party should not be examined against parties who were "representatives of a deceased person" in respect to any transaction had personally between the deceased person and the witness. It was held that the heir was a 'representative' of the deceased, within the meaning of this provision, and, therefore, the testimony of the executor as to the personal transactions and conversations between deceased and himself was incompetent. The court by Allen, J., said: "Representatives of a deceased person are real or personal; the former being heirs at law and the latter, ordinarily, the executors or administrators. The term 'representative' includes both classes. When the personal representatives alone are intended in a statute they are so named, and there is no intimation of an intent to limit the protection and benefit of this exception to the personal representatives. The 'real representatives,' are as much within the reason of the rule as the 'personal representatives,' and there is as much reason for protecting the one class as the other. As to the personalty, executors and administrators, although the usual, are not the sole representatives of a deceased person. The next of kin when they succeed to the personalty, whether through the intervention of the executors or administrators, or in any other way, become the representatives *quoad* the effects distributed, and are within the protection of the statute. Other statutes recognize and provide for the next of kin under the general term 'representatives.' (3 R. S. (5th. ed.), 1883.) And in wills and settlements the term representatives and legal representatives are frequently held to mean heirs and next of kin, and not executors or administrators. (Barns *v.* Otley, 1 M. & K. 465; Robinson *v.* Smith, 6 Sumn. 47; Walter *v.* Meeker, 6 Sumn. 148; Colton *v.* Colton, 2 Beav. 67; Long *v.* Blackford, 3 Ves. 36)." The court noticed, disapprovingly, the case of McCray *v.* McCray, 12 Abb. Pr. (N. Y.) 1, cited as holding a contrary doctrine, and said that it was decided by a divided court, and was a case of peculiar hardship. See also, Lockwood *v.* Lockwood, 56 Conn. 106; WITNESSES.

Whether the term "representatives" means the "personal" or "real" representatives or both must be determined by the subject-matter of the statute. Duncan *v.* Walker, 2 Dall. (U. S.) 205; Mullanphy *v.* Simpson, 4 Mo. 335; Loos *v.* John Hancock Mut. L. Ins. Co., 41 Mo. 541; Wear *v.* Bryant, 5 Mo. 164.

A person appointed by the court as a substitute for a deceased trustee is not a representative of the deceased. Guery *v.* Kinsler, 3 S. Car. 423.

Code of *Georgia*, § 4043, provides that the applicant for dower shall give

a written notice of her intention to the "representative" of the estate. It was held that "representative" as here used, does not include a temporary administrator who has no authority to interfere with the real property except to preserve it. Langford *v.* Langford, 82 Ga. 202.

Legal Representative.—(See also LEGAL, vol. 13, p. 221). "The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interest, whether transferred to them by his act or by operation of law." New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 597; New York L. Ins. Co. *v.* Flack, 3 Md. 341; 56 Am. Dec. 742.

A "legal representative," in the most extensive acceptation of those words, is one who legally or lawfully represents another in any matter or thing of whatever nature or character it may be. Wear *v.* Bryant, 5 Mo. 164.

It has been held that, in a land patent issued to A, or his "legal representatives," the phrase "or his legal representatives" embraces representatives of the original grantee in the land by contract, such as assignees or grantees, as well as by operation of law. Hogan *v.* Page, 2 Wall. (U. S.) 607; Carpenter *v.* Rannels, 19 Wall. (U. S.) 138.

The term has been held to include assignees, as used in a license for the use of a patent (Hamilton *v.* Kingsbury, 15 Blatchf. (U. S.) 64); and in a policy of life insurance (New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 597; New York L. Ins. Co. *v.* Flack, 3 Md. 341; 56 Am. Dec. 742). And so an assignee in bankruptcy was held to be the "legal representative" of the bankrupt, within the meaning of the 30th section of the National Banking Act permitting the borrower or his "legal representative" to recover twice the amount of usurious interest paid to any association organized under the act. Wright *v.* First Nat. Bank, 8 Biss. (U. S.) 243.

In a covenant to warrant the title of another against all persons except A and his "legal representatives," it was held that the term included the person succeeding to the claims of A, whether as heir, devisee, grantee or assignee, and did not include his executor or administrator, who could take no interest in the land. Bowman *v.* Long, 89 Ill. 19.

An act of Congress granted to each and every person of a certain class, "or his, her, or their legal representative or representatives," the right to pre-empt certain lands. It was held that the assignee or purchaser was the "legal representative" of the person entitled to pre-empt. Delauney *v.* Burnett, 9 Ill. 494; Phelps *v.* Smith, 15 Ill. 572.

A clause in the *habendum* of a deed provided that if the grantor should survive the grantee, he should have the right to repurchase "at a valuation to be then made by two disinterested persons, one of whom shall be selected by the legal representatives of the said grantee, and the other selected by the said grantor." It was held that the term "legal representatives" as here used, meant those who succeed the grantee in the title of the land,—in that case, the land having been devised in trust, the trustee and the *cestui que trust.* The court by McGill, Ch., said: "It is obvious that the personal representatives of the grantee in the deed are not intended. It is not within their province to deal with real estate. The use of the general term 'representatives,' in treating of the disposition of land, would rather indicate that the design was to reach those who might succeed to the title, and, in case of a trust, also to the beneficial use of the land. Then, both trustee and *cestui que trust* are representatives who should appoint a valuer." Woodruff *v.* Woodruff, 44 N. J. Eq. 349.

But if the subject-matter or context of the statute or instrument in which it occurs does not control the meaning, "legal representatives" is equivalent to "executors and administrators." People *v.* Phelps, 78 Ill. 149; Bowman *v.* Long, 89 Ill. 21; Cox *v.* Curwen, 118 Mass. 198; Lodge *v.* Weld, 139 Mass. 504; Johnson *v.* Van Epps, 110 Ill. 560; Loos *v.* John Hancock Mut. L. Ins. Co., 41 Mo. 538; Saltmarsh *v.* Candia, 51 N. H. 74, n.

Personal Representative.—See PERSONAL, vol. 18, p. 407.

Next Personal or Legal Representative.—See NEXT OF KIN, vol. 16, p. 706.

Real Representative.—The heir at law: he represents the real estate of his deceased ancestor. And. L. Dict. The heir at law succeeds to all the rights and responsibilities of the deceased in respect to the realty, and is in all respects *pro hac vice*, his representative. Card *v.* Card, 39 N. Y. 323.

REPRESENTING.—See note 1.

REPRIEVE—(See also PARDON, vol. 17, p. 317; RESPITE; SENTENCE).—A reprieve, from *reprendre*, to take back, is the withdrawing of sentence for an interval of time, whereby the execution is suspended.[2] Any court which has power to award execution may, of common right, grant reprieves of its own sentences.[3] In *England*, and in most of the States in this country, the executive has the power of reprieve.[4] If a statute requires a respite, it becomes a right in the prisoner.[5]

REPRISAL.—See LETTERS OF MARQUE AND REPRISAL, vol. 13, p. 265; RECAPTION.

1. Where petitioners described themselves as "representing a majority of the tax-payers of the town," and the affidavit of verification attached to the petition stated that the "persons signing said petition are a majority of the tax-payers," it was held that the word "representing" did not import that the majority did not themselves sign, but did it through agents representing such tax-payers, but that the word might be treated as having reference to the term "majority," not to the persons constituting it. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 131.

2. 4 Bl. Com. 394. *followed* in Sterling *v.* Drake, 29 Ohio St. 460; 23 Am. Rep. 762; And. L. Dict.

It has been said that "the law of respite or reprieve appears to apply only to capital sentences." Bishop Cr. Proc., § 1299; 1 Chit. Cr. L. 757; Sterling *v.* Drake, 29 Ohio St. 457; 23 Am. Rep. 762. But the term has, in this country, been applied to a suspension of judgment in other criminal cases, and even in civil ones. Fults *v.* State, 2 Sneed (Tenn.) 235; Mishler *v.* Com., 62 Pa. St. 55.

3. Sterling *v.* Drake, 29 Ohio St. 461; 23 Am. Rep. 762, *citing* 2 Hale 412; 1 Ch. Cr. L. 758, 759; 1 Bishop Cr. Proc., § 1299; Fultz *v.* State, 2 Sneed (Tenn.) 232; Allen *v.* State, Mart. & Y. (Tenn.) 294; People *v.* Reilly, 53 Mich. 260.

4. 1 Bishop Cr. Proc., § 1299; PARDON, vol. 17, p. 320.

Different Kinds of Reprieves.—Reprieves are of three kinds: 1. *Ex mandatio regis*, from the mere pleasure of the crown. 2. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment defective; and sometimes after judgment, if it be a small felony, though out of clergy, or in order to a pardon or transportation. The power of granting this respite belongs of common right to every tribunal which is invested with authority to award execution. The justices of assize may, by long practice, either grant arbitrary reprieves, or take them away, after the termination of their sessions; though this seems rather to stand on ancient usage than any express authority or recognized principle. 2 Hale 412; 1 Ch. Cr. L. 758, 759. 3. *Ex necessitate legis.* There are some cases in which the judge is bound to reprieve. Thus: 1. When a woman is convicted either of treason or felony she may allege pregnancy of a quick child in delay of execution. See also PREGNANCY. 2. When a prisoner has become insane between the time of sentence and the time affixed for execution. 1 Chit. Cr. L. 761; Sterling *v.* Drake, 29 Ohio St. 461; 23 Am. Rep. 762.

5. 1 Bishop Cr. Proc., § 1299, *citing* John *v.* State, 2 Ala. 290.

Whether Where Power of Reprieve Is in Governor Courts May Reprieve.—For a discussion of the question, whether, in those States whose constitution or statutes confer upon the governor the power of reprieve and pardon, a reprieve may be granted by a court after sentence and adjournment, see Miller's Case, 9 Cow. (N. Y.) 730. A court at common law might certainly grant a reprieve after adjournment. 1 Bishop Cr. Proc., § 1299.

The question is settled in *New York* by a statute providing that "no judge, court, or officer other than the governor, shall have authority to reprieve or suspend the execution of any convict sentenced to the punishment of

REPUBLIC.—See note 1.

REPUBLICATION.—See CODICILS, vol. 3, p. 301; WILLS. *Compare* PUBLICATION and references there given.

REPUGNANCY — *In General* — (See also INTERPRETATION, vol. 11, p. 507; LIMITATION IN INSTRUMENTS, vol. 13, p. 798; STATUTES; WILLS). — A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails if the inconsistency be not so great as to avoid the instrument for uncertainty.[2] In wills, the later clause prevails under the same exceptions.[3]

In Pleadings.—See PLEADING, vol. 18, p. 113; INDICTMENT, vol. 10, p. 565.

REPUTABLE.—Worthy of repute or distinction; held in esteem; honorable; praiseworthy.[4]

REPUTATION—REPUTE—(See also CHASTE, vol. 3, p. 157; CHARACTER (IN EVIDENCE), vol. 3, p. 110, and references there given).—Reputation, in general, is the opinion entertained in a community concerning any person or thing. More particularly reputation is the opinion of a man's character held generally by those who are acquainted with him.[5]

death." Carnal *v.* People, 1 Park. Cr. Rep. (N. Y.) 265.

Distinction Between a Suspension and a Reprieve.—The term "reprieve," as applied to convicts, has a definite meaning. It postpones the time of execution to a definite day, while "suspension" is for an indefinite period. Carnal *v.* People, 1 Park. Cr. Rep. (N. Y.) 266.

1. Distinguished from Monarchy.—"The great distinction between monarchies and republics (at least our Republic) in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation is subject to him, though in some countries with many important special limitations. This, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their political capacity only." Penhallow *v.* Doane, 3 Dall. (U. S.) 54.

2. Bouv. L. Dict.; Elph. on Interp. of Deeds, rule 20, p. 91.

3. Bouv. L. Dict. See also WILLS.

4. Illinois State Board *v.* People, 123 Ill. 227, *quoting* Webster's Dict. That case was a petition for a mandamus, alleging that the relator was a graduate of a "reputable dental college;" and was entitled to a license under the *Illinois* act regulating the practice of dentistry, which provides that the State board of dental examiners shall issue a license to any regular graduate of a "reputable dental college" without examination, and that such license had been refused him by such board. It was held that while it was within the discretion of the examiners to determine what colleges were "reputable," yet a mandamus would lie where there was a manifest abuse of such discretion from personal or selfish motives, and that under the particular circumstances of the case, a mandamus must be granted to compel the board to issue the license. See also MANDAMUS, vol. 14, p. 147.

Reputable Freeholders.—See INTOXICATING LIQUORS, vol. 11, p. 657.

5. CHARACTER, vol. 3, p. 114, note; Bouv. L. Dict., Abb. L. Dict. The qualities which a person is supposed to possess. Webster's Dict. *followed* in State *v.* Andre, 5 Iowa 394. Reputa-

The word is frequently, but inaccurately, used as a synonym of character; for character consists of those qualities which distinguish a man from others, while reputation is the opinion of others in regard to those qualities.[1]

tion is the estimate in which an individual is held by public fame in the place where he is known. Cooper *v.* Greeley, 1 Den. (N. Y.) 347.

Reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another. Higham *v.* Ridgway, 10 East 120; Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.) 301; 81 Am. Dec. 656.

An existing reputation is a fact to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes the reputation. Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 642; 45 Am. Rep. 63.

Proof of reputation is proof of what the community thinks, believes, or says. Hunnicutt *v.* Peyton, 102 U. S. 363.

Repute and Cohabitation as Proof of Marriage.—See MARRIAGE, vol. 14, p. 527, *et seq.*

Reputed.—The London Police Act, 3 Geo. IV, ch. 55, § 16, authorizing the apprehension of suspected persons or "reputed thieves," only applies to the apprehension of persons of general bad character, as rogues and vagabonds, and not to apprehension on suspicion of a particular felony. Cowles *v.* Dunbar, 2 C. & P. 265; 12 E. C. L. 265.

Reputed Wife.—See LIFE INSURANCE, vol. 13, p. 636.

1. Character Distinguished from Reputation. — And. L. Dict. tit. Character; State *v.* Andre, 5 Iowa 394; Marts *v.* State, 26 Ohio St. 168; State *v.* Wilson, 15 R. I. 100. "It would be well if character and reputation were used distinctively. In truth, character is what a person is; reputation is what he is supposed to be. Character is in himself; reputation is in the hands of others. Character is injured by temptations, and by wrong-doing; reputation by slanders and libels. Character endures throughout defamation in every form, but perishes when there is a voluntary transgression; reputation may last through numerous transgressions, but be destroyed by a single, and even an unfounded, accusation or aspersion; but character has been used again and again in statutes and adjudications in the sense of reputation. Thus, a libel is said to be an injury to the character. The character of a witness for veracity is said to be impeached. Evidence is offered of a prisoner's good character." Abb. L. Dict.

A *New York* Statute (Sess. Laws 1848, ch. 105, p. 118) enacted "that any person who shall inveigle, entice, or take away any unmarried female of previous chaste character," etc., etc., shall be guilty of a misdemeanor. In Carpenter *v.* People, 8 Barb. (N. Y.) 608, the trial court instructed that "previous chaste character" did not mean actual personal virtue. This was held error. The court by Wells, P. J., said: "Character is defined by Webster to be 'the peculiar qualities impressed by nature or habit on a person which distinguish him from others; these constitute real character, and the qualities he is supposed to possess, constitute his estimated character, or reputation.' . . . The statute uses the expression 'previous chaste character,' not previous chaste reputation. The charge substitutes reputation for character. Reputation may be good evidence of character, but is not character itself. I do not see why it would not be a consistent and logical inference from the ruling of the court that a female perfectly pure in heart and life, but who at the time of the abduction, through malice and falsehood sustained a bad reputation for chastity, could not be the subject of the abduction punishable by this statute. Indeed, this would seem to be the inevitable consequence of the doctrine of the charge." See also ABDUCTION, vol. 1, p. 25.

In Kenyon *v.* People, 26 N. Y. 203 *affirming* 5 Park. Cr. Rep. (N. Y.) 254, a seduction case, the court by Wright, J., said: "Nor can 'character' as the term is used in the statute under which the prisoner was convicted, be proved by reputation. The statute is "any man who shall, under promise of marriage, seduce, and have illicit connection with any unmarried female, of previous chaste character, shall be guilty of a misdemeanor,' etc. Character, as here used, means actual personal virtue and not reputation. The female must be unmarried, and chaste in

REQUEST—(*Compare* REQUIRE).—To request is to ask for earnestly; to express desire for; to solicit; to entreat; to address with a request.[1] The words "request" and "require" have the same origin, though usage has given to them somewhat different meanings, which, however, are more distinctions in intensity than in effect or substance. The latter is nearer a command than the former.[2]

REQUIRE—(*Compare* REQUEST).—The primary meaning of "require" is to demand, to insist, to ask as a favor, to request.[3]

fact, when seduced. By the term 'chaste character,' the legislature could only have meant personal qualities that make up the real character, and not public reputation, which is the estimate of character formed by the public. It could not have been intended to substitute reputation for character in this its primary and true sense." See also Crozier *v.* People, 1 Park. Cr. Rep. (N. Y.) 453; Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474; State *v.* Andre, 5 Iowa 389; State *v.* Prizer, 49 Iowa 531. SEDUCTION.

Contra.—But there are authorities holding that "character" and "reputation" may be used as synonymous. Kimmel *v.* Kimmel, 3 S. & R. (Pa.) 338; 8 Am. Dec. 655; Powers *v.* Leach, 26 Vt. 270; Abb. Trial Ev. 674. See also Knode *v.* Williamson, 17 Wall. (U. S.) 586; State *v.* Wilson, 15 R. I. 180.

1. Long *v.* State, 23 Neb. 33. In that case, which was an indictment for aiding, abetting, inciting, and procuring a murder, the trial court used in its charge, the words "requested, advised, and incited" in reference to the alleged instigation of the crime by the prisoner. It was held that this was no error, the words being practically of equivalent meaning with the words of the *Nebraska* statute, which are "aid, abet or procure."

2. Prentice *v.* Whitney, 8 Hun (N. Y.) 301. That case was an action against the defendants, as executors, to recover a claim existing against their testator in his life time. Defendants pleaded the special Statute of Limitations. The statute authorized administrators to insert a notice "requiring" all persons having claims against the deceased to present them within six months. The notice upon which defendants relied, was in the usual form, except that it "requested" instead of "required" the creditors to present their claims. It was held that there was no reasonable difference between the words "requested" and "required" as thus used. See also DEBTS OF DECEDENTS, vol. 5, p. 206; NON CLAIM, vol. 16, p. 716.

Requested by Mail.—A policy of insurance provided that the policy should be void "if the assured shall neglect, for the term of thirty days, to pay his premium note or any assessment thereon when requested to do so by mail or otherwise." The court by Bigelow, C. J., said: "A request by mail is a familiar phrase and has a well understood meaning. It does not import that the person to whom it is addressed shall receive it, but only that the person by whom it is to be made, shall deposit in the post-office, a written request, duly directed, so that in the usual course of the mail, it will reach its destination. Shed *v.* Brett, 1 Pick. (Mass.) 401." Accordingly, it was held that the policy was avoided by the neglect of the assured to pay the amount of an assessment for thirty days after a written request for payment, duly posted by the company, should have reached the place of his residence, in due course of mail, whether he received it or not. Lothrop *v.* Greenfield, etc., Mut. L. Ins. Co., 2 Allen (Mass.) 82; see also DEMAND, vol. 5, p. 532; LETTERS, vol. 13, p. 260.

Request Equivalent to Demand.—Request is used in law as substantially equivalent to demand. See DEMAND, vol. 5, p. 526.

Precatory Words.—As to the effect of a "request" by a testator that his executor, legatee, or devisee shall make certain dispositions of his estate, see TRUSTS.

Request for Money.—See FORGERY, vol. 8, p. 486.

3. Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. Rep. 547. That case was

a motion to remand the cause from the United States circuit court to the State court from which it had been removed. The act of Congress of March 3, 1887, requires applications for removals to be made at the time, or any time before the defendant is "required" to plead or answer. It was insisted that the term "required" to plead or answer means "compelled" to do so. In accordance with the definition given in the text the court held that the word could not be so construed, *citing* in support of this position, Wedekind *v.* Southern Pac. Co., 36 Fed. Rep. 281, and refusing to follow McKeen *v.* Ives, 35 Fed. Rep. 803. See also REMOVAL OF CAUSES.

In a contractual obligation whereby one party is to do or permit such things as the other may "require," the word means "reasonably require." Braunstein *v.* Accidental Ins., 1 B. & S. 780; see also SATISFACTORY.

Require in the Sense of Need—Necessary.—(See also INTENT, vol. 11, p. 370; *compare* NEED, vol. 16, p. 373.) Require is frequently used as being substantially equivalent to the word "need." In Colies *v.* Allen, 36 N. J. Eq. 100, where a testator had made a provision for a daughter of weak mind by a bequest to his executors for her use and benefit, the interest to be paid her "as she may need or require," it was held that she was entitled to only so much of the said interest as was necessary to support her, and was not entitled to as much as she should demand. The court distinguished the case from that of Lippincott *v.* Ridgway, 11 N. J. Eq. 556, where the trust was to pay the interest to the testator's daughter, and so much of the principal as she from time to time by writing under her hand and attested by two credible witnesses, should "require" of the trustees, thus: "There the word was used in the sense of 'demand'; the gift of the whole of the interest to the daughter was absolute, and the gift of the principal conditioned only on her calling for or 'requiring' it with certain formalities. Here the gift is not of the whole of the interest absolutely, but of the whole or such parts of it as she may need or require. Whether she is to receive the whole or only part is dependent upon her wants." See also McKeever *v.* Canonsburg Iron Co., 138 Pa. St. 184.

In Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 360, the appellant had filed a petition for the condemnation of private property for public use under the general railroad laws of *Michigan*. It was contended that the petition was defective in that it did not aver that the taking of the property described in it was necessary for public use. The court, by Chaplain, J., said: "The petition sets up with sufficient certainty, the rights which the petitioner seeks to acquire, and alleges that the property, which is thus sought is required for the public use. It is true, the statute provides that the petition shall state that the taking of the property is 'necessary' for the public use. But the word 'required' in the sense in which it is used in the petition in this case, is synonymous with the word 'necessary.' It conveys the same meaning." See also EMINENT DOMAIN, vol. 6, p. 609.

When a railway company, or other body, is empowered by an act of Parliament to take such lands "as may be required" for their undertaking, that means such lands as the company or other body may fairly think convenient for its purpose. "I cannot think that 'required' (in this connection) means, 'absolutely necessary.' 'Required' means, where the company *bona fide* think and are of opinion that the lands are desirable. I think those cases of Stockton, etc., R. Co. *v.* Brown, 9 H. L. Cas. 246, and Kemp *v.* Southeastern R. Co., L. R., 7 Ch. 364 . . . really mean this, that the opinion of the railway authorities is to be the governing matter as to whether the things are for the advantage of the railway, if that opinion is an opinion *bona fide* expressed and *bona fide* laid before the court." Errington *v.* Metropolitan District R. Co., 19 Ch. Div. 559. See also EMINENT DOMAIN, vol 6, p. 518; RAILROADS.

In a Mandatory Sense.—"If trustees be authorized and required at the instance of the tenant for life, to invest the trust funds in the purchase of leaseholds, they have no option if the tenant for life insist upon his right;" Lewin on Trusts, 328, *citing* Cadogan *v.* Earl of Essex, 2 Drew 227; 23 L. J. Ch. 487; Beauclerk *v.* Ashburnham, 8 Beav. 322; but if they are "required" to lend money to a husband on his personal security at the request of the wife, and the husband become insolvent, they are justified in refusing to lend, because the circumstances and

REQUISITION—(See also EXTRADITION, vol. 7, p. 630).—A formal request. Its most common legal application is to designate the request made by the governor of one State upon the governor of another for the extradition of fugitives from justice.

RES—(See also ADMIRALTY, vol. 1, p. 201; REVENUE).—In proceedings *in rem*, the *res* is that which is seized and brought within the jurisdiction of the court. In admiralty and in revenue cases, the thing condemned is considered the offender or the debtor, and is seized in entirety. But such is not the case in many other proceedings *in rem*.[1]

RESCISSION—(See also ASSUMPSIT, vol. 1, p. 882; BILL QUIA TIMET, vol. 2, p. 258; BILL TO REMOVE CLOUDS, vol. 2, p. 298; CANCELLATION, vol. 2, p. 718; CONTRACT, vol. 3, p. 823; DEEDS, vol. 5, p. 423; EQUITY, vol. 6, p. 684; FRAUD, vol. 8, p. 635; FRAUDULENT CONVEYANCES, vol. 8, p. 748; FRAUDULENT SALES, vol. 8, p. 786; HUSBAND AND WIFE, vol. 9, p. 789; ILLEGAL CONTRACTS, vol. 9, p. 879; ILLEGAL SALES, vol. 9, p. 923; INADEQUATE CONSIDERATION, vol. 10, p. 325; INSANITY, vol. 11, p. 105; INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 773; MASTER AND SERVANT, vol. 14, p. 74; MORTGAGES, vol. 15, p. 725; REFORMATION OF INSTRUMENTS, vol. 20, p. 713; RELEASE, vol. 20, p. 739; SALES; SHERIFF'S SALES; UNDUE INFLUENCE; VENDOR AND PURCHASER).

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Required to Testify.—It is provided by a *Kansas* statute "that no person on trial or examination, nor wife or husband of such person shall be required to testify, except as a witness on behalf of the person, on trial or examination." In State *v.* M'Cord, 8 Kan. 239; 12 Am. Rep. 469, it was held that the word "required" as here used, had not the same meaning as the words "permitted" or "allowed." The court by Kingman, C. J., said: "This word has a definite meaning. It simply means that the State shall not demand as a right that such a witness under such circumstances shall testify. It does not profess to deal with the competence of the witness, only with the right of the prosecution to demand that they should testify, and the power of the court to enforce that demand. Therefore it does not prevent any such testimony from being voluntarily given. See also WITNESSES.

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I. **Definition.**—For convenience of discussion, contracts, deeds, and other writings, purporting to set forth a bargain, covenant, or grant, are considered in two categories—the valid and the invalid. The latter also is divided into two classes, the void and the voidable. In clearest delineation, the word "void" is applied only to such agreements, or assumed compacts, as are absolutely of no force or effect, even without judicial declaration of nullity; although sometimes a decree, announcing the fact, may be sought and obtained in order to prevent some threatened mischief; as, for instance, the beclouding of one's title. The word "voidable," is restricted to a compact which is in any respect in force, but which, owing to some infirmity, or to some demand of justice, equity or public policy, is liable to be annulled.[1] It is also a legal

1. "Thus, while acceptance of rent will make good a voidable lease, it will not affirm a void lease. . . . Of marriages, those which are defective by reason of want of form in the celebration, are void, *ab initio*, and may be declared void at any time before or after the death of the parties. So are marriages in which one party is insane. Marriages defective from immaturity of age are voidable by merely failing to ratify them by cohabitation when the parties come to the age. Marriages defective by reason of impotency are voidable only, must be impeached in the lifetime of the parties, and can be impeached only by the person not impotent." Wharton Law Lex. (8th ed.), art. "Void."

Most of the acts of infants are voidable only, and not absolutely void. 2 Kent Com. (13th ed.) 234.

In Allis *v.* Billings, 6 Met. (Mass.) 417; 39 Am. Dec. 744, the court, by Dewey, said: "The term 'void,' as applicable to conveyance, or other agreements, has not at all times been used with technical precision nor restricted sense as contradistinguished from 'voidable,' it being frequently introduced even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms 'void' and 'voidable,' in their application to contracts, is one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be applied to those contracts

usage to express according to the subject-matter the act of rendering void, whether consummated by the parties themselves or by some judicial or other authority; thus, we say an agreement is "avoided," a corporation is "dissolved," a bond is "annulled," a deed is "canceled," a will is "revoked," a treaty is "abrogated," a statute is "repealed," an entry is "expunged," a motion is "quashed," a judgment is "reversed," a decree is "vacated," a proceeding is "set aside." In colloquial parlance, these predicates often come in as random synonyms. "Rescission," however, seems to be the generic, or most commonly representative term,[1]

that are of no effect whatsoever; such as are a mere nullity and incapable of confirmation or ratification."

In Brown *v.* Brown, 50 N. H. 552, the court, by Foster, J., said: "The laying out of a highway by a tribunal having no jurisdiction of the subject-matter, would be void in the pure sense of that term, absolutely null; but the laying out of a road by a tribunal having jurisdiction of the subject-matter and of the parties concerned therein may be so affected by some irregularity as to be void as to some person or in some particular, without impeachment of the whole proceeding; or, perhaps, void until or unless confirmed by the act or acquiescence of the party entitled to bring the validity of the matter in question."

In Kerney *v.* Vaughan, 50 Mo. 287, the court, by Bliss, J., said: "It is, perhaps, unfortunate that we are not supplied with a term of more precision than the word 'void,' a word more often used to point out what may be avoided by those interested in doing so than to indicate an absolute nullity —a proceeding or act to be disregarded on all occasions. For instance, conveyances, assignments, etc., in fraud of creditors, are declared by the statute to be void, as to such creditors, and yet they become perfectly good unless attacked by such creditors; and if they shall fail to attack them for the period fixed by the Statute of Limitations, they become absolutely valid."

In Anderson *v.* Roberts, 18 Johns. (N. Y.) 527; 9 Am. Dec. 235, the court, by Spencer, C. J., said: "In 2 Lilly's Abr. 807, and Bac. Abr. title, 'Void and Voidable,' we have the true distinction. A thing is 'void' which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is 'voidable' which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done.

"Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. (2 Leo. 218); Viner, title, 'Void and Voidable,' A. pl. 11."

In Alexander *v.* Nelson, 42 Ala. 469, the court, by Byrd, J., said: "The true distinction between void and voidable acts, orders and judgments, is, that the former can always be assailed in any proceeding, and the latter only in a direct proceeding."

When an act says anything shall be void, "*to all intents and purposes*," the phrase italicised seems little more than an expletive. Stroud Jud. Dict., art. "Void."

A deed declared, by 13 Eliz., ch. 20, to be "utterly void," may be good in part and bad in part. Kerrison *v.* Cole, 8 East 234. In 27 Eliz., ch. 4, the phrase as to fraudulent conveyances is that they shall be "utterly void, frustrate, and of none effect."

1. In Spanish law (which influences, more or less, judicial administration in *Louisiana*, *New Mexico* and *California*) nullity may be absolute—that arising from law and based on the public interest—and relative, that which affects only certain individuals. Nullity therein is distinguished from rescission in this: Nullity takes place when the act is affected with a radical vice, which prevents it from producing any effect, *e. g.*, a transaction contravening laws or good morals, or executed by an infant under seven years old, or by a demented person; rescission is predicable of an act valid in appearance, but concealing a defect which may make it null, if demanded by any of the parties, *e. g.*, mistake, duress, fraud, infancy. Nullity cannot be made good either by ratification or precipitation. Otherwise, as to rescission: Neither party can demand it unless he

and is defined generally as the "avoiding of a voidable contract."[1]

II. CONTRACTS GENERALLY—1. Grounds Existing When Contract Was Made—*a.* ELECTION TO RESCIND RESERVED.—Where the election to rescind a contract is reserved to either party by the terms thereof, rescission may be effected by him to whom the right belongs, upon the happening of the event upon which the rescission is conditioned.[2]

b. FRAUD.—Any contract, the making of which is induced by the fraud of either party, practiced upon the other at the time the contract is made, or while negotiations in regard to it are

can show that he has been damnified. See Escriche, Dic. de Leg., art. "Nulidad."

This is analogous to the distinction between "void" and "voidable" transactions, but is far from being identical therewith in practice. *Compare* Suñol *v.* Hepburn, 1 Cal. 254, 281; Spencer *v.* Grimball, 6 Martin N. S. (La.) 362; Tino *v.* Hatch, 1 N. Mex. 125.

1. Bishop on Contracts, § 679. "This method of relief is the converse of specific performance." Orton, J., in Smith *v.* Hughes, 50 Wis. 620.

2. Fitzgerald *v.* Allen, 128 Mass. 232; Sanger *v.* Chicago, 65 Ill. 506; Kuhns *v.* Gates, 92 Ind. 66; Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Barr *v.* Van Duyn, 45 Iowa 228; Cummer *v.* Butts, 40 Mich. 322, 29 Am. Rep. 530, where it was stipulated in a contract that it might be canceled by either party "for good cause," and the court held that any cause assigned in good faith would be ground for rescission, considering the uncertainty of the phrase.

In Thayer *v.* Allison, 109 Ill. 180, it was held that the refusal by one party to grant an extension of time for performance of a contract, rescinds it, where the election to rescind within a certain time is reserved to either party by the terms of the instrument.

Where the right to declare a forfeiture is reserved in a contract, a failure to claim it waives such right, and until it is declared the contract remains binding on both parties. Heald *v.* Wright, 75 Ill. 17.

But a stipulation in a written contract for liquidated damages, in case of breach, does not necessarily give the party bound thereby the option to pay the damages, and break his contract. Crane *v.* Peer, 43 N. J. Eq. 553.

In Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, the plaintiff had contracted with defendant company for the construction of a bridge. The stipulations were to the effect, that for any reason deemed sufficient to the company, and by giving one month's notice, it was to have the privilege of rescinding the contract; further, that in case the contractor should not well and truly conform to all the stipulations, or in case it should appear to the defendant's engineer that the work was not progressing in a proper manner, the defendant could annul the contract if it saw fit, and the value of work done, which remained unpaid, be forfeited. It was held that the right to rescind the contract under such circumstances could be exercised without question by, or notice to, the contractor, whenever it appeared to the engineer that the work was not progressing in the manner stipulated for.

In *Louisiana*, a contract containing a stipulation for the rescission thereof, upon an event dependent upon the will of either party, is not rescinded as of right by the non-performance of the condition, but such rescission must be sought judicially. So held in the case of a contract granting a railroad the right of way, on condition that the road be completed within a certain time. Gayden *v.* Louisville, etc., R. Co., 39 La. Ann. 269.

In a contract to pay the debts of another, if the right to rescind is reserved, rescission under such reservation does not affect a creditor, after notice given of his acceptance, although he may have taken a note from the original debtor. Hume *v.* Brower, 25 Ill. App. 130.

The exercise of a right of election to rescind an agreement must be signified in an unqualified manner, and within a reasonable time, or at all events not after the other party has gone to expense in the belief of the right of election not being exercised.

being carried on, is voidable, and may be rescinded at the election of the party defrauded.[1] This is the most frequent ground for rescission, and may consist either of false representations or

Marsden *v.* Sambell, 43 L. T. 120; 28 W. R. 952. See *infra*, this title, *Loss of Right.*

1. Smith *v.* Richards, 13 Pet. (U. S.) 26; Daniel *v.* Mitchell, 1 Story (U. S.) 172; Warner *v.* Daniels, 1 Woodb. & M. (U. S.) 90, 691; Foreman *v.* Bigelow, 4 Cliff. (U. S.) 508; Taylor *v.* Fleet, 1 Barb. (N. Y.) 471; Buckner *v.* Street, 15 Fed. Rep. 365; Addington *v.* Allen, 11 Wend (N. Y.) 375; Masson *v.* Bovet, 1 Den. (N. Y.) 69; 43 Am. Dec. 651; Dauchy *v.* Silliman, 2 Lans. (N. Y.) 361; Schwenck *v.* Naylor, 102 N. Y. 683; Babcock *v.* Case, 61 Pa. St. 427; 100 Am. Dec. 654; Clark *v.* Everhart, 63 Pa. St. 347; Holmes' Appeal, 77 Pa. St. 50; Bird's Appeal, 91 Pa. St. 68; Swimm *v.* Bush, 23 Mich. 99; Sheldon Axle Co. *v.* Scofield, 85 Mich. 177; Dennis *v.* Leaton, 72 Mich. 586; Skinner *v.* Brigham, 126 Mass. 132; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Bowker *v.* Delong, 141 Mass. 315; Hickey *v.* Drake, 47 Mo. 369; Lockridge *v.* Foster, 5 Ill. 569; Hall *v.* Fullerton, 69 Ill. 448; Reed *v.* Peterson, 91 Ill. 288; Bradley *v.* Luce, 99 Ill. 234; Herrin *v.* Libbey, 36 Me. 350; Wright *v.* Haskell, 45 Me. 489; Farris *v.* Ware, 60 Me. 482; Leeds *v.* Boyer, 59 Ind. 289; Leake *v.* Ball, 116 Ind. 214; Busterud *v.* Farrington, 36 Minn. 320; Shackleford *v.* Handley, 1 A. K. Marsh. (Ky.) 496; Rhea *v.* Yoder, Sneed (Ky.) 87; Dietz *v.* Sutcliffe, 80 Ky. 650; Havlin *v.* Reed (Ky. 1887), 5 S. W. Rep. 554; Walker *v.* Day, 8 Baxt. (Tenn.) 77; Perkins *v.* McGavock, Cooke (Tenn.) 415; White *v.* Cox, 3 Hayw. (Tenn.) 79; Pendarvis *v.* Gray, 41 Tex. 326; Cook *v.* Moore, 39 Tex. 255; Tyner *v.* Cotter, 67 Wis. 482; Wills *v.* Millet, 23 Wis. 64; Law *v.* Grant, 37 Wis. 548; Foster *v.* Gressett, 29 Ala. 393; Lindsey *v.* Veasy, 62 Ala. 421; West *v.* Waddill, 33 Ark. 575; Crabtree *v.* Bradbury (Ark. 1890), 13 S. W. Rep. 935; Myton *v.* Thurlow, 23 Kan. 212; Grindrod *v.* Wolf, 38 Kan. 292; Wampler *v.* Wampler, 30 Gratt. (Va.) 454; Davis *v.* Henry, 4 W. Va. 571; Jones *v.* Emery, 40 N. H. 348; Willoughby *v.* Moulton, 47 N. H. 205; Preston *v.* Reeve, 65 N. H. 6; Gates *v.* Bliss, 43 Vt. 299; Yeoman *v.* Lasley, 40 Ohio St. 190; Gilvery *v.* Trenwith (N. J. 1887), 11 Atl. Rep. 325; Willcox *v.* Jackson, 51 Iowa 208; Ormsby *v.* Budd, 72 Iowa 80; Morrison *v.* Lods, 39 Cal. 381; Gunby *v.* Sluter, 44 Md. 237; Foss *v.* Newbury, 20 Oregon 257; Kennedy *v.* Panama, etc., Royal Mail Co., L. R., 2 Q. B. 580.

In case of a joint contract for the purchase and improvement of certain property, the fraud of one only of four contractors is not sufficient ground for rescission, where the partnership had been carried on for two years. Moore *v.* Holt, 3 Tenn. Ch. 141.

In Smith *v.* Brittenham, 98 Ill. 188, a bill in equity sought to rescind an executed contract for the exchange of lands for goods, and it was held that where no offer to return the goods had been made, and no excuse for not doing so given; and where the contract price of the goods was alleged to be their cost, and it was charged that the goods were of less cost than those specified; and the bill alleged generally that a fraudulent inventory had been made, but did not specify the particular facts lying at the base of the allegation, such allegations were insufficient to justify a decree of rescission.

In Esham *v.* Lamar, 10 B. Mon. (Ky.) 43, the bargain appeared "hard and unconscientious and extortionate," and of such a character as the misfortune of the injured party should have forbidden. The contract was rescinded by a court of equity.

A bill for rescission of a contract on the ground of fraud will not be entertained if the fraud has been practiced after the making of the contract. Fulton *v.* Loftis, 63 N. Car. 393.

In Morgan *v.* New Orleans, etc., R. Co., 2 Wood (U. S.) 244, it was held that in order to set aside a contract on the ground of fraud, when such contract has been partly performed, and where rescission would be productive of the upheaval of large and important transactions, it must be clearly proved that the misstatements of facts were such as to mislead the other party, and induce him to make the contract. *Compare* Ludington *v.* Renick, 7 W. Va. 273; Treacy *v.* Hecker, 51 How. Pr. (N. Y.) 69.

Thus A's grant of a right of way was rescinded for false representations by the railroad company's agent that

fraudulent concealment in respect to the subject-matter of the contract.[1]

In regard to false representations, it is primarily essential that they be positive statements of facts and not of mere matters of opinion,[2]

certain culvert and depot conveniences were intended, and that the line would be where the land was not valuable; and this, whether or not the agent had authority to make such averments. Albitz *v.* Minneapolis, etc., R. Co., 40 Minn. 476.

Sometimes the maxim *fraus non est fallere fallentem* is applied and one party's misrepresentation is put against the other's. A was induced by his solicitor to execute a deed as absolute purchaser of an estate, on the understanding that he was acting as trustee for the real purchaser, and also to execute a mortgage of the same property to B. The deed contained a fictitious recital of an agreement for a loan from B to A, and a fictitious receipt of the mortgage money by A from B, also a covenant of A to pay the mortgage debt to B. Afterwards the security becoming doubtful, B pressed A for payment of interest, and on A's answering that he had acted as trustee and was not liable, sued A on his covenant. On bill by A for an injunction, it appeared that A's solicitor, being B's debtor and pressed by B for further security, had offered B the estate of A as a security; so that A was a necessary party to the mortgage, the solicitor being the real borrower. *Held*, that although A had been guilty of misrepresentation in the mortgage deed, yet as B (no money having passed) was equally guilty of misrepresentation, the two offset, and A was entitled to the injunction. Greenfield *v.* Edwards, 11 L. T. N. S. 663.

The fact that a corporation became insolvent a few months after making a contract of purchase, does not prove that its president's representations of solvency had been intentionally false. Dennis *v.* Leaton, 72 Mich. 586.

The rules applicable to the rescission of contracts generally also apply to contracts for rescission; thus, where a seller of barrels believed the false representations of the buyer that they were defective, and agreed to rescind the sale, it was held that upon discovering the fraud, and giving prompt notice, he might rescind his agreement to rescind. Byers *v.* Chapin, 28 Ohio St. 300. See also Jones *v.* Booth, 38 Ohio St. 405.

On the same principle a compromise induced by fraud and deception will not preclude the rescission of a contract. Carr *v.* Callaghan, 3 Litt. (Ky.) 365.

1. See FRAUD, vol. 8, pp. 635, *et seq.*; 644, *et seq.*

2. Herring *v.* Skaggs, 62 Ala. 180; 34 Am. Rep. 4; Broughton *v.* Winn, 60 Ga. 486; Holbrook *v.* Connor, 60 Me. 578; 11 Am. Rep. 212; Bishop *v.* Small, 63 Me. 12; Gordon *v.* Parmelee, 2 Allen (Mass.) 212; Hazard *v.* Irwin, 18 Pick. (Mass.) 105; Mooney *v.* Miller, 102 Mass. 217; Tucker *v.* White, 125 Mass. 344; Clark *v.* Everhart, 63 Pa. St. 347; McClanahan *v.* McKinley, 52 Iowa 222; Lucas *v.* Crippen, 76 Iowa 507; Hunter *v.* McLaughlin, 43 Ind. 38; Neidefer *v.* Chastain, 71 Ind. 363; 36 Am. Rep. 198; Foster *v.* Caldwell, 18 Vt. 176; Jaffray *v.* Moss, 41 La. Ann. 548; Sawyer *v.* Prickett, 19 Wall. (U. S.) 146; Stebbins *v.* Eddy, 4 Mason (U. S.) 414; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711; 10 W. R. 305.

In Pomeroy on Contracts, p. 291, § 212, it is said: "It is sometimes, but very incorrectly, said that a representation cannot be made of a matter of opinion. The true rule is that the representation cannot itself be the mere expression of an opinion held by the party making it, but must be an affirmation of a fact; but the very fact concerning which the statement is made, may be an opinion. In other words, the existence of an opinion may be a fact material to a proposed contract; and, therefore, a statement that such opinion exists, becomes an affirmation of a material fact, and, if untrue, it is a misrepresentation. In all such cases, however, there must be the positive affirmation that the opinion is held by the specified person, that it exists as a fact, which is something quite different from the expression of an opinion."

As to false representations of value, see Martin *v.* Hill, 41 Minn. 337.

To justify a party in rescinding a contract on the ground of fraudulent

or law,[1] and it seems that a knowledge of the falsity of the representations must rest with the party making them;[2] but it has been held in a number of cases that the fact of the ignorance of the party as to their falsity is immaterial, provided he does not know them to be true,[3] or if he has acted carelessly and in ignorance of the facts.[4] Again, they must be material in inducing the other party, by reason of his confidence in them, to enter into the contract,[5] but if the means of ascertaining their

misrepresentations, they must have been made to him, or for the purpose of being communicated to him, and with the design of influencing his conduct; but false statements made to a third person without any intent to influence the conduct of the contracting party will not be considered sufficient ground for rescinding. Van Kleeck *v.* Le Roy, 37 Barb. (N. Y.) 544. The misrepresentation must also have been made as a part of the same transaction. Barnett *v.* Barnett, 83 Va. 504.

1. Upton *v.* Tribilcock, 91 U. S. 45; Beall *v.* McGehee, 57 Ala. 438; Bell *v.* Lawrence, 51 Ala. 160; Davis *v.* Betz, 66 Ala. 206; Thompson *v.* Phœnix Ins. Co., 75 Me. 55; 46 Am. Rep. 357; People *v.* San Francisco, 27 Cal. 655; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; New Albany, etc., R. Co. *v.* Slaughter, 10 Ind. 218; Clodfelter *v.* Halett, 72 Ind. 137; Indiana Ins. Co. *v.* Brehm, 88 Ind. 578; Starr *v.* Bennett, 5 Hill (N. Y.) 303; Jaggar *v.* Winslow, 30 Minn. 263; Fish *v.* Cleland, 33 Ill. 238. But see Cooke *v.* Nathan, 16 Barb. (N. Y.) 342, where it was held that "if one of the parties to a contract is, in truth, ignorant of a matter of law involved therein, and the other knows this to be the case and takes advantage of the circumstance, he is guilty of a fraud and the contract may be rescinded." See also Berry *v.* Whitney, 40 Mich. 65; Townshend *v.* Cowles, 31 Ala. 428; Hirschfield *v.* London, etc., R., 2 Q. B. Div. 1.

But it seems that where confidential relations exist, misstatements of law will impair a contract. People *v.* San Francisco, 27 Cal. 655. See Hartsville University *v.* Hamilton, 34 Ind. 506.

2. Walker *v.* Hough, 59 Ill. 375; Sims *v.* Klein, 1 Ill. 302; Schwabacher *v.* Riddle, 99 Ill. 343.

3. Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Busterud *v.* Farrington, 36 Minn. 320; Seeberger *v.* Hobert, 55 Iowa 756; Mohler *v.* Carder, 73 Iowa 582; Stimson *v.* Helps, 9 Colo. 33; Smith *v.* Richards, 13 Pet. (U. S.) 26.

4. Parmlee *v.* Adolph, 28 Ohio St. 10; Stone *v.* Covell, 29 Mich. 359; Match *v.* Hunt, 38 Mich. 6; Munroe *v.* Pritchett, 16 Ala. 785; 50 Am. Dec. 203; Foard *v.* McComb, 12 Bush (Ky.) 723; Allen *v.* Hart, 72 Ill. 104. *Compare* Cooper *v.* Schlesinger, 111 U. S. 148.

In Mississippi Union Bank *v.* Wilkinson, 3 Smed. & M. (Miss.) 78, the assignor of title bonds made the same representations in regard to the quantity of land embraced by them as his assignor had made to him, but did not warrant their correctness, and the court held that such representations were not fraudulent, and could not authorize a rescission.

In Yeater *v.* Hines, 24 Mo. App. 619, it was held that a material misrepresentation would be ground for rescission, though not fraudulently or negligently made. But see *contra* Anstee *v.* Ober, 26 Mo. App. 665; Kennedy *v.* Panama, etc., Royal Mail Co., L. R., 2 Q. B. 580, unless the innocent misrepresentation is as to the substance of the whole consideration.

5. Attwood *v.* Small, 6 C. & F. 444; Smith *v.* Kay, 7 H. L. Cas. 750; Winter *v.* Bandell, 30 Ark. 362; Righter *v.* Roller, 31 Ark. 170; Schwabacker *v.* Riddle, 99 Ill. 343; Hanna *v.* Rayburn, 84 Ill. 533; Tuck *v.* Downing, 76 Ill. 71; Bowman *v.* Carithers, 40 Ind. 90; McLaren *v.* Cochran, 44 Minn. 255; Wells *v.* Waterhouse, 22 Me. 131; Central Bank *v.* Copeland, 18 Md. 305; 81 Am. Dec. 597; Ely v. Stewart, 2 Md. 408; Gunby *v.* Sluter, 44 Md. 237; Foy *v.* Houghton, 83 N. Car. 467; Anderson *v.* Burnett, 5 How. (Miss.) 165; 35 Am. Dec. 425; Hall *v.* Thompson, 1 Smed. & M. (Miss.) 443; Ayres *v.* Mitchell, 3 Smed. & M. (Miss.) 683; Duncan *v.* Hogue, 24 Miss. 671; Selma, etc., R. Co. *v.* Anderson, 51 Miss. 829; Percival *v.* Harger, 40 Iowa 286; Heineman *v.* Steiger, 54 Mich. 232; Humphries *v.* Merriam, 32 Minn. 197; Weist

falsity be equally accessible to both parties, neither can rescind ;[1] yet, it is said that where a representation is made of a fact which has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving such representation has the absolute right to rely on its truthfulness, although the means of ascertaining its falsity are fully open to him.[2]

A concealment, to afford ground of rescission for fraud must consist of a willful suppression of such facts, in regard to the subject-matter of the contract, as the party making it is bound to disclose.[3]

v. Grant, 71 Pa. St. 95; Burkholder *v.* Beetem, 65 Pa. St. 496; Pennybacker *v.* Laidley, 33 W. Va. 624; Addington *v.* Allen, 11 Wend. (N. Y.) 374; Bruce *v.* Burr, 67 N. Y. 237; Hill *v.* Carley, 8 Hun (N. Y.) 636; Safford *v.* Grout, 120 Mass. 20; Colton *v.* Stanford, 82 Cal. 351; Bailey *v.* Fox, 78 Cal. 389; Larimer Co. Land Imp. Co. *v.* Cowan, 5 Colo. 320; Turnbull *v.* Gadsen, 2 Strobh. Eq. (S. Car.) 14.

Ambiguous Statements.—"Statements which are in themselves ambiguous cannot be treated as fraudulent merely because they are false in some of their possible senses. In such a case, the party who complains of having been misled must satisfy the court that he understood and acted upon the statement in the sense in which it was false." Wald's Pollock on Contracts, p. 524, *citing* Smith *v.* Chadwick, L. R., 9 App. Cas. 187.

1. Hoitt *v.* Holcomb, 32 N. H. 185; Mooney *v.* Miller, 102 Mass. 217; Parker *v.* Moulton, 114 Mass. 99; 19 Am. Rep. 315; Moore *v.* Turbeville, 2 Bibb (Ky.) 602; 5 Am. Dec. 642; Hunt *v.* Hardwick, 68 Ga. 100. Likewise if the party does not have any faith in such representation, but makes a contract by reason of some other motive. Howell *v.* Biddlecom, 62 Barb. (N. Y.) 131. *Compare* Blease *v.* Garlington, 92 U. S. 1.

2. Cockrill, C. J., in Gammill *v.* Johnson (Ark. 1886), 1 S. W. Rep. 610, *citing* Mead *v.* Bunn, 32 N. Y. 275; David *v.* Park, 103 Mass. 501; Kiefer *v.* Rogers, 19 Minn. 32; Matlock *v.* Todd, 19 Ind. 130; Kellar *v.* Equitable Ins. Co., 28 Ind. 170; Raynell *v.* Spry, 8 Hare Ch. 222. See also Porter *v.* Fletcher, 25 Minn. 493; Union Nat. Bank *v.* Hunt, 76 Mo. 439; Carmichael *v.* Vandebur, 50 Iowa 651; McKee *v.* Eaton, 26 Kan. 226; Oswald *v.* McGehee, 28 Miss. 340; Herron *v.* Debrell, 87 Va. 289; Henry *v.* Allen, 93 Ala. 197.

Where there has been a fraudulent misrepresentation, or a willful concealment, of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry. Venezuela R. Co. *v.* Kisch, L. R., 2 H. L. Cas. 99.

3. See Pomeroy on Contracts, p. 352. See FRAUD, vol. 8, p. 644, 645.

When a party wishes to rescind a contract, on the ground of fraudulent concealment, the principal inquiry is, whether the concealment was of facts which the party concealing was under obligation to disclose. The leading case on this question is Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178. The opinion was delivered by Chief Justice Marshall, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, although it were exclusively in his possession, and that it would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. Kintzing *v.* McElrath, 5 Pa. St. 467; Dambmann *v.* Schulting, 75 N. Y. 55.

In Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222, it is said that it is the duty of a vendor to disclose any defect in the article which he is selling, unless such defect is palpable to the purchaser, and the practice of putting up goods so as to present a favorable exterior, while the interior is not truthfully represented, is a fraudulent concealment. *Compare* Croyle *v.* Moses, 90 Pa. St. 250, where the vendor of a horse used artifice to conceal a certain unsoundness in the animal.

Suppressio veri or *suggestio falsi*

are sufficient grounds for rescinding a contract in equity. Waters *v.* Mattingly, 1 Bibb (Ky.) 244; 4 Am. Dec. 631.

E. g., where the foreman in a mine concealed the discovery of a rich vein of ore from a non-resident owner, and procured a conveyance of her interest below value. Gruber *v.* Baker, 20 Nev. 453.

But see Harris *v.* Tyson, 24 Pa. St. 347; 64 Am. Dec. 661, where it was held that a person knowing the existence of a mine on the land of another, which the owner is ignorant of, may, nevertheless, buy it, and such suppression will not be ground for rescission on the part of the vendor. See also Williams *v.* Spurr, 24 Mich. 335.

If one party to a contract make a statement in regard to the subject-matter which is true as far as it goes, but suppresses other facts which would change the effect of such statement, such concealment is fraudulent. Mallory *v.* Leach, 35 Vt. 156; 82 Am. Dec. 625; Kidney *v.* Stoddard, 7 Met. (Mass.) 252; Newell *v.* Randall, 32 Minn. 171; 50 Am. Dec. 562. See also the case of Hadley *v.* Clinton Co. Importing Co., 13 Ohio St. 502; 82 Am. Dec. 454, where Gholson, J., said: "This obligation to disclose will be found to arise from something in the acts or conduct of the vendor in connection with the sale, doing something or saying something, which, for want of the disclosure, is false and deceptive. The old adage applies that half a truth is a lie. It is in this view, that the principles governing false representations become applicable, and as, in the case of a false representation, a fraudulent intention in concealing the fact which ought to have been disclosed need not appear, it will suffice to sustain the action if the fact having been improperly concealed, there was falsehood to the defendant's knowledge, which produced a damage to plaintiff." *Citing* Thorn *v.* Bigland, 8 Ex. Ch. 725; Polhill *v.* Walter, 3 B. & Ad. 114; 23 E. C. L. 38; Collins *v.* Evans, 5 Q. B. 820; 48 E. C. L. 819; Ormrud *v.* Huth, 14 M. & W. 651; Railton *v.* Matthews, 10 C. & F. 934; Blydenburgh *v.* Welsh, Baldw. (U. S.) 337; Cornelius *v.* Malloy, 7 Pa. St. 299.

Latent Defects.—The doctrine seems to be that where there is some *latent* defect in the subject-matter of the contract, known to the seller and unknown to the purchaser, it is the duty of the former to disclose it. Hoe *v.* Sanborn, 21 N. Y. 555; 78 Am. Dec. 163; Barron *v.* Alexander, 27 Mo. 530; McAdams *v.* Cates, 24 Mo. 223. See 2 Kent's Comm. (4th ed.) 482 and n; LATENT DEFECTS, vol. 2, p. 926.

Confidential Relations.—Where parties stand in a confidential relation to each other, there is always an obligation on the part of one to communicate whatever may be known to him and unknown to the other in regard to the subject-matter of the contract. Emmons *v.* Moore, 85 Ill. 304; Young *v.* Hughes, 32 N. J. Eq. 372; Cornelius *v.* Malloy, 7 Pa. St. 300. So of persons standing in a fiduciary relation. Narcessa *v.* Nathan, 2 B. Mon. (Ky.) 241. Again in case of a contract made by a person upon coming of age with his late guardian, concealment from him of material facts known to the guardian is ground for rescission. Lee *v.* Fox, 6 Dana (Ky.) 171.

Miscellaneous Instances.—It may be ground for rescission that one party made innocent misrepresentations and after discovering their falsity, failed to disclose the fact. Pettigrew *v.* Chellis, 41 N. H. 95. See Barron *v.* Alexander, 27 Mo. 530.

In an action by an allottee of shares in a railway company, for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 50,000*l.* shares, of 25*l.* each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits. At the time when he executed the deed, the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him. *Held*, that the withholding of this fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. Vane *v.* Cobbold, 1 Exch. 798.

Knowledge and non-communication of a fact which may influence the other party are not sufficient to rescind a contract. The fact must be, and be known by him who keeps it back to be, of sufficient importance to form a substantial element in the transaction, or there must be some active misrepresentation. Thompson *v.* Lambert, 2 Ir. Eq. 433; 17 W. R. 111.

For cases in which contracts have been rescinded for fraudulent concealment, see McNiel *v.* Baird, 6 Munf.

As to the manner of making fraudulent representations, it is not always necessary that they be made orally or in writing; they may be implied from the conduct of the party, and, if relied on, may be ground for rescission.[1] But it is no ground for rescission that the fraud is practiced by some third person, unless it be upon the instigation of the party to the contract, or with his knowledge.[2] In the case of principal and agent, the right to rescind for the agent's fraud, in case of false representations, depends on whether the representation was within the scope of the agent's authority; in such case, the party defrauded may rescind.[3]

Such are the general principles applicable to rescission, whether effected by act of the party or by action at law or in equity. It is said by an eminent writer that, "In general the courts of law and equity have concurrent jurisdiction in cases of fraud; yet there are frauds that can be availed of only in equity. The authorities are not quite uniform as to where the line separating this class from the other runs."[4]

(Va.) 316; White *v.* Flora, 2 Overt. (Tenn.) 426; Juzan *v.* Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Rawdon *v.* Blatchford, 1 Sandf. (N. Y.) 344; Bench *v.* Sheldon, 14 Barb. (N. Y.) 66; Storrs *v.* Barker, 6 Johns. Ch. (N. Y.) 166; 10 Am. Dec. 316; Brown *v.* Montgomery, 20 N. Y. 287; 75 Am. Dec. 404; Conover *v.* Wardell, 22 N. J. Eq. 492; Keen *v.* James, 39 N. J. Eq. 527; Holmes' Appeal, 77 Pa. St. 50; Lunn *v.* Shermer, 93 N. Car. 164; Glasscock *v.* Minor, 11 Mo. 655; McHarry *v.* Irvin, 85 Ky. 322. Parry *v.* Parry, 80 Wis. 122.

1. Croyle *v.* Moses, 90 Pa. St. 250; Mizner *v.* Kussell, 29 Mich. 229; Chisolm *v.* Gadsden, 1 Strobh. (S. Car.) 220. See also, McCall *v.* Davis, 56 Pa. St. 431; 94 Am. Dec. 92; Story *v.* Norwich, etc., R. Co., 24 Conn. 94.

2. Lindsey *v.* Veasy, 62 Ala. 421; Williamson *v.* Raney, Freem. Ch. (Miss.) 112; Vass *v.* Reddick, 89 N. Car. 6; Dangler *v.* Baker, 35 Ohio St. 673; Law *v.* Grant, 37 Wis. 548; Cooper *v.* Lovering, 106 Mass. 77; Sturge *v.* Starr, 2 M. & K. 195; Wheelton *v.* Hardisty, 8 E. & B. 232; 92 E. C. L. 231.

Where a grantor's attorney for exchanging lands made a conveyance on information obtained from third persons, and not from any representations by the grantee, rescission was refused. Shields *v.* Hanbury, 128 U. S. 584.

False representations by a son or other third person must be shown to have been made with the purchaser's knowledge. Dent *v.* Long, 90 Ala. 172.

In McFarland *v.* Creath, 35 Mo. App. 112, it was held that an administrator could not rescind for the fraud of his decedent.

3. Weir *v.* Bell, 3 Exch. Div. 238; Barwick *v.* English Joint Stock Bank, L. R., 2 Exch. 259; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; 28 Am. Dec. 476; Durst *v.* Burton, 47 N. Y. 167; 7 Am. Rep. 428; Krumm *v.* Beach, 25 Hun (N. Y.) 293; Kennedy *v.* McKay, 43 N. J. L. 288; 39 Am. Rep. 581; Perley *v.* Catlin, 31 Ill. 533. See Echols *v.* Dodd, 20 Tex. 190; Fellows *v.* Oneida Co., 36 Barb. (N. Y.) 655; 2 Schouler Pers. Prop., § 607.

And, conversely, fraud practiced upon an agent is fraud upon his principal. May *v.* Magee, 66 Ill. 112.

4. Bishop on Contracts (ed. of 1887), § 690, *citing* Smith *v.* McIver, 9 Wheat. (U. S.) 532; Jackson *v.* Burgatt, 10 Johns. (N. Y.) 457; 6 Am. Dec. 349; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; McKnight *v.* Kellett, 9 Ga. 532; Wood *v.* Goodrich, 9 Yerg. (Tenn.) 266. See also Haden *v.* Garden, 7 Leigh (Va.) 157; Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449.

For cases where rescission has been granted in equity for fraud, see Hough *v.* Richardson, 3 Story (U. S.) 659; Kitchen *v.* Rayburn, 19 Wall. (U. S.) 254; Piersoll *v.* Elliott, 6 Pet. (U. S.) 98; Rood *v.* Chapin, Walk. (Mich.) 79; Thorn *v.* Thorn, 51 Mich. 167; Oswald *v.* McGehee, 28 Miss. 340; Fulton *v.* Woodman, 40 Miss. 593; Stark *v.* Hen-

Equity will also relieve when there is a constructive fraud in which the plaintiff has not participated, or when, if he has participated, it would be against public policy to let the contract stand.[1] But it seems that equity will not rescind, even though there may have been fraud in the procurement of the contract, unless injury has resulted to the party seeking relief.[2]

c. INADEQUACY OF CONSIDERATION. — The well-established rule is that inadequacy of consideration, either in the price paid or in the subject-matter, is not of itself sufficient ground to warrant the rescission of a contract merely because hardship would result from a performance thereof, but the inadequacy must be such as to furnish strong evidence that fraud has been practiced upon the party seeking to rescind.[3]

derson, 30 Ala. 438; Calloway *v.* McElroy, 3 Ala. 406; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 520; Hall *v.* Perkins, 3 Wend. (N. Y.) 626; Morland *v.* Atchison, 19 Tex. 303; Crayton *v.* Munger, 9 Tex. 285; Wray *v.* Wray, 32 Ind. 126; Matthey *v.* Wood, 12 Bush (Ky.) 293; Taymon *v.* Mitchell, 1 Md. Ch. 496; Reese *v.* Wyman, 9 Ga. 430; Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583; Crosland *v.* Hall, 33 N. J. Eq. 111; Rorer Iron Co. *v.* Trout, 83 Va. 397; Rawlins *v.* Wickham, 3 De G. & J. 304.

Where a man is so drunk as to become an easy victim to the fraudulent designs of another party, and such party takes an unfair advantage of his intoxication by inducing him to make a disadvantageous contract, a court of equity will rescind the contract, not on the ground of drunkenness, but of fraud. Calloway *v.* Witherspoon, 5 Ired. Eq. (N. Car.) 128.

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d. UNDUE INFLUENCE.—Another ground for the rescission of contracts in equity is where there has been an exercise of undue

Mr. Pomeroy, in his work on Contracts, p. 270, § 193, says in regard to inadequacy of consideration: "The true doctrine is that fraud is always a sufficient ground for the rescission of agreements; inadequacy of consideration is evidence of fraud, slight or powerful, according to its amount and other circumstances; when it is satisfactory, or, in other words, when, from the proof of the inadequacy, the triers, judge or jury, are convinced that fraud, as a fact, did exist, then the rescission follows as a necessary operation of law. Instead, therefore, of saying that the inadequacy must be so great as to be conclusive evidence of fraud, I prefer to state the rule as follows: When the inadequacy of the consideration is such as to be satisfactory evidence of fraud, the fraud, so proved, is a ground for setting aside the contract."

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In case of an executed contract between a corporation and a county, the court held that it had jurisdiction to set aside the contract on the ground of inadequacy of consideration, and ignorance of the officers as to the value of what they sold. American Emigrant Co. *v.* Wright Co., 97 U. S. 339. See Schiffer *v.* Dietz, 83 N. Y. 300.

Inadequacy Coupled with Other Facts.—As where a person deliberately induced a young man, addicted to the habit of intoxication, to become his guest and encouraged him to drink, in order that, while in a state of intoxication, he might obtain from him a settlement of disputed matters. In such a case equity will rescind the settlement, though the inadequacy of consideration did not furnish complete evidence of fraud. Cleere *v.* Cleere, 82 Ala. 581; 60 Am. Rep. 750.

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So, if the inadequacy of price be attended by circumstances evincing unconscientious advantage taken of the improvidence and distress of a party, equity will rescind a contract even though executed. McKinney *v.* Pinckard, 2 Leigh (Va.) 149; 21 Am. Dec. 601.

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A purchase from an illiterate poor man, who was ill at the time, was set aside, the price being inadequate, the vendor having no professional advice, and the transaction being completed in great haste and on terms unduly disadvantageous to him. Clark *v.* Malpas, 4 De G., F. & J. 401.

Courts of equity will not rescind contracts entered into by fully competent parties because they are uncon-

Equity will also relieve when there is a constructive fraud in which the plaintiff has not participated, or when, if he has participated, it would be against public policy to let the contract stand.[1] But it seems that equity will not rescind, even though there may have been fraud in the procurement of the contract, unless injury has resulted to the party seeking relief.[2]

c. INADEQUACY OF CONSIDERATION. — The well-established rule is that inadequacy of consideration, either in the price paid or in the subject-matter, is not of itself sufficient ground to warrant the rescission of a contract merely because hardship would result from a performance thereof, but the inadequacy must be such as to furnish strong evidence that fraud has been practiced upon the party seeking to rescind.[3]

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take must be mutual,[1] and material in inducing the con-

other party to rescind. Burkham *v.* Daniel, 56 Ala. 604.

In Dale *v.* Roosevelt, 5 Johns. (N. Y.) ch. 174, it was held, that where a party had covenanted to pay to another an annuity and in consideration certain land was conveyed which was supposed to contain a coal mine, the agreement could be rescinded upon the discovery that there was no coal upon the land. But a mistake as to value was held to be no ground for rescission in Hunter *v.* Gowdy, 1 Ohio 449; nor, where both parties to a contract were equally ignorant as to the facts upon which it was based, and both were aware of their ignorance, but exercised their own judgment, could the contract be rescinded on the ground of mistake of facts. Crowder *v.* Langdon, 3 Ired. Eq. N. Car. 476; Ashcom *v.* Smith, 2 Pa. St. 211. And so, where a bill seeks to rescind a contract on the ground of fraud only, the discovery of an error committed *bona fide* will have no effect. Goode *v.* Hawkins, 2 Dev. Eq. (N. Car.) 393; Elwood *v.* Gardner, 45 N. Y. 349; McMichael *v.* Kilmer, 76 N. Y. 36; Pasman *v.* Montague, 30 N. J. Eq. 385.

An act which has been done intentionally, and with full knowledge, will not be considered a mistake. Griffith *v.* U. S., 22 Ct. of Cl. 165; Wier *v.* Johns (Colo.), 24 Pac. 262.

Griffith *v.* Sebastian Co., 49 Ark. 24, was a case arising out of a mistake as to the site of a county seat. Land had been conveyed in a certain town upon which to build a county court-house, both parties believing that such town was the county seat, but it was subsequently adjudged that such was not the case, and the grantor of the land was entitled to rescission.

Unless a party can show that his mistake was caused by the fraud of the other party, he is not entitled to rescission on the ground that his bargain was unreasonable, and entered into in ignorance of the facts. Schields *v.* Hickey, 26 Mo. App. 194, and so in Bean *v.* Western N. Car. R. Co., 107 N. Car. 731, where a mistake was made by one party under such circumstances that his means of knowing the character of the agreement was certainly destroyed. See also Livingston *v.* New York L. Ins., etc., Co., 59 Hun (N. Y.) 622.

A contract cannot generally be rescinded for an innocent mistake, if the rescission will work injustice to either party, or if either party cannot be placed *in statu quo*. Martin *v.* McCormick, 4 Sandf. (N. Y.) 366.

An erroneous opinion as to the value of a partnership interest, which is common to both parties, is not such a mistake of fact as will be sufficient ground for rescission. Ludington *v.* Ford, 33 Mich. 123; Dortic *v.* Dugas, 55 Ga. 484.

See EQUITY, vol. 6, p. 716.

See also later illustrations, as follows: As to the fact that one, in absence of duress or fraud, signed a contract for dissolution of co-partnership articles, without reading or knowing its contents, not being such mistake or surprise as to be ground for setting it aside, Little *v.* Little (N. Dak. 1891), 49 N. W. Rep. 756. *Compare* Linington *v.* Strong, 111 Ill. 152.

As to the fact that one, in absence of concealment or false representations, agreed to a compromise acceptance of a sum in settlement of an oral partnership agreement upon the other's denial of partnership, not being a ground for avoiding the compromise, see Wahl *v.* Barnum, 116 N. Y. 87.

As to the fact that one, to avert anticipated litigation, agreed with a party no better informed than herself, to accept certain rents in lieu of dower, not being entitled to have the compromise rescinded, see Gormley's Appeal, 130 Pa. St. 467.

Otherwise, as to rescission of a wife's release of her claim to damages for personal injuries, of the real extent and character whereof she was misinformed. Blair *v.* Chicago, etc., R. Co., 89 Mo. 383.

1. Allen *v.* Hammond, 11 Pet. (U. S.) 63; Gano *v.* Palo Pinto Co., 71 Tex. 99; German American Ins. Co. *v.* Davis, 131 Mass. 316; Nevins *v.* Dunlap, 33 N. Y. 676; Schantz *v.* Neener, 87 Ind. 258; Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184; Brainerd *v.* Arnold, 27 Conn. 617; Renshaw *v.* Lefferman, 51 Md. 277.

When two parties, under a mistake of fact, enter into an agreement, either of them has a title to come to equity to be relieved from it. That relief will be given on the principles of good conscience alone. Cooper *v.* Phipps, L. R., 2 H. L. Cas. 149.

Thus, where a city conveyed property

tract,[1] and, generally, it must be in regard to a matter of fact and not of law.[2] Sometimes relief will be granted where there

to the plaintiff, which it held by virtue of assessment and sale, and the assessment turned out to be void, the contract could be rescinded on the ground of mutual mistake of facts. Gardner *v.* Mayor, etc., of Troy, 26 Barb. (N. Y.) 423.

In Irwin *v.* Wilson, 45 Ohio St. 426, it was held that where the parties to a contract for the exchange of lands in another State, with which they were both unacquainted, relied upon the statements as to value, etc., of a third party, and such third party was mistaken as to the identity of the land, the contract could be rescinded upon the return of the deeds and notes taken, since the mistake was mutual. See also Crist *v.* Dice, 18 Ohio St. 536. So where both parties to a contract for the sale of a remainder in fee after an estate tail, were ignorant of the fact that the tenant in tail had suffered a recovery, and no remainder was left. Hitchcock *v.* Giddings, 4 Price 135.

Likewise, when the subject-matter of a contract of sale does not exist, or was materially different from what it was supposed, equity will rescind for mutual mistake. Marvin *v.* Bennett, 8 Paige (N. Y.) 312.

In Barth *v.* Devel, 11 Colo. 494, the mutual mistake which was held ground for rescission was, that a house which both parties supposed to stand on land conveyed was only partially thereon.

It has been held in some New York cases that a court of equity will rescind for a mistake acted under by the plaintiff alone which prevented the uniting of the minds, and this even where no fraud has been practiced by the other party. Smith *v.* Mackin, 4 Lans. (N. Y.) 41; Mills *v.* Lewis, 55 Barb. (N. Y.) 179; but the later cases hold that there must be mutual mistake of fact and that if the mistake is confined to one party, and no fraud practiced by the other, relief will not be granted. *In re* Potter, 10 Daly (N. Y.) 139; Moran *v.* McLarty, 75 N. Y. 25.

In the following cases it was held that instead of there being a mistake common to both parties, the mistake might be on one side and fraud on the other, which would have the same effect as a mutual mistake. Bergen *v.* Ebey, 88 Ill. 269; Shields *v.* Hickey, 26 Mo. App. 194; Weller *v.* Weller, 112 N. Y. 655; Worley *v.* Moore, 77 Ind. 567; Fitzmaurice *v.* Mosier, 116 Ind. 363; Pierce *v.* Graham, 85 Va. 227; Wyche *v.* Green, 26 Ga. 415; Hood *v.* Smith, 79 Iowa 621.

In order to establish a mutual mistake, it must be shown that both parties to the contract simultaneously made a like mistake. Crane *v.* McCormick, 92 Cal. 176. See; generally, MISTAKE, vol. 15, p. 625, where, in its application to the reformation of instruments, the doctrine of *Mistake of law*, *Mistake of fact*, *Mutual mistake*, etc., is fully treated.

1. Grymes *v.* Sauders, 93 U. S. 55; Wood *v.* Evans, 43 Mo. App. 230; Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184; Caton *v.* Willis, 5 Ired. Eq. N. Car. 335.

But ignorance of a mere extrinsic fact which is not essential to the contract, a knowledge of which might have influenced the conduct of one of the parties, is not sufficient ground for rescission. Cleaveland *v.* Smith, 132 U. S. 318. Nor will rescission be effected where the mistake was in regard to something connected with the subject matter of the contract, if it could in no way alter the position of the parties. Lyman *v.* Campbell, 34 Mo. App. 213. And where the liability is the result of pure carelessness, equity will not rescind on the ground of mistake. Voorhis *v.* Murphy, 26 N. J. Eq. 434; Robertson *v.* Smith, 11 Tex. 211; 60 Am. Dec. 234.

2. Bank of U. S. *v.* Daniel, 12 Peters (U. S.) 32; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; Snell *v.* Atlantic etc., Ins. Co., 98 U. S. 85; Illingworth *v.* Spaulding, 23 Fed. Rep. 827; Haven *v.* Foster, 9 Pick. (Mass.) 112; 19 Am. Dec. 353; Champlin *v.* Laytin, 18 Wend. (N. Y.) 409; 31 Am. Dec. 382; Weed *v.* Weed, 94 N. Y. 243; Good *v.* Herr, 7 W. & I. (Pa.) 253; 42 Am. Dec. 236; Light *v.* Light, 21 Pa. St. 407; Goltra *v.* Sanasack, 53 Ill. 456; Wood *v.* Price, 46 Ill. 439; Evants *v.* Strode, 11 Ohio 480; 38 Am. Dec. 744; Martin *v.* Hamlin, 18 Mich. 354; 100 Am. Dec. 181; Glenn *v.* Statter, 42 Iowa 107; Mellish *v.* Robertson, 25 Vt. 608; Wheaton *v.* Wheaton, 9 Conn. 96; Bentley *v.* Whittemore, 18 N. J. Eq. 366; Dill *v.* Shahan, 25 Ala. 694; 60 Am. Dec. 540; Hutton *v.* Edgerton, 6 Rich. (S. Car.) 485; Showman *v.* Miller, 6 Md. 479; Parham *v.* Parham, 6

has been a mistake of mixed law and fact, but only when the parties can be placed *in statu quo.*[1]

Under the general head of mistake may be placed the want of

Humph. (Tenn.) 287; Brown *v.* Armistead, 6 Rand. (Va.) 594; Shugart *v.* Thompson, 10 Leigh (Va.) 436; Alexander *v.* Newton, 2 Gratt. (Va.) 266; Marshall *v.* Collett, 1 Y. & C. 232; Stewart *v.* Kennedy, L. R., 15 App. Cas. 108; Midland, etc., R. Co. *v.* Johnson, 6 H. L. Cas. 798; Cockerell *v.* Cholmeley, 1 R. &. M. 418.

The fact that a mistake of law is common to both parties to the contract will not give it any weight as ground for rescission. Macklein *v.* Bacon, 57 Mich. 335.

A party who, under a misapprehension of his legal rights, parts with his property for a *bona fide* and valuable, but not an adequate, consideration, cannot have the transaction set aside on the mere ground of mistake. Marshall *v.* Collett, 1 Y. & C. 232.

In Pomeroy on Contracts, p. 316, § 232, it is said: "If the ignorance of one party, or his mistaken view of a legal rule, has been taken advantage of by the other, as the occasion for misrepresentation, concealment, undue advantage, overreaching or other like means of imposition, it is a circumstance of great weight and might easily induce a court to rescind a contract, or refuse to enforce it, although the misstatement, concealment, unfairness or other similar incident might not perhaps have been sufficient of itself to warrant such judicial action." See Snell *v.* Atlantic, etc., Ins. Co., 98 U. S. 85; Taylor *v.* Holmes, 14 F. R. 498; Benson *v.* Markoe, 37 Minn. 30; Stewart *v.* Kennedy, L. R., 15 App. Cas. 108; Sparks *v.* White, 7 Humph. (Tenn.) 86; Cooke *v.* Nathan, 16 Barb. (N. Y.) 342.

Where a party laboring under a clear and unequivocal mistake as to his legal rights, makes a contract, and such rights are of a doubtful character, the contract will be rescinded. Lammot *v.* Bowly, 6 Har. & J. (Md.) 500. And so, where one being mistaken as to the law, acknowledges himself to be under an obligation which in fact the law does not impose, the contract will be rescinded. Freeman *v.* Boynton, 7 Mass. 483; Toland *v.* Corey (Utah 1890), 24 Pac. Ry. 190; Ross *v.* McLaughlan, 7 Gratt. (Va.) 86; Silvernail *v.* Cole, 12 Barb. (N. Y.) 685. See Marquis of Townshend *v.* Stangroom, 6 Ves. 328.

Where a young man made a conveyance to a trustee containing no revocation, supposing he was only making a temporary arrangement for the management of the property, equity set the trust deed aside and ordered a reconveyance. Derr *v.* Cowper, 5 Del. Ch. 507.

So, where aged parents, not understanding English, conveyed all their interest in the estate of a deceased son to two of his brothers, misapprehending the deed, it was set aside. Weller *v.* Weller, 112 N. Y. 655.

As to what circumstances will defeat one's allegation that he did not know his rights when he executed the deed or instrument which he seeks to get rescinded, see Taylor *v.* Cayce, 97 Mo. 242; Fretland *v.* Mack, 76 Iowa 434; Barth *v.* Devel, 11 Colo. 494.

In Ordway *v.* Continental Ins. Co., 35 Mo. App. 426, it was held that equity will not relieve a party from his own folly or careless indifference in relying upon the opinion, as to matters of law, of another, especially if such other had less extensive knowledge than he himself had.

Where a contract was entered into under a mistaken supposition that the law was in accordance with a previous decision made upon a like case, it will not be rescinded on account of a subsequent decision by the same court changing the rule. Kenyon *v.* Welty, 20 Cal. 637; 81 Am. Dec. 137.

A mistake in the construction of a will cannot be set up as ground for rescission of a contract founded upon it. Wintermute *v.* Snyder, 3 N. J. Eq. 489.

Foreign Laws.—Mistakes as to foreign laws, or those of another State, are considered mistakes of fact for which a contract may be rescinded. Merchants' Bank *v.* Spalding, 12 Barb. (N. Y.) 302; Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233; King *v.* Doolittle, 1 Head (Tenn.) 77.

1. Where upon a wrong interpretation of a Delaware statute one who was a decedent's aunt of the half blood and cousin of the whole blood, accepted less than her portion and conveyed away her inheritance, this was not a mistake of mixed law and fact, and a rescission and reconveyance were

authority on the part of an agent or officer as a ground for which equity will sometimes rescind.[1]

f. ILLEGALITY.—The effect of illegality in an executory contract is to make it utterly void and incapable of being enforced, and if an illegal contract is voluntarily executed, the parties being *in pari delicto*, the court will not interfere to relieve either from the result of such execution.[2] It may happen that the illegality is in one of the parties only; in such a case, if the contract is *malum in se*, relief will in no case be granted, but if it is *malum prohibitum*, the innocent party may rescind and recover back the consideration.[3] It seems that this rule sometimes applies also, where one party is less guilty than the other, both being *in delicto*.[4]

g. DISABILITY—(1) *Coverture.*—Since the contracts of married women were, as a rule, void at common law, by reason of their disability, it seems that no necessity for rescission would arise. The restrictions, however, as to their contractual power, have been variously modified in many States, in some, to the extent of an entire removal, and where they are empowered by statute to make a contract, such contract can be rescinded only on the same grounds and with the same limitations, as in the case of any other person capable of contracting.[5]

refused. Hamblin *v.* Bishop, 41 Fed. Rep. 74.

1. **Non-Authorization.**—Thus, where a special agent was wanting in authority to assign a mortgage belonging to his principal. Holden *v.* Phelps, 135 Mass. 61. Or, where a note was fraudulently given by a partner in the name of the firm and the circumstances did not admit any adequate remedy at law. Fuller *v.* Percival, 126 Mass. 381.

See also in 1 Story's Eq. Jur. (13th ed.), § 33, Mr. Bigelow's valuable note concerning *Massachusetts* legislation affecting equity jurisdiction.

The United States Supreme Court has refused to cancel a policy of insurance for fraud, a suit thereon having been begun at law, wherein the alleged misrepresentations could avail in defense. Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616.

See also AGENCY, vol. 1, p. 331.

2. See ILLEGAL CONTRACTS, vol. 9, p. 879.

3. Tracy *v.* Talmage, 14 N. Y. 162; 67 Am. Dec. 132. In this case Selden, J., said: "But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money and property have been advanced upon it, relief will be granted to the party making the advance where he is not *in pari dilecto*, and it is of no importance whether the contract has been executed or not." Mount *v.* Waite, 7 Johns. (N. Y.) 434; Curtiss *v.* Leavitt, 15 N. Y. 9; Worcester *v.* Eaton, 11 Mass. 368; White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Lovell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24; Smith *v.* Bromley, 2 Dougl. 696 *n*; Jacques *v.* Golightly, 2 Md. Bl. 1073; Browning *v.* Morris, Cowp. 793; Jaques *v.* Withy, 1 H. Bl. 65.

In the case of an illegal contract, as in any other, the parties may rescind by mutual consent. See, *infra*, this title, *Mutual Consent.* See also Lea *v.* Cassen, 61 Ala. 312.

Sometimes, although the contract be prohibited by law, yet if it is not *malum in se*, a party may rescind while it is still executory, and recover the money paid upon it, and in such case it is unimportant whether the parties be *in pari delicto* or not. Tracy *v.* Talmage, 14 N. Y. 162; 67 Am. Dec. 132; Congress, etc., Spring Co. *v.* Knowlton, 103 U. S. 49.

4. Tracy *v.* Talmage, 14 N. Y. 162; 67 Am. Dec. 132. See Worcester *v.* Eaton, 11 Mass. 368.

5. See HUSBAND AND WIFE, vol. 9, p. 793; MARRIED WOMEN, vol. 14, p. 604 *et seq.*

(2) *Infancy.*—The contracts of infants are, with a few exceptions,[1] either void or voidable; that is, they are either entirely without force, when of course no rescission is necessary, or they may, with some restrictions,[2] at the election of the infant party, upon his coming of age, be repudiated by him on the ground of his infancy.[3] While such infancy is generally ground for rescission by the infant party, with the exceptions referred to above, there is no case on record where a contract between an adult and an infant is held rescindable by the adult on the ground of the infancy of the other party.[4]

(3) *Insanity.*—The contracts of persons insane at the time of the making thereof, are, like the contracts of infants, either void or voidable,[5] with a few exceptions.[6]

(4) *Intoxication.*—The better rule, and the one supported by the majority of decisions, seems to be that a contract entered into while one party is intoxicated, can be rescinded by him upon becoming sober, though some cases are cited as sustaining the contrary view.[7] The doubt seems to exist only in those cases where the intoxication is voluntary, but where it is brought about by the other party, it amounts to fraud, and is always ground for avoidance.[8]

1. As to what contracts of an infant are binding, see INFANTS, vol. 10, p. 660 *et seq.*

2. See *infra*, this title, *Duty to Place in Statu Quo.*

3. As to what contracts of an infant are void and what voidable, see INFANTS, vol. 10, p. 628 *et seq.*

In *Kansas*, a minor will not be allowed to disaffirm a contract procured by his misrepresentation, which the other party had reason to believe, that he was of age. Dillon *v.* Burnham, 43 Kan. 77.

A, a minor, with his mother's assent, agreed with B to work for B, and let part of the wages be applied to pay a debt due B from the estate of A's father. When the debt was paid, B discharged A. *Held*, that in absence of any showing that A had any interest in preventing B from collecting such debt out of the estate, A could avoid the contract, and recover on the *quantum meruit*, or recover on his contract for the balance due for the services. Dube *v.* Beaudry, 150 Mass. 448. But *compare* Hagerty *v.* Nashua Lock Co., 62 N. H. 576.

4. Hyer *v.* Hyatt, 3 Cranch (C. C.) 276.

Where a guardian gave in settlement worthless shares of stock, the release given by the ward was vacated fourteen days after his arrival of age. McConkey *v.* Cockey, 69 Md. 286. *Compare* the rescission of a settlement for conspiracy of the guardian, etc., in Wainwright *v.* Smith, 117 Ind. 414.

In Davis *v.* Hagler, 40 Kan. 187, it was held that an infant's receipt, made with full knowledge of the facts, might not be set aside.

As to disaffirmance of contracts of infant married women, see also INFANTS, vol. 10, p. 658.

5. As to what contracts of an insane person are void or voidable, see INSANITY, vol. 11, p. 132.

Insanity of a partner is ground for a dissolution of the copartnership. Jones *v.* Lloyd, 18 L. R. Eq. 265.

Mere feebleness of intellect is not alone sufficient ground for rescission if the party has power to contract at all. Graham *v.* Castor, 55 Ind. 559.

6. See INSANITY, vol. 11, p. 134 *et seq.*

7. See INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 773, where the subject is fully treated.

8. Hotchkiss *v.* Fortson, 7 Yerg. (Tenn.) 67; Willcox *v.* Jackson, 51 Iowa 208.

So in Whipper *v.* McClure, 2 Root. (Conn.) 216, it was held ground for rescission where the defendant took advantage of the natural debility of intellect of the plaintiff, which was increased by intemperance.

(5) *Duress and Stress.*—A contract procured by means of duress [1] practiced by one party over another is voidable, and may be rescinded.[2] The party seeking to rescind must have been subjected to the duress, and not some third person,[3] except in the case of husband and wife, where a contract will be voidable if entered into by reason of duress to the other,[4] and in the case of parent and child, when the same rule applies.[5]

A contract may also be rescinded where it was entered into under circumstances of extreme necessity and distress, even though there was no direct restraint.[6]

Of course the party who entered into a contract while intoxicated may affirm upon becoming sober, and when such party acted upon a contract for four weeks, it was held that such action amounted to an affirmation and that he could not rescind. Moore *v.* Reed, 2 Ired. Eq. (N. Car.) 580; Carpenter *v.* Rogers, 61 Mich. 384. The rescission must be made within a reasonable time after becoming sober. Cummings *v.* Henry, 10 Ind. 109.

In Keeler *v.* Baker, 1 Heisk. (Tenn.) 640, the plaintiff was an old man who sold his land to his son-in-law, the consideration of such sale being a certain sum of money and the promise to give him a home and support him. The contract could not be rescinded because of the old age of the complainant, or of the fact that he was intoxicated at the time of making it.

In Davidge *v.* Crandall, 23 Ill. App. 360, it was held that if a party voluntarily becomes intoxicated, and while in that condition makes a contract, he may not be relieved from it unless he was *non compos mentis.* See *infra*, this title, *Contracts of Sale, Intoxication.*

In Thackrah *v.* Haas, 119 U. S. 499, equity granted relief where one of the parties was intoxicated, and, while in such condition, was taken advantage of by the other.

A contract, unreasonable in itself, entered into by an habitual drunkard, when in a state of excitement from excessive drinking, almost amounting to madness, with a person who at the time held him in complete subjection, will be set aside in equity. It is not necessary in such a case to establish actual madness. Wiltshire *v.* Marshall, 14 W. R. 602; 14 L. T. N. S. 396.

1. As to what constitutes duress. See DURESS, vol. 6, p. 57.

2. Parsons on Contracts (7th ed.) 446; Clark *v.* Pease, 41 N. H. 414; Veach *v.* Thompson, 15 Iowa 380; Loomis *v.* Ruck, 56 N. Y. 462; Lehman *v.* Shackleford, 50 Ala. 437; Guilleaume *v.* Rowe, 94 N. Y. 268; 46 Am. Rep. 141; Soule *v.* Bonney, 37 Me. 128; Kocomek *v.* Marak, 54 Tex. 201; Line *v.* Blizzard, 70 Ind. 23.

3. Robinson *v.* Gould, 11 Cush. (Mass.) 55, 57; Spaulding *v.* Crawford, 27 Tex. 155; Jones *v.* Turner, 5 Litt. (Ky.) 147; Plummer *v.* People, 16 Ill. 358; Bowman *v.* Hiller, 130 Mass. 153; Schee *v.* McQuilken, 59 Ind. 269.

4. Harris *v.* Carmody, 131 Mass. 51; 41 Am. Rep. 188; Robinson *v.* Gould, 11 Cush. (Mass.) 55; Brooks *v.* Berryhill, 20 Ind. 97; Singer Mfg. Co. *v.* Rawson, 50 Iowa 634; Plummer *v.* People, 16 Ill. 358; McClintick *v.* Cummins, 3 McLean (U. S.) 158; Little *v.* Dodge, 32 Ark. 453.

5. McClintick *v.* Cummins, 3 McLean (U. S.) 158; Harris *v.* Carmody, 131 Mass. 51; 41 Am. Rep. 188; Osborn *v.* Robbins, 36 N. Y. 365; Shultz *v.* Culbertson, 46 Wis. 313; Seymour *v.* Prescott, 69 Me. 376; Owens *v.* Mynatt, 1 Heisk. (Tenn.) 675.

6. As where an exorbitant price is exacted from a purchaser who is greatly embarrassed. Hough *v.* Hunt, 2 Ohio 495; 15 Am. Dec. 569.

But a hasty sale of a stock of goods, by a debtor in failing circumstances, to his brother-in-law, partly to extinguish a debt, was upheld. Carter *v.* Coleman, 84 Ala. 256. Otherwise as to a failing debtor's sale of a stock of millinery to her brother-in-law, a non-resident lawyer, in fraud of her creditors. Roberts *v.* Radcliffe, 35 Kan. 502.

Where A, knowing B, a reputed imbecile, to be habitually overreached in contracts, until most of his personal property had become exhausted, bought up several notes given by B, for mechanical and farm work, and procured from B, instead of them, new notes secured by mortgages on B's lands, it was held that the mortgages would be

2. Grounds Arising Subsequent to Making of Contract—*a.* NON-PERFORMANCE.—The most frequent ground for rescission amongst those arising after the making of the contract is that of non-performance; in other words, if one party to a contract fails to perform what the stipulations therein bind him to, the other, upon such failure, may rescind.[1] This applies when the non-perform-

allowed to stand only for the benefit conferred by the work for which the original notes were given. Gates *v.* Cornett, 72 Mich. 420. *Compare* Castle *v.* Kemp, 124 Ill. 307; Summerlin *v.* Cowles, 101 N. Car. 473; Fuller *v.* Buice, 80 Ga. 395; Harper *v.* Harper, 85 Ky. 160; Cowles *v.* Barber, 74 Iowa 71; Savoie *v.* Meyers, 40 La. Ann. 677; Bugbee's Appeal, 110 Pa. St. 331.

And where a party made a more advantageous contract than he would have done had the circumstances of the other party been less pressing, relief will not be granted if the contract was entered into freely, without fraud or imposition. Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294.

When confidential relations exist the utmost good faith is required, and, accordingly, evidence in a suit for rescission is the more jealously scrutinized as against the fiduciary party. Ralston *v.* Turpin, 129 U. S. 663; Wilson *v.* Moriarty, 77 Cal. 596; Sears *v.* Hicklin, 13 Colo. 143.

Where A, a girl nineteen years old, who had resided with B, her grandmother, as the ward of her grandparents for the last ten years, conveyed all her property to B, on B's representations that it really belonged to A's grandfather, and that B would devise it to A, the conveyance was set aside for stress. Brown *v.* Burbank, 64 Cal. 99. *Compare* a case of rescission of a reconveyance by one's natural daughter, procured through stress of his legitimate daughter. Davis *v.* Strange, 86 Va. 793.

"The constant rule in equity is that where a party is not a free agent and is not equal to protecting himself, the court will protect him." 1 Story Eq. § 239.

1. Farmers' L. & T. Co. *v.* Galesbury, 133 U. S. 156; Rector *v.* McDermott (Ark. 1890), 13 S. W. Rep. 334; Goodrich *v.* Lafflin, 1 Pick. (Mass.) 57; Moore *v.* Curry, 112 Mass. 13; Miller *v.* Phillips, 31 Pa. St. 218; Lauman *v.* Young, 31 Pa. St. 306; Dodge *v.* Greeley, 31 Me. 343; Titus *v.* Cairo, etc., R. Co., 46 N. J. L. 393; Daughten *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556; Pironi *v.* Corrigan, 47 N. J. Eq. 135; Rowe *v.* Rowe, 5 Ill. App. 331; Brewster *v.* Van Liew, 20 Ill. App. 43; Mamero *v.* Henschel, 20 Ill. App. 426; Webster *v.* Enfield, 10 Ill. 298; Cromwell *v.* Wilkinson, 18 Ind. 365; Anderson *v.* Haskell, 45 Iowa 45; Patterson *v.* Patterson, 81 Iowa 626; Nelson *v.* Hanson, 45 Minn. 543; Pinger *v.* Pinger, 40 Minn. 417; Reeder *v.* Reeder, 89 Ky. 529; Shephardson *v.* Stevens, 77 Mich. 256; Morgan *v.* Loomis, 78 Wis. 594; Gullich *v.* Alford, 61 Miss. 224; Lewis *v.* Andrews, 127 N. Y. 673; Michel *v.* Halheimer, 56 Hun (N. Y.) 416.

Examples.—Thus the fact that a check, taken in exchange for the note of a third party, is dishonored, is such non-performance as to entitle the holder thereof to rescission and return of the note. Stockmeyer *v.* Weidner, 32 La. Ann. 106. See Hodgson *v.* Barrett, 33 Ohio St. 63; 31 Am. Rep. 527.

In Heller *v.* Charleston Phosphate Co., 28 S. Car. 224, the plaintiff made a contract in writing to sell defendant merchandise, if he would obtain certain security or the price. This the defendant failed to do; thereupon the plaintiff was allowed to rescind the contract and re-sell the merchandise, holding the defendant liable for the difference between the contract price and the price obtained, although other securities were offered for the payment.

In Rowe *v.* Rowe, 5 Ill. App. 331, a mother conveyed to her son certain land in trust, he to pay her an annuity during life. Subsequently an agreement was made between them to the effect that she should give him a receipt each year for the annuity in consideration of his providing her with a home for life. Upon being forced to leave his house by reason of ill treatment she obtained a judgment for the payment of the annuity, and it was held that such action rescinded the agreement and she could not recover upon it.

An agreement was entered into between A and a corporation that he

should be elected superintendent thereof, and should receive a certain salary and be allowed to purchase stock on credit. Upon the failure of the corporation to elect him, he was allowed to return the stock and recover what he had paid. Seymour *v.* Detroit Copper, etc., Rolling Mills, 56 Mich. 117.

In Moore *v.* Curry, 112 Mass. 13, a person contracted to buy a one-eighth interest in a vessel, with the stipulation that the deferred payment should be made out of his wages as master. The court held that his wrongful discharge by the owner, who then took possession of the vessel, was ground for rescission and recovery of the money paid.

Townsend *v.* Hurst, 37 Miss. 679, was a case arising from the sale by a physician of his office, stating at the same time his intention to remove to another state, and promising to recommend his successor to his patrons. In such a case, the court held that his return and resumption of practice was a sufficient non-performance to authorize the purchaser to rescind the contract.

The declaration of a party that he does not intend to sell to any customers on a milk route that he has just sold, when he has bargained for another route over the same territory, will not prevent his purchaser from rescinding the contract. Munsey *v.* Butterfield, 133 Mass. 492.

A party subscribed so much for public improvements to be made in a certain locality. A change in location without his consent released him from such subscription. Pratt *v.* Canton Cotton Co., 51 Miss. 470.

Where a party gave his note for a certificate, which entitled him to tuition in a college, which was to be returned in case a specified number of the same certificates were not sold to others within the year, the court held that he could not set up the failure to sell the number agreed on as an absolute defense to the note, unless he first tendered back the certificate, or showed that it had been of no use to him. Wood *v.* Ridgeville College, 114 Ind. 320.

Where a contract was made between two persons and a third to furnish supplies to the third for prospecting and locating mine claims for the benefit of all, the furnishing of such supplies is a condition precedent, and a failure to do so rescinds the contract. Murley *v.* Ennis, 2 Colo. 300.

Where a party was employed to superintend some work at a certain time, and, although he knew the work had been let to contractors, took no steps under the contract, he thereby rescinded the same. Wehrli *v.* Rehwoldt, 107 Ill. 60.

In Casey *v.* Gunn, 29 Mo. App. 14, the party for whom a house was being built refused on account of non-performance to pay installments. Such refusal was not a sufficient rescission of the contract as to preclude him from proceeding against the sureties of the builder.

The discharge of the defendant employed to build a schoolhouse by one of a board of trustees, who has been selected to superintend the work without the knowledge or consent of the other trustees, will rescind the contract. Schofield *v.* McGregor, 1 Thomp. & C. (N. Y.) 404.

Where one receives money to be applied to the payment of a particular debt, and afterwards treats the debt as still due, it gives to the party making the payment the right to treat the contract of payment as rescinded. Pierce *v.* Duncan, 22 N. H. 18.

If in case of an executory contract, one party advances money upon it, and after such advances the other party fails to perform his part, the party who has made the advances may treat the contract as rescinded, and recover back the money advanced. Wheeler *v.* Board, 12 Johns. (N. Y.) 363; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Brown *v.* Harris, 2 Gray (Mass.) 359.

Where a ditch company has contracted to furnish a consumer with a certain amount of water from year to year so long as he shall pay the annual rental therefor, his causing the county commissioner to fix a rate, and declining to pay more than this rate, terminates the contract without its return or cancellation. South Boulder, etc., Ditch Co. *v.* Marfell, 15 Colo. 302.

As to a contract with an officer, repudiable by a municipal corporation, see Gurley *v.* New Orleans, 41 La. Ann. 75. *Compare* New Orleans *v.* Great Southern Telephone, etc., Co., 40 La. Ann. 41.

If a defaulting party has been reluctant, and his default is gross, and the circumstances of the case such that the value of the property has changed, rescission ought to be decreed. Kirby

ance is simply a refusal by one to fulfill the contract,[1] or when it arises by reason of his inability to do so.[2] On the other hand, if performance by one is prevented by some act of the other, the latter cannot rescind, thereby taking advantage of his own wrong, but the party to whom such performance is rendered impossible may treat the contract as rescinded.[3] Again, performance may be rendered impossible by the terms of another contract between the same parties touching the same subject-matter.[4] Generally, however, there must be a total failure of performance in order to afford ground for rescission,[5] and in case there is a

v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

Where there is a stipulation in a contract to the effect that if one party fails to perform his covenant, the contract shall be void, the party defaulting cannot rescind the contract on that ground, and profit by his own wrong. Hard *v.* Seeley, 47 Barb. (N. Y.) 428; Beaty *v.* Harkey, 2 Smed. & M. (Miss.) 563; Decamp *v.* Feay, 5 S. & R. (Pa.) 323; 9 Am. Dec. 372. See, *infra*, this title, *Loss of Right.*

In the case of an executory contract, the language and actions of one of the parties tending to show that he rescinds it, may give the other party the right to consider it at an end, the same as if there had been a breach. Fox *v.* Kitton, 19 Ill. 519.

So where one party indebted to another delivers goods and money as part payment of the debt, and afterwards the creditor refuses to account for such goods and money, but requires payment in full, and makes no deduction, the debtor may consider the agreement, under which the money and goods were received, as rescinded, and recover the amount. Fuller *v.* Little, 7 N. H. 535; Rowe *v.* Smith, 16 Mass. 306.

Interdependence of stipulations, the breach of which may be ground for rescission, may be presumed from the order of time set for performance and payment. Grant *v.* Johnson, 5 N. Y. 250. And that which follows is *prima facie* dependent on that which goes before. Neale *v.* Ratcliffe, 15 Q. B. 916; 69 E. C. L. 914. So things to be done at the same time are reciprocally dependent, unless a contrary intimation appears. Keenan *v.* Brown, 21 Vt. 86; Kane *v.* Hood, 13 Pick. (Mass.) 281; Williams *v.* Healey, 3 Den. (N. Y.) 363; Roach *v.* Dickinsons, 9 Gratt. (Va.) 160.

But the violation of an oral agreement by which the grantee should provide the grantor with a home, and which was made at the same time as the deed, and as consideration therefor, is not sufficient ground for canceling the deed. Herrick *v.* Starkweather, 54 Hun (N. Y.) 532.

1. See cases cited in preceding note.

2. Shaffner *v.* Killian, 7 Ill. App. 620; Lytle *v.* Breckinridge, 3 J. J. Marsh (Ky.) 663.

If a party demands the rescission of a contract on the ground of inability of the other party to perform it, he must put such other party in the wrong and must show such performance on his own part as will entitle him to performance by the other. Mitchell *v.* Sherman, Freem. Ch. (Miss.) 120.

3. Seipel *v.* International L., etc., Ins. Co., 84 Pa. St. 47; Leonard *v.* Smith, 80 Iowa 194; Wright *v.* Haskell, 45 Me. 489.

In Webster *v.* Enfield, 10 Ill. 298, it was held that, in case one party fail to perform his part of a special agreement, and the other party is thereby prevented from performing his part, the contract may be rescinded by the latter, and he may bring an action in *assumpsit* to recover for what he has done, provided such an action would lie had there been no such agreement. See Giles *v.* Edwards, 7 T. R. 181.

So where an employer prevents his employé from fulfilling his contract, the latter may rescind. Connelly *v.* Devoe, 37 Conn. 570.

4. Paul *v.* Meservey, 58 Me. 419.

5. Selby *v.* Hutchinson, 9 Ill. 319; Weintz *v.* Hafner, 98 Ill. 27.

In Lauman *v.* Young, 31 Pa. St. 306, the following rule was laid down: "If there be a total failure, the contract may be rescinded; if there be a substantial performance, it may not be, and a defective, negligent and worthless performance is the same as none at all."

So in Burge *v.* Cedar Rapids, etc.,

failure by both parties, non-performance cannot be pleaded by either.[1]

b. FAILURE OF CONSIDERATION.—Similar in principle to non-performance as a ground for rescission, is failure of consideration; that is, if the consideration, upon the strength of which one has promised, fail, he may rescind.[2] For example, the non-existence

R. Co., 32 Iowa 101, it was said: "A party cannot rescind if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed. See also Rogers *v.* Garland (D. C.), 18 Wash. L. 381; Carmody v. Powers, 60 Mich. 26.

But if a contract consists of distinct parts, any one of which can be performed without reference to the others, the refusal of a party to perform one does not authorize the other party to decline the subsequently offered performance of the others. Rugg *v.* Moore, 110 Pa. St. 236. See John A. Roebling Sons Co. *v.* Merchants' Union Barb Wire Co., 78 Iowa 608. See also Cannon Coal Co. *v.* Taggart (Colo. 1891), 27 Pac. Rep. 238, where it was held that a single failure to furnish merchantable coal by one party to another, who is bound by the contract to push the sale of such coal for one year, but not to take any definite amount, will not warrant a rescission. The coal must be shown to be unsalable.

But where work was to be done by sections, to be paid for as each section was completed, failure to pay for one is ground for rescinding the contract. Bennett *v.* Shaughnessy (Utah 1889), 22 Pac. Rep. 156.

1. Missouri River, etc., R. Co. *v.* Miami Co., 12 Kan. 482.

2. Winfrey *v.* Drake, 4 Lea (Tenn.) 293; Robinson *v.* Bright, 3 Metc. (Ky.) 30; Curtis *v.* Clark, 133 Mass. 509; Anderson *v.* Armstead, 69 Ill. 452; Ehle *v.* Judson, 24 Wend. (N. Y.) 97; Cross *v.* Huntly, 13 Wend. (N. Y.) 385; Strahn *v.* Hamilton, 38 Ind. 57; Allen *v.* Prater, 30 Ala. 458; Clough *v.* Patrick, 37 Vt. 421; Woods *v.* Schlater, 24 La. Ann. 284.

Thus, in Bonner *v.* Herrick, 99 Pa. St. 220, the failure on the part of one party to an agreement for the exchange of lands to obtain a release of liens on the premises, where he had fraudulently deceived the other party as to the number and amount thereof, was such a failure as to be good ground for rescission.

Where a creditor agreed to receive the note of a third person in satisfaction of a debt due him from another, and such third person was an infant, it was held that the note being of no value, the agreement to receive it, being without consideration, could be rescinded. Wentworth *v.* Wentworth, 5 N. H. 410.

Where the purchaser of a patent right gave therefor his promissory note and the patent proved to be void, the note was held to be entirely without consideration, and the maker could refuse to pay it. Dickinson *v.* Hall, 14 Pick. (Mass.) 217; 25 Am. Dec. 390.

But it has been held that a court of equity will not decree rescission of a contract for failure of consideration if an original security has been surrendered, and another taken in its place by the party seeking to rescind. Johnson *v.* Jones, 13 Smed. & M. (Miss.) 580.

To rescind an executed contract in equity, fraud or mistake must appear. Mere failure of consideration arising from the sale of a defective title is not sufficient. Thompson *v.* Jackson, 3 Rand. (Va.) 504; 15 Am. Dec. 721.

In Chapman *v.* Wilson, 4 Woods (U. S.) 30, it is said that a decree of nullity must be final before a contract can be rescinded on the ground thereof for failure of consideration.

Partial Failure of Consideration.—When a party wishes to rescind a contract on the ground of failure of consideration, if it has been partial only and a subsisting executed part performance is in the hands of one party without fraud on the part of the other, rescission will not be allowed. Desha *v.* Robinson, 17 Ark. 228. See Hodgdon *v.* Golder, 75 Me. 293; Cotten *v.* McKenzie, 57 Miss. 418; Case *v.* Grim, 77 Ind. 565. But in the case of an entire contract, if the consideration is partly lawful and partly unlawful, the contract is void. Tenney *v.* Foote, 95 Ill. 99. However, if the contract is divisible, and one part is founded on a consideration which has failed, and the other on one which is valuable,

of subject-matter, contrary to the expectation of the parties, may afford ground for rescission;[1] but there can be no rescission where parties are aware of the doubt as to the existence of the subject-matter,[2] or in case the failure or depreciation arises subsequently to entering into the contract.[3] In a contract wholly unexecuted, a failure of consideration arising by the act of God will, it seems, be ground for rescission.[4]

c. FUNCTUS OFFICIO.—Where a deed or other instrument originally valid, has by payment, satisfaction, or other extinguishment, legal or equitable, become *functus officio*, equity will, by rescission, relieve an innocent party whose rights may be thereby imperiled.[5]

III. CONTRACTS FOR THE SALE OF PERSONALTY.—The foregoing doctrines apply to contracts for the sale of personalty as to contracts generally, but for covenience of reference the cases involving questions of rescission of sales of personalty are here grouped separately.

the contract will be avoided as to one part, and will be binding as to the other. Perkins *v.* Cummings, 2 Gray (Mass.) 258.

1. State *v.* Illyes, 87 Ind. 405; Gibson *v.* Pelkie, 37 Mich. 380; Hopkins *v.* Hinkley, 61 Md. 584.

2. Fay *v.* Richards, 21 Wend. (N.Y.) 626. See also Carson *v.* Kelley, 57 Tex. 379; Ellis *v.* Adderton, 88 N. Car. 472, where it was announced at a public sale that, in case the person whose interest only was to be sold, had no title, the purchaser would get none. There was an entire failure of title, but the purchaser was liable for the amount he agreed to pay.

3. Perry *v.* Buckman, 33 Vt. 7; Smock *v.* Pierson, 68 Ind. 405; 34 Am. Rep. 269; Topp *v.* White, 12 Heisk. (Tenn.) 165; Dowdy *v.* McLellan, 52 Ga. 408, which was a case arising out of the sale of a slave, and it was held that the subsequent emancipation of the slave did not relieve the purchaser from paying.

But if the subject-matter of a contract has undergone a material change before consummation of the agreement, brought about by the act of one of the parties which the party desiring to rescind did not consent to, rescission may be effected. Harris *v.* Piatt, 64 Mich. 105.

4. See Stewart *v.* Loring, 5 Allen (Mass.) 306; 81 Am. Dec. 747, where a person agreed to pay a certain sum in return for his tuition, but was prevented by sickness from receiving the instruction which was the consideration of the promise.

5. And this, whether the function is fulfilled according to the original intent and understanding of both parties, or whether the party entitled to the benefit thereof has treated the instrument as released or otherwise dead in point of effect. *E. g.*, where A gave his uncle B a note for a sum of money, and B made a private entry, "A pays no interest, nor shall I ever take the principal, unless greatly distressed," this, found by B's executors, after B's death, was held to be a good discharge of the note. Aston *v.* Pye, 5 Ves. 350, note. *Compare* Flower *v.* Marten, 2 M. & C. 474; Duffield *v.* Elwes, 1 Bligh, N. S. 497; Elliott *v.* Davenport, 2 Vern. 521; Sipthorp *v.* Moxon, 3 Atk. 579; Toplis *v.* Baker, 1 P. Wms. 86, note.

In *New Jersey* it has been held that a creditor's declaration of intention to release a debtor, unaccompanied by any act amounting to a release at law, will not operate as an equitable release. Irwin *v.* Johnson, 36 N. J. Eq. 347.

Where A had given his bond to B, and B on his death-bed requested his executrix not to trouble A therefor, equity decreed rescission of the bond; and this not as a *donatio mortio causa*, but as a case of implied trust or equitable extinguishment of the debt. The House of Lords affirmed the decree. Weckett *v.* Raby, 3 Bro. P. C. 16. But *compare* Tufuell *v.* Constable, 8 Sim. 69.

The same principle has been recognized in some of the States. Otis *v.* Beckwith, 49 Ill. 135; Leddell *v.* Starr, 20 N. J. Eq. 283.

1. Election to Rescind Reserved.—Here, of course, the party to whom the right is reserved may rescind upon the happening of the event upon which rescission is conditioned.[1]

2. Fraud.—Here, too, fraud is a frequent ground for rescission.[2] The fraud may be on the part of the vendor, when it consists generally of misrepresentations in respect to the thing sold, whereby the other party is induced to buy,[3] or the fraudulent concealment of some defect which it is his duty to make known to the purchaser, and which, if it had been known, would have

1. As where a horse was sold with express warranty of soundness and an agreement to take him back if he proved unsound. The purchaser was not confined to his warranty, but could rescind the contract by returning the horse upon proof of his unsoundness. Latham *v.* Hartford, 27 Kan. 249.

But in Davis *v.* Butrick, 68 Iowa 94, it was held where the buyer of a machine reserved the right to return it, and the seller to repay the money or give a new machine, that, upon the return of the machine by the purchaser and his demand of repayment, the seller had the right to insist upon his taking a new machine.

See as to *contract of* "*Sale or return*," CONDITIONAL SALES, vol. 3, p. 424; SALES.

2. See FRAUDULENT SALES, vol. 8, p. 786.

Fraud does not of itself render a sale void, but only voidable at the election of the vendor, and, unless rescission is made the sale takes effect and the property passes. Brown *v.* Pierce, 97 Mass. 46; 93 Am. Dec. 57.

As to essentials of *fraud* and *concealment*, such as constitute fraud, see *supra*, this title, *Fraud;* also FRAUD, vol. 8 p. 635, where the subject is fully treated. See also Cross *v.* Peters, 1 Me. 376; 10 Am. Dec. 78. In an action to rescind a sale for fraud the plaintiff must establish clearly, the representation, falsity, *scienter*, deception, and injury. Hotchkin *v.* Third Nat. Bank, 57 Hun (N. Y.) 594; Hotchkin *v.* Marten, 58 Hun. (N. Y.) 606. See Reed *v.* Pinney, 35 Ill. App. 610; Gregory *v.* Schoenell, 55 Ind. 101. As to seller's reliance upon buyer's representations, see Darby *v.* Kroell, 92 Ala. 607; also Pratt *v.* Burhans, 84 Mich. 487.

In Slaughter *v.* Gerson, 13 Wall. (U. S.) 379, it was said that misrepresentation, in order to be ground for avoiding a sale, must relate to a material matter constituting an inducement to the sale, and to one, of which the party wishing to rescind, could not obtain information; and it must be one on which he relied, and by which he was actually misled to his injury.

In Gregory *v.* Schoenell, 55 Ind. 101, it was held that where a seller parts with his property, giving credit to the purchaser on account of confidence in him, acquired in prior transactions, although there may have been fraudulent misrepresentations on the part of such purchaser, nevertheless, such sale is valid and cannot be rescinded because of the fraud.

3. Montgomery *v.* Bucyrus Mach. Works, 92 U. S. 257; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Stroud *v.* Pierce, 6 Allen (Mass.) 413; Waters' Patent Heater Co. *v.* Smith, 120 Mass. 444; Bridge *v.* Penniman, 105 N. Y. 642; Ketletas *v.* Fleet, 7 Johns. (N. Y.) 324; Elwell *v.* Chamberlain, 4 Bosw. (N. Y.) 320; Farris *v.* Ware, 60 Me. 482; Gaty *v.* Holcomb, 44 Ark. 216; Whitworth *v.* Thomas, 83 Ala. 308; Phelps *v.* Quinn, 1 Bush (Ky.) 375; Nelson *v.* Martin, 105 Pa. St. 229; Taylor *v.* Saurman, 110 Pa. St. 3; Johnson *v.* Hillstrom, 37 Minn. 120; McLaren *v.* Cochran, 44 Minn. 255; Page *v.* Dickerson, 28 Wis. 694; 9 Am. Rep. 532; Hicks *v.* Stevens, 121 Ill. 186; Wentz *v.* Morrison, 17 Tex. 372; Clark *v.* Edgar, 84 Mo. 106; 54 Am. Rep. 84; Higham *v.* Harris, 108 Ind. 246; Johnson *v.* Seymour, 79 Mich. 156; Clayton *v.* O'Conner, 29 Ga. 687.

Potter *v.* Taggart, 54 Wis. 395, was a case arising from the sale of a note and mortgage induced by the false representation that the lien of the mortgage still continued on the whole of the land when in fact it had been released as to part, thereby rendering the note and mortgage of little value. The plaintiff demanded upon discovery of the facts a return of the sum paid, which the defendant refused to make. The court held that the com-

influenced him not to buy.[1] Again, the fraud may be on the part of the vendee, in which case it most frequently consists of misrepresentations in regard to his debts, or pecuniary standing generally, whereby the vendor is induced to part with his goods on credit;[2] or it may consist in the concealment of some fact,

plaint sufficiently alleged the fraud and showed a notice to the defendant of the plaintiff's election to rescind.

So where a judgment against one, who was known to both parties to the sale to be insolvent, was sold, the false representation of the vendor, that the insolvent party was ready to pay the judgment in lumber, was ground for rescinding the contract. Pearcy *v.* Huddleston, 3 Yerg. (Tenn.) 36.

In Alexander *v.* Dennis, 9 Port. (Ala.) 174, the vendor of certain notes stated to the vendee that the makers of the notes were "wealthy and responsible men," upon proof to the contrary the sale could be rescinded.

So where the vendor of a patented article makes false representations as to the amount of former sales of such article, thereby inducing the other party to buy. Miller *v.* Barber, 66 N. Y. 558. See also Somers *v.* Richards, 46 Vt. 170; Patez *v.* Stoppleman, 75 Wis. 510.

But where there was a mortgage upon a stock of goods which was sold, the owner representing them to be free from incumbrance, the purchaser is not entitled to rescind, if the mortgage was released as soon as the seller's attention was called to it. Johnson *v.* Seymour, 79 Mich. 156.

Falsity of statements made, or opinions expressed, upon facts equally within the knowledge, or open to the inquiry of both parties, does not, as a matter of course, give the vendee a right to rescind the sale. Gatling *v.* Newell, 12 Ind. 118; Marilock *v.* Fairbanks, 46 Wis. 415; 32 Am. Rep. 716.

A representation that an association was an incorporated company, although untrue in fact, is not such a misrepresentation, in the absence of inquiry on the part of the purchaser, as will be ground for decreeing a rescission of the contract. Curtis *v.* Hurd, 30 Fed. Rep. 729.

In the case of a sale of a slave, rescission was not decreed for concealment of unsoundness, where the disease with which he was affected was of such an obscure character as probably not to have been noticed by the vendor. Brooks *v.* Cannon, A. K. Marsh. (Ky.) 524.

Misrepresentations of the market price of a commodity by the vendor will not avoid a contract. Graffenstein *v.* Epstein, 23 Kan. 443; 33 Am. Rep. 171; Burns *v.* Mahannah, 39 Kan. 87.

"A value given conjecturally, or as an estimate or expression of opinion, by a party negotiating a sale, is not ordinarily to be regarded as a representation of a fact whose falsity exposes the party making it to rescission of the contract made by him, or to an action for deceit, unless such value be given by an expert as such." Wharton on Contracts section 260, and cases cited.

1. Croyle *v.* Moses, 90 Pa. St. 250; Harris *v.* Tyson, 24 Pa. St. 347; 64 Am. Dec. 661; Matthews *v.* Bliss, 22 Pick. (Mass.) 53; Hanson *v.* Edgerly, 29 N. H. 343; Smith *v.* Countryman, 30 N. Y. 681; Paddock *v.* Strobridge, 29 Vt. 470; Graham *v.* Stiles, 38 Vt. 578; Cecil *v.* Spurger, 32 Mo. 462; 82 Am. Dec. 140.

For example, where the vendor sells a note which he knows has been paid, the vendee may rescind. Sibley *v.* Hulbert, 15 Gray (Mass.) 509.

Fraudulent concealment may exist where a vendor acquiesces in the misrepresentations of another, knowing their falsity, or having no reason to believe their truth, from which he intends to derive an advantage. Perry *v.* Johnston, 59 Ala. 648; Fitzsimmons *v.* Joslin, 21 Vt. 129; 52 Am. Dec. 46.

2. Hoffman *v.* Noble, 6 Met. (Mass.) 68; 39 Am. Dec. 711; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; 23 Am. Dec. 607; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700; Knowles *v.* Lord, 4 Whart. (Pa.) 500; 34 Am. Dec. 525; Johnson *v.* Peck, 1 Woodb. & M. (U. S.) 334; Scott *v.* Simmons, 34 How. Pr. (N. Y.) 66; Burgess *v.* Chapin, 5 R. I. 225; Bradberry *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Dietz *v.* Sutcliffe, 80 Ky. 650; Schweizer *v.* Tracy, 76 Ill. 345; Voorhis *v.* Smith, etc., Mfg. Works, 11 Mo. App. 108; Reid *v.* Cowduroy,

79 Iowa 169; Traywick *v.* Keeble, 93 Ala. 498.

In an action to rescind a contract of sale of personal property, on the ground of false representations, the plaintiff must establish the following facts: 1st, that the alleged representations were made; 2d, that at the time they were made they were false, and the purchaser knew them to be so; 3d, that they were such as would deceive a prudent man; 4th, that they were believed by the seller, and induced him to part with his property. Gregory *v.* Schoenell, 55 Ind. 101; Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102; 41 Am. Dec. 214.

In Hughes *v.* Winship Machine Co., 78 Ga. 793, false representations were made that the purchaser owned real and personal estate unincumbered, and that there were no judgments or liens against him. A contract of sale made under these representations, with no other security than a mortgage on the property, may be rescinded by the vendor on discovering their falsity.

Where the fraud consisted of false representations on the part of the purchaser that the billiard-table on which a cloth was put was his property, the sale of the cloth was rescinded. Perkins *v.* Bailey, 99 Mass. 61; 96 Am. Dec. 689.

Where a merchant represented to a mercantile agency that he had a large surplus over his liability, and shortly afterwards, having purchased goods of plaintiff, was found to be insolvent, in consequence of which he assigned, and the plaintiffs sold him goods on the faith of the previous statement, the sale was decreed to be null and void. Mooney *v.* Davis, 75 Mich. 188; Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48.

But it was no ground of rescission that a seller relied on the rating of a mercantile agency and sold goods on credit to persons insolvent, when such persons were not aware of their condition and gave no particular inducement to obtain credit. Jaffrey *v.* Moss, 41 La. Ann. 548.

In Wollner *v.* Lehman, 85 Ala. 274, it was held, where a purchaser on credit was insolvent at the time of sale and intended to secure certain creditors by selling a large part of the goods purchased, which he did, and concealed the facts from the vendor, that the sale might be rescinded and the vendor could recover the goods although a creditor had attached them. See also Morris *v.* Wells, 7 N. Y. Supp. 61; Frank *v.* Robinson, 65 Miss. 162.

In Collins *v.* Cooley (N. J. 1888), 14 Atl. Rep. 594, the purchaser represented that he was indebted to a much smaller amount than was really the case. Such representation was a fraud on the seller, although the purchaser afterwards claimed that it was made in respect to his merchandise account and that the excess was for money borrowed, and the vendor could rescind.

A purchaser in *North Carolina*, knowing himself to be insolvent, bought goods in Baltimore, giving New York firms as references as to his solvency, and immediately went into bankruptcy. This was held to be fraudulent intent, and the contract was rescinded. Wilson *v.* White, 80 N. Car. 280.

On account of the expected insolvency of vendee the vendor stopped shipments of iron ore and did not offer to make more or give notice of his readiness to do so, and the vendee corporation did not call for the ore or offer cash in payment. It was held that the vendee's insolvency did not excuse the other party from offering to deliver and that the contract was rescinded. Florence Min. Co. *v.* Bryan, 124 U. S. 325.

Where vendors had goods sold on account of the insolvency and assignment by the vendees, such intention does not rescind the contract, and the vendors are entitled to a *pro rata* distribution out of the assigned estate. Patten's Appeal, 45 Pa. St. 151; 84 Am. Dec. 479.

Solvency of a purchaser is generally presumed on an application to buy goods, and there must be a willfully false statement as a fact, not as a mere opinion, in order to rescind the contract, or else it must appear that at the time of the purchase the buyer intended to defraud and had no intention of paying. Yaeger Milling Co. *v.* Lawler, 39 La. Ann. 572.

So it will not be sufficient ground for rescission if the purchaser represents his assets as exceeding his liabilities when he believes the same to be true and has no intention of defrauding, although he really be insolvent. Johnson *v.* Bent, 93 Ala. 160.

the knowledge of which would have induced the vendor not to part with his goods.[1] Thus if it can be shown that the vendee had a preconceived intention of not paying for goods sold him, the sale may be rescinded.[2]

1. As for example, the knowledge on the part of the purchaser of his own insolvency, concealed with an intent to defraud by not paying for the property purchased. Loeb *v.* Flash, 65 Ala. 526; Mears *v.* Waples, 3 Houst. (Del.) 581; Doyle *v.* Mizner, 40 Mich. 160; Houghtaling *v.* Hills, 59 Iowa 287; Cross *v.* Peters, 1 Me. 376; 10 Am. Dec. 78; Anderson *v.* Read, 106 N. Y. 333; Swarthout *v.* Merchant, 47 Hun (N. Y.) 106; Dalton *v.* Thurston, 15 R. I. 418. *Ex parte* Whittaker, *In re* Shackleton, L. R., 10 Ch. 446. See *contra* Kraft *v.* Dalles, 2 Cin. Sup. Ct. Rep. (Ohio) 116.

In *Alabama* it was held in La Grand *v.* Eufaula Nat. Bank, 81 Ala. 123; 60 Am. Rep. 140, that the following evidence must be shown to justify a vendor in rescinding a sale on account of insolvency: First, that the purchaser must have been insolvent at the time of the sale, or in failing circumstances; second, he must have had a preconceived intention not to pay for the goods or no reasonable expectation of doing so; third, there must have been fraudulent concealment or misrepresentation of these facts. And the burden of proof is on the vendor to show that the vendee, being insolvent obtained the goods by misrepresentation with no intention or expectation of paying for them. See also Kyle *v.* Ward, 81 Ala. 120; Robinson *v.* Levi, 81 Ala. 134; Reticker *v.* Katzenstein, 26 Ill. App. 33; Manheimer *v.* Harrington, 20 Mo. App. 297. See Morris *v.* Reticker, 27 Ill. App. 601; Bach *v.* Tuck, 57 Hun (N. Y.) 588.

In *Pennsylvania* insolvency and the knowledge thereof at the time of sale, are not alone sufficient ground for rescission, but there must be artifice, trick or false pretense as a means of obtaining possession, and intent to defraud. The mere insolvency and knowledge thereof are evidence to go to the jury in connection with other circumstances. Rodman *v.* Thalheimer, 75 Pa. St. 232; Smith *v.* Smith, 21 Pa. St. 367; 60 Am. Dec. 51; Bunn *v.* Ahl, 29 Pa. St. 387; Bachenstross *v.* Speicher, 31 Pa. St. 326.

2. Davis *v.* Stewart, 8 Fed. Rep. 803; Jaffrey *v.* Brown, 29 Fed. Rep. 476; Spira *v.* Hornthall, 77 Ala. 137; Thompson *v.* Rose, 16 Conn. 71; 41 Am. Dec. 121; Farwell *v.* Hanchett, 120 Ill. 573; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573; 43 Am. Rep. 53; Lane *v.* Robinson, 18 B. Mon. (Ky.) 623; Kline *v.* Baker, 106 Mass. 61; Ross *v.* Miner, 67 Mich. 410; Fox *v.* Webster, 46 Mo. 181; Slagle *v.* Goodnow, 45 Minn. 531; Thomas *v.* Freligh, 9 Mo. App. 151; Hennequin *v.* Naylor, 24 N. Y. 139. See Sparks *v.* Leavy, 19 Abb. Pr. (N. Y.) 364; Edson *v.* Hudson, 83 Mich. 450; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419.

But the fraudulent intent not to pay must exist at the time of the making of the contract. King *v.* Brown, 24 Ill. App. 579; Hanchett *v.* Mansfield, 16 Ill. App. 407; Catlin *v.* Warren, 16 Ill. App. 418; Bidault *v.* Wales, 20 Mo. 546; 64 Am. Dec. 205. And the intent will be presumed from the facts that the defendants at the time were hopelessly insolvent, that they asserted themselves to be solvent, and knowingly committed a false rating of their condition to be carried on the books of a commercial agency. Taylor *v.* Mississippi Mills, 47 Ark. 247. And the purchaser's knowledge that he will not be able to pay for goods bought on credit has been held to be equivalent to an intention not to pay. Elsass *v.* Harrington, 28 Mo. App. 300; Dobson *v.* Warner, 58 Hun (N. Y.) 602. See *contra*, King *v.* Brown, 24 Ill. App. 579.

A purchase made with a preconceived intent to defraud by selling the goods purchased for a price less than the original price, without paying for them, is ground for rescission. Mackinley *v.* McGregor, 3 Whart. (Pa.) 369; 31 Am. Dec. 522.

But when the original contract is substituted by another and different one, the seller cannot rescind, because of a fraudulent intent on the part of the vendee not to pay, existing only at the time of the first contract, and the failure to perform the new one is not sufficient to show that such intent con-

3. Inadequacy of Consideration.—Inadequacy of consideration is ground for rescinding a contract of sale only when it tends to show actual fraud.[1]

4. Undue Influence.[2]

5. Mistake.[3]—A mistake in order to afford ground for the rescission of a contract of sale must be a mutual mistake as to a material fact connected with the subject-matter of the contract,[4] as, for example, where the purchaser had reference to one article and the seller to another,[5] or where the article was not in existence, contrary to the supposition of the parties.[6] Or it may be

tinued in respect to it. Sparks *v.* Leavy, 19 Abb. Pr. (N. Y.) 364.

For other instances where sales have been rescinded for fraud in particular cases, see Amer *v.* Hightower, 70 Cal. 440; Thaxter *v.* Foster, 153 Mass. 151; Whittin *v.* Fitzwater, 58 Hun (N. Y.) 601; Morrison *v.* Adoue, 76 Tex. 255.

1. Holmes *v.* Holmes, 1 Sawy. (U. S.) 99; Franklin *v.* Osgood, 2 Johns. Ch. (N. Y.) 1; Baldwin *v.* Dunton, 40 Ill. 188; Wintermute *v.* Snyder, 3 N. J. Eq. 489; Holden *v.* Crawford, 1 Aik. (Vt.) 390; 15 Am. Dec. 700; Howard *v.* Edgell, 17 Vt. 9; Harrington *v.* Wells, 12 Vt. 505; Hardiman *v.* Burge, 10 Yerg. (Tenn.) 202; Merriman *v.* Lacefield, 4 Heisk. (Tenn.) 209; Ford *v.* Herron, 4 Munf. (Va.) 316; McKinney *v.* Prickard, 2 Leigh (Va.) 149; 21 Am. Dec. 601; Green *v.* Thompson, 2 Ired. Eq. (N. Car.) 365; Butler *v.* Haskell, 4 Desaus. (S. Car.) 651; Tootle *v.* Taylor, 64 Iowa 629.

This rule does not apply to auction sales. Newman *v.* Meek, Freem. Ch. (Miss.) 441.

A purchase of a contingent reversionary interest was set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. Davies *v.* Cooper, 5 Myl. & C. 270.

See *supra*, this title, *Contracts Generally; Inadequacy of Consideration;* also CATCHING BARGAIN, vol. 3, p. 37. McKinney *v.* Pinckard, 2 Leigh (Va.) 149; 21 Am. Dec. 601.

2. The cases involving rescission on this ground deal chiefly with contracts for the sale of realty. See *infra*, this title, *Deeds and Land Bargains;* DEEDS, vol. 5, p. 423; DURESS, vol. 6, p. 57; VENDOR AND PURCHASER, UNDUE INFLUENCE.

3. See *supra*, this title, *Mistake.*

"If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of the other side, a restoration to the condition in which he was before the contract was made." Benj. on Sales, § 415 and citations.

4. Ketchum *v.* Catlin, 21 Vt. 191. See Mowatt *v.* Wright, 1 Wend. (N. Y.) 355; 19 Am. Dec. 508; Wiswall *v.* Harriman, 62 N. H. 671. In Kennedy *v.* Panama, etc., Royal Mail Co., L. R., 2 Q. B. 580, Judge Blackburn says: "Where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

5. Harvey *v.* Harris, 112 Mass. 32; Gardner *v.* Lane, 9 Allen (Mass.) 499; 85 Am. Dec. 779; Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 86; Chapman *v.* Cole, 12 Gray (Mass.) 141; 71 Am. Dec. 739; Kyle *v.* Kavanaugh, 103 Mass. 356; 4 Am. Rep. 560; Fullerton *v.* Dalton, 58 Barb. (N. Y.) 236; Webb *v.* Odell, 49 N. Y. 583; Sheldon *v.* Capron, 3 R. I. 171; Bowen *v.* Sullivan, 62 Ind. 281; 30 Am. Rep. 172; Thornton *v.* Kempster, 5 Taunt. 786; Calverley *v.* Williams, 1 Ves. Jr. 213. See Hills *v.* Snell, 104 Mass. 173; 6 Am. Rep. 216; Walker *v.* Davis, 65 N. H. 170.

6. Allen *v.* Hammond, 11 Pet. (U. S.) 63; Thomas *v.* Knowles, 128 Mass. 22; Ketchum *v.* Bank of Commerce, 19 N. Y. 502; Kelly *v.* Bliss, 54 Wis. 187.

But a mere mistake as to quality will not be ground for rescission on

a mutual mistake as to the price or terms, in which case neither party is bound.[1] Again, the mistake may be on the part of the seller as to the purchaser's ability to pay, which will furnish ground for rescission,[2] or it may be in regard to the identity of the party dealt with.[3]

the part of the buyer. Wheat *v.* Cross, 31 Md. 99; 94 Am. Dec. 214. See Scott *v.* Littledale, 8 E. & B. 815; 92 E. C. L. 813. But see Smith *v.* Hughes, 6 L. R. Q. B. 597; 19 W. R. 1059, where the plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 34*s.* per quarter. He afterward refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shown as to their being old, but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and if they were of opinion that he had so believed, he directed them to find for the defendant. The jury, having found for the defendant; *held* that there must be a new trial; per Cockburn, C. J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract; per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old, and per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. Smith *v.* Hughes, L. R., 6 Q. B. 597; 40 L. J., Q. B. 221; 19 W. R. 1059; 25 L. T., N. S. 329.

But the seller of a cow was allowed to rescind where he had sold her supposing that she was sterile, but found shortly afterward that she was with calf, which greatly enhanced her value. Sherwood *v.* Walker, 66 Mich. 568.

A mutual mistake as to quantity is ground for rescission if the exact quantity is a material matter. Schurtz *v.* Romer, 82 Cal. 474; Cox *v.* Prentice, 3 M. & S. 344. See Montgomery Co. *v.* American Emigrant Co., 47 Iowa 91; Laurence *v.* Staigg, 8 R. I. 256; Scott *v.* Warner, 2 Lans. (N. Y.) 49.

1. Rupley *v.* Daggett, 74 Ill. 351; Harran *v.* Foley, 62 Wis. 584; Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Rovegno *v.* Defferari, 40 Cal. 459; Wilkinson *v.* Williamson, 76 Ala. 163; Fullerton *v.* Dalton, 58 Barb. (N. Y.) 237; Phillips *v.* Bristolli, 2 B. & C. 511; 9 E. C. L. 162.

But a mutual mistake as to some merely collateral matter is of no effect. Wheat *v.* Cross, 31 Md. 99; 94 Am. Dec. 214.

In Montgomery *v.* Ricker, 43 Vt. 169, it was held that a mistake or misunderstanding as to the meaning of a stipulation in a contract, that the lumber should be square edged, did not alone give either party a right to rescind.

And so mistake as to price in a telegram offering a sale when goods were shipped after discovery of the error by both parties is not ground for rescission. Ayer *v.* Western Union Tel. Co., 79 Me. 493.

The mistake of one party is not generally ground for rescission; but where goods are offered at a price lower than was intended, and the purchaser takes advantage of the mistake with knowledge thereof, the sale is not binding. Harran *v.* Foley, 62 Wis. 584. See Webster *v.* Cecil, 30 Beav. 62; Tamplin *v.* James, 15 Ch. Div. 215; Stoddard *v.* Ham, 129 Mass. 383; 37 Am. Rep. 369.

2. Lupin *v.* Marie, 6 Wend. (N. Y.) 77; 21 Am. Dec. 256.

3. As where an order for goods given to one party is filled by his successor in the business. Boston Ice Co. *v.* Potter, 123 Mass. 28; 25 Am. Rep. 9. This is

6. Illegality.[1]—If the seller discovers that the buyer intends to use the property for an illegal purpose, he is entitled to rescind,[2] unless there has been an actual transfer of possession before discovering the unlawful intent.[3]

7. Disability — *a.* COVERTURE.[4]

b. INFANCY.—We have already seen, while treating the contracts of infants generally, that they are either void or voidable, with some exceptions.[5] As to their contracts of sale it seems that, with the exception of such as are binding, by reason of the character of the subject-matter, they are in most cases voidable, not void, and therefore may be rescinded or affirmed, as the infant contractor sees fit.[6]

c. INSANITY AND INTOXICATION.[7]

so, especially where privity has existed between the purchaser and the person with whom he first contracted. Boulton *v.* Jones, 2 H. & N. 564. *Compare* Mitchell *v.* Lapage, Holt. 253; Mudge *v.* Oliver, 1 Allen (Mass.) 74; Orcutt *v.* Nelson, 1 Gray (Mass.) 536; Winchester *v.* Howard, 97 Mass. 303; 93 Am. Dec. 93.

1. See *supra*, this title, *Illegality*.

2. Cowan *v.* Milbourn, L. R., 2 Ex. 230.

3. Feret *v.* Hill, 15 C. B. 207; 80 E. C. L. 207; Myers *v.* Munrath, 101 Mass. 366; 3 Am. Rep. 368; McWilliams *v.* Phillips, 51 Miss. 196. See ILLEGAL SALES, vol. 9, p. 923.

4. See *supra*, this title, *Disability*.

5. See *supra*, this title, *Disability*, *Infancy*.

6. 1 Chitty on Contracts (11th Am. ed.) 215; Story on Sales, § 22; Hunt *v.* Massey, 5 B. & Ald. 902; Irvine *v.* Irvine, 9 Wall. (U. S.) 617; Eureka Co. *v.* Edwards, 71 Ala. 248; Harrod *v.* Myers, 21 Ark. 592; 76 Am. Dec. 409; Price *v.* Furman, 27 Vt. 268; 65 Am. Dec. 194; Abell *v.* Warren, 4 Vt. 149; Bartlett *v.* Bailey, 59 N. H. 408; Heath *v.* Stevens, 48 N. H. 251; Vent *v.* Osgood, 19 Pick. (Mass.) 572; Oliver *v.* Houdlet, 13 Mass. 237; Badger *v.* Phinney, 15 Mass. 359; 8 Am. Dec. 105; Owen *v.* Long, 112 Mass. 403; Cole *v.* Pennoyer, 14 Ill. 161; Stafford *v.* Roof, 9 Cow. (N. Y.) 626; Jackson *v.* Burchins, 14 Johns. (N. Y.) 124; Bool *v.* Mix, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; Robinson *v.* Weeks, 56 Me. 104; Bailey *v.* Barnberger, 11 B. Mon. (Ky.) 114; Allen *v.* Poole, 54 Miss. 323; French *v.* McAndrew, 61 Miss. 187; Bingham *v.* Bailey, 55 Tex. 281; Lowe *v.* Sinclair, 27 Mo. 308; Mustard *v.* Wohlford, 15 Gratt. (Va.) 329; 76 Am. Dec. 209.

An infant's right to rescind his contract may be exercised even against purchasers in good faith from his grantee. Myers *v.* Sanders, 7 Dana (Ky.) 506; Hill *v.* Anderson, 5 Smed. & M. (Miss.) 216; and during minority as well as after becoming of age. Towle *v.* Dresser, 73 Me. 252; Chapin *v.* Shafer, 49 N. Y. 407.

7. See *supra*, this title, *Disability*, *Insanity*, *Intoxication*.

Inquisition of Lunacy.—There seems to be a conflict of decisions as to the effect, upon a contract, of judgment of lunacy being pronounced on one of the parties. In Fitzhugh *v.* Wilcox, 12 Barb. (N. Y.) 235, Johnson, J., in delivering the opinion of the court said: "The distinction between the void and voidable contracts of a lunatic does not appear to be entirely settled upon authority, but I apprehend it will be found to be substantially this: that the deeds and contracts of a lunatic made before office found are not void, but voidable, while those made afterwards are absolutely void. (Pearl *v.* M'Dowell, 3 J. J. Marsh. (Ky.) 658; 20 Am. Dec. 199; Wait *v.* Maxwell, 5 Pick. (Mass.) 217; 16 Am. Dec. 391.) How can a person who is judicially declared a lunatic and in charge of a committee make a contract which will confer any rights or impose any obligations upon any one? . . . The lunatic has no mind capable of assenting or of incurring any obligation. Indeed it seems to me perfectly clear that the judgment of the law which pronounces the party a lunatic, and gives over his person and estate to the custody of another, takes away from him absolutely all competency to contract until his rights are restored." See Freed *v.* Brown, 55 Ind. 310; Imhoff *v.* Witmer, 31 Pa. St. 243; Edwards *v.* Davenport, 20 Fed. Rep. 756.

8. Non-Performance.—Any breach of the stipulations contained in a contract of sale, either on the part of the vendor or the purchaser, gives the other party a right to rescind.[1] Thus, upon the

Other cases, however, hold that the judgment of lunacy is only *prima facie* evidence of the fact and not conclusive, and the contract is merely voidable. Hart *v.* Deamer, 6 Wend. (N. Y.) 497, the court by Savage, C. J., *citing* 1 Phil. Ev. 300; 1 Stark 258, where it is said: "An inquisition of lunacy may be considered to be in the nature of a proceeding *in rem* since it is instituted by the direction of the chancellor to whom by special authority from the king the custody of lunatics is intrusted, to inquire into the state of the party's mind." Little *v.* Little, 13 Gray (Mass.) 264; Parker *v.* Davis, 8 Jones (N. Car) 460; Hopson *v.* Boyd, 6 B. Mon. (Ky.) 296; Farlan *v.* Silk, 3 Camp. 126.

Rescission, by Whom.—Such contract of a lunatic may be rescinded by himself upon becoming sane. Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535; Gibson *v.* Soper, 6 Gray (Mass.) 279; 66 Am. Dec. 414; Turner *v.* Rusk, 53 Md. 65; or by his committee or guardian as long as he is insane. McClain *v.* Davis, 77 Ind. 419; Gibson *v.* Soper, 6 Gray (Mass.) 279; 66 Am. Dec. 414; Moore *v.* Hershey, 90 Pa. St. 196; or, in case of his death, by his personal representative. Schuff *v.* Ransom, 79 Ind. 458.

Intoxication.—Where a party to a contract is voluntarily intoxicated at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable, where no advantage is gained by dealing with him. Henry *v.* Ritenour, 31 Ind. 136. But the intoxication must have been so excessive as to deprive the party of the use of his reason and understanding. Willcox *v.* Jackson, 51 Iowa 208; Schramm *v.* O'Connor, 98 Ill. 539; Bates *v.* Ball, 72 Ill. 108; Van Wyck *v.* Brasher, 81 N. Y. 260. See Holland *v.* Barnes, 53 Ala. 83; 25 Am. Rep. 595.

1. Sumner *v.* Parker, 36 N. H. 449; Kimball *v.* Grover, 11 N. H. 375; Webb *v.* Stone, 24 N. H. 282; Phillips *v.* Bruce, Anthon (N. Y.) 123; Hill *v.* Hovey, 26 Vt. 109; Fletcher *v.* Cole, 23 Vt. 114; Dodge *v.* Greeley, 31 Me. 343; Goodrich *v.* Lafflin, 1 Pick (Mass.) 57; Allen *v.* Ford, 19 Pick (Mass.) 217; Shaw *v.* Turnpike Co., 3 P. & W. (Pa.) 445; Peckham *v.* Davis, 93 Ala. 474; Davis *v.* Hubbard (Wis. 1877), 4 Cent. L. J. 501; Basten *v.* Butler, 7 East 579.

So in case of a contract to deliver corn where the article is not merchantable, the buyer may rescind the contract and recover the purchase money. Peck *v.* Armstrong, 38 Barb. (N. Y.) 215.

A purchaser may rescind a sale when the vendor refuses to pay storage charges and deliver goods at purchaser's request according to agreement. Malone *v.* Minnesota Stone Co., 36 Minn. 325. See Johnson *v.* Latimer, 71 Ga. 470.

If the consignee named in a bill of lading contracts for the sale of goods, for cash or notes, and assigns both to the purchaser, and the latter refuses to receive the cargo and to make payment except on conditions which he has no right to prescribe, the consignee may rescind the contract of sale. The Treasurer, 1 Sprague (U. S.) 473.

The failure to deliver notes executed in payment for goods, to the wife of the vendor, to whom he was indebted, in compliance with the agreement, on the ground that the vendor was indebted to others, was good ground for rescinding the sale and conveying the goods to his wife. Lang *v.* Rickmers, 70 Tex. 108.

So the breach of a stipulation in respect to the time at which delivery is to be made, is ground for rescission. Coddington *v.* Paleologo, L. R., 2 Ex. 193.

If the act of one party be such as necessarily to prevent the other from performing his part according to the terms of his agreement, the contract may be considered as rescinded. Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285. This is properly a case of wrongful rescission by one party which gives the other party the right to treat the property as though no bargain had ever been made, and without any liability to the party in default. See Monroe *v.* Reynolds, 47 Barb. (N. Y.) 574, where Johnson, J., said: "It is not every breach of contract which will amount to a rescission of it, by the party in default, so as to authorize the other party to treat it as abandoned by the party so in default. If the alleged breach be not such as to amount to a rescission by the defaulting party and the seller takes advan-

tage of it, and disposes of the subject of the contract to another, without any demand or offer of performance on his part, and without notice to the other party, he may be treated as wrongfully rescinding the contract on his part; and the law will then give the other party a right of action to recover back what has been paid in part performance. The cases of Raymond *v.* Bearnard (12 Johns. (N. Y.) 274; 7 Am. Dec. 317); and Faucher *v.* Goodman (29 Barb. (N. Y.) 315), were both cases of this character. In each of those cases the purchaser paid part of the purchase money in advance, and was to pay the residue and take the property at a day specified. He did not pay nor offer to pay by the day, and the seller, without any demand, or offer on his part, or any notice, sold the property to others; and this was held to be a rescission of the contract and to give the purchaser a right of action to recover back the money advanced on the contract. It is clear from these decisions, as well as from general principles applied in other cases, that the mere neglect to perform by the day specified is not such a breach by the defaulting party as to authorize the other party to treat the contract as rescinded by such defaulting party, or abandoned. This is so in all cases where time is not necessarily of the essence of the contract. The seller in such a case, if he wishes to have the contract either performed or abandoned, must go further and by some demand, offer on his part, or notice, put the purchaser to his refusal to perform before he can treat the contract as having been rescinded by the purchaser. Mere neglect to perform by the day is, generally, not sufficient."

Where goods were delivered to the purchaser without the authority of the seller and before the performance of a stipulation in the contract, providing for the giving of certain security, the seller could rescind. Harrison Mach. Wks. *v.* Miller, 36 Ill. App. 86.

In Dawson *v.* Chisholm, 1 N. Y. Supp. 171, a question arose as to whether the ballast of a yacht which had been sold to the plaintiff, went with the yacht; the evidence showed that the seller had given his agent $100 to supply ballast, but it had never been done, though plaintiff swore that he had ordered it. The court held that it was evident that ballast was to go with the yacht, and that a failure to supply gave the purchaser a right to rescind the contract.

Difference in Quality Ordered.—Contract of sale may be rescinded on the ground that the goods delivered were not such as the purchaser had ordered. Howard *v.* Hoey, 23 Wend. (N. Y.) 350; 35 Am. Dec. 572; Bennett *v.* Terry, 42 Ga 283; Cahen *v.* Platt, 69 N. Y. 348; 25 Am. Rep. 203.

Where wood was to be delivered in lots, and the first lot was not of the stipulated quality, the purchaser may rescind, nor is he obliged to accept an offer by the seller to take it at a reduced price, or to sort it in such way as to comply with the contract. Walker *v.* Davis, 65 N. H. 170.

But in Hoadley *v.* House, 32 Vt. 179; 76 Am. Dec. 167, it was held that rescission cannot be effected after delivery and use of a part of the goods for mere difference in quality, but the difference must be in kind or class.

So in Dounce *v.* Dow, 6 Thomp. & C. (N. Y.) 653, it was held that, where the purchasers had used iron delivered to them under a contract of sale, without first testing it, the contract could not be rescinded upon the subsequent discovery that it was worthless.

Articles Bought for Specific Purpose.—An article ordered for a specific purpose may be returned, thereby rescinding the sale, if, after a fair trial, it is found to be unfit for the intended use. Crover *v.* Hornburg, 26 Kan. 94.

So where a chattel is bought by sample for a particular purpose, which purpose is known to the vendor, if a latent defect is discovered, the buyer may rescind the sale even after acceptance. Hudson *v.* Ross, 72 Mich. 363. See LATENT DEFECTS, vol. 12, p. 926.

The inferiority must be real and not rest merely in the opinion of the vendee. Penn *v.* Smith, 93 Ala. 476.

But an action for rescission cannot be maintained on account of a defect existing at the time of the sale, which was so apparent that it might have been discovered by simple inspection. Bloom *v.* Beebe, 15 La. Ann. 65; Bell *v.* Lacy, 16 La. Ann. 51.

Rescission Refused.—Where there is a stipulation in a contract for the sale of a stock of goods to the effect that they are to be "invoiced at cost and as agreed," the contract cannot be rescinded because of the failure of the vendor to produce the original bills of certain of the goods on demand. Kendall *v.* Young, 27 Ill. App. 174. Nor where the

refusal by the vendee to accept the goods, it would seem that the vendor may rescind,[1] although the ordinary remedy in such case is by means of a resale, where the purchaser is credited with the product of the sale, and is liable for the difference between the price obtained and the market value at the time of the contract.[2] Again, refusal to pay the price of goods at the time fixed for such payment, where a purchase is made of goods to be delivered at a future day, authorizes the seller to rescind;[3]

stipulation was to the effect that the defendant to whom lumber was sold would remove the "skids" on which it was delivered at his mill so as to prevent accumulation, and he failed to make such removal. Hoffman *v.* King, 70 Wis. 372.

For Failure of Seller to Deliver Goods.— A contracted to sell to B a specific cargo of wheat, described in a bought-and-sold note as "shipped per Diletta Mimbella, as per bill of lading dated September or October," and which was all on board at the date of the contract. *Held*, that this did not amount to a condition so as to entitle the buyer to rescind the contract, on its turning out that the wheat was not shipped at the time mentioned. Gattorno *v.* Adams, 12 C. B. N. S. 560; 104 E. C. L. 559.

But where a contract called for the delivery of a machine "at once, or as soon as possible" when the distance was only twenty-eight miles, and the machine was not sent for two weeks, although it was through the fault of the railroad company, the vendee could rescind. Robinson *v.* Brooks, 40 Fed. Rep. 525.

1. Thus in Redmond *v.* Smock, 28 Ind. 365, where the purchaser refused to accept the goods, whereupon the seller retook possession thereof, treating them as his own, and selling them without any notice to the buyer of an intention to sell on his account, it was held to be a rescission. See Coon *v.* Reed, 1 Hilt. (N. Y.) 511.

So where the plaintiffs sold and shipped goods to vendee, which he did not receive or pay charges on, but afterwards wrote that he could not receive them since he was in trouble. The plaintiffs replied that he need not do so, but before this reply was written or received by the vendee, he assigned to the defendant, who took possession of the goods. The court held that a rescission of the sale had taken place, and the plaintiff could recover the goods. Flynn *v.* Lowery, 1 N. Y. Supp. 235.

This rule applies more particularly where there has been only a partial execution on the part of the vendor, as where he has delivered a part of the goods, which part the buyer received, but refused to receive the rest. Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 109 E. C. L. 711. See Clements, etc., Mfg. Co. *v.* Meserole, 107 Mass. 362.

Thus where there was a contract for the sale of hay of a certain quality, and after part delivery the buyer refused to accept hay of the specified quality, although it was a fair representation of the entire crop of the seller, the latter could rescind and be released from any further performance. Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567; Hughes *v.* Case, 4 Ct. of Cl. 64.

2. See SALES, vol. 21, p. 447; Westfall *v.* Peacock, 63 Barb. (N. Y.) 209.

3. Dwinel *v.* Howard, 30 Me. 258; Hayden *v.* Reynolds, 54 Iowa 157; Globe Milling Co. *v.* Minnesota Elevator Co., 44 Minn. 153; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189; Neil *v.* Chevers, 1 Bailey (S. Car.) 539; Pickett *v.* Cloud, 1 Bailey (S. Car.) 362; Preble *v.* Bottom, 27 Vt. 249; Steen *v.* Harris, 81 Ga. 681; Shines *v.* Stiner, 76 Ala. 458; Harmon *v.* Goetter, 87 Ala. 325; Beauchamp *v.* Archer, 58 Cal. 431; 41 Am. Rep. 266.

And so where the maker of an article, after delivery to the purchaser, took it back because it remained unpaid for, the sale is presumed to be rescinded, unless there is some evidence to show an intention on the part of the seller to take it for the purchase of resale on the buyer's account, or otherwise not to discharge the debt due for the price. Sloan *v.* Van Wick, 4 Abb. App. (N. Y.) 250.

Likewise where the sale of corn was contracted for, to be delivered in six loads, payment for each load to be made upon delivery, the refusal to pay for one after acceptance gives the vendor the right to rescind. Rugg *v.*

but default in payment after the goods have become the property of the vendee does not give the vendor such right, unless it be expressly reserved in the contract.[1]

Where by the terms of the contract the delivery of goods is to be by installments, payment to be made upon each delivery, the refusal of the vendee to make such payment, entitles the vendor to rescind;[2] and, on the other hand, if the vendor fails to deliver

Moore, 110 Pa. St. 236. See Stocksdale *v.* Schuyler, 55 Hun (N. Y.) 610.

1. Martindale *v.* Smith, 1 Q. B. 395; Keller *v.* Strasburger, 23 Hun (N. Y.) 625; Buckingham *v.* Osborne, 44 Conn. 133.

But although the property be delivered, still, if the title is not to pass until payment, the vendor may rescind at any time for default in payment. Morse *v.* Chicago, etc., R. Co., 73 Iowa 226.

2. Sale by Installments.—Rugg *v.* Moore, 110 Pa. St. 236. But see *contra* on the ground that the breach did not extend to the whole consideration, Osgood *v.* Bauder, 75 Iowa 550.

Thus, where the goods are to be delivered in installments, payment for each to be made on delivery, and the buyer does not pay for one, under such circumstances as to give the seller reasonable ground to believe that he will be unable to pay for the others, and that he does not intend to go on with the contract, the seller may rescind. Withers *v.* Reynolds, 2 B. & Ad. 882; 22 E. C. L. 203; Bloomer *v.* Bernstein, L. R., 9 C. P. 588.

The rule seems to apply also where an entire delivery of the subject-matter is made, but the payment is to be by installments. Thus in case of the sale of a piano, it was stipulated that the price was to be paid in installments, the piano to remain the property of the seller while in possession of the purchaser until full payment was made, and if the buyer failed to pay any one of the installments specified, from the time of such failure the seller should be entitled to the possession, and the agreement to sell was to become void. Such contract does not give the seller the right to retain as a forfeit all the money received by him on the contract, but only so much as will be a fair compensation for the use of the instrument, or for any injury it might have sustained while in the possession of the buyer. Preston *v.* Whitney, 23 Mich. 260. And in such a case, where personal property is sold on condition that the title shall remain in the vendor until payment in full by the vendee of the purchase money due in installments, a rescission of the contract, by returning, or offering to return, what has been paid, is condition precedent to the seller's right to sue for the property. Ketchum *v.* Brennen, 53 Miss. 596. *Compare* O'Rourke *v.* Hadcock, 114 N. Y. 541.

But in Freeth *v.* Burr, L. R., 9 C. P. 208, the defendant had contracted to sell to the plaintiff a large amount of iron, to be delivered in two installments, one in two, the other in four weeks, each to be paid for two weeks after delivery, and the first installment was not delivered until nearly six months had elapsed, the purchaser being obliged thereby to procure other iron, and, consequently, suffering loss, as the market was rising, on account of which he refused to pay for the first installment, but demanded the delivery of the second. This the vendor refused to do, on the ground that the refusal to pay for the first rescinded the contract. There was, however, nothing to show the inability on the part of the vendor to pay, and he ultimately paid for the first installment. Under these circumstances the refusal to pay for the first installment did not warrant the rescission of the contract. See also Mersey Steel, etc., Co. *v.* Naylor, 9 Q. B. Div. 648.

In pursuance of a contract for the sale of 330 tons of bleaching powder in monthly installments of 30 tons per month, payment to be in cash fourteen days after delivery, the whole amount was delivered except the December installment, but the November installment was not paid for. In December the purchaser declared himself insolvent, whereupon the vendor refused to deliver any more of the powder; and later, upon the bankruptcy of the purchaser, his trustee applied for an order to pay £150 damages for the non-delivery of the last installment. Under these circumstances it was held that neither the non-payment of the November installment nor the bankruptcy of the purchaser would entitle the ven-

any one of the installments, the same right belongs to the vendee.[1]

While breach of warranty, as a general rule, does not entitle the vendee to rescind, unless there be fraud or an election to rescind reserved,[2] yet, in some States, the rule is different and the vendee has the right to rescind and return the goods in all cases where there is such breach, whether the warranty be express or implied.[3]

dor to rescind the contract, but that after the declaration of insolvency he might refuse to deliver any more goods till the price of the installment was paid for, and also the last installment was tendered him. *Ex parte* Chalmers, *In re* Edwards, L. R., 8 Ch. 289. *Compare* Morgan *v.* Bain, L. R., 10 C. P. 15; also *In re* Phœnix Bessemer Steel Co., 4 Ch. Div. 108. Norrington *v.* Wright, 5 Fed. Rep. 768; *In re* Wheeler, 2 Low. (U. S.) 252.

In the case of a contract of sale of a large amount of coal to be delivered in equal monthly installments, the vendors could not rescind the contract because the purchasers took less than the stipulated amount during the first month. Simpson *v.* Crippen, L. R., 8 Q. B. 14. *Compare* Hoare *v.* Rennie, 5 H. & N. 19; Honck *v.* Muller, 7 Q. B. Div. 92.

1. Thus a contract to deliver a lot of iron in March and another lot in April, may be rescinded because of a failure to deliver the March installment. Pope *v.* Porter, 102 N. Y. 366.

So in Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417, it was held where a contract was made for the manufacture and delivery of goods to be delivered in monthly installments of 40,000 yards per month and the plaintiff only furnished 25,000 during the first month, that such failure was ground for rescission, although they had offered to make up the deficiency with goods bought in the market which the defendant refused to accept.

Where goods were sold under contract to be delivered in periodical installments, and the vendee becomes bankrupt, the trustee of such bankrupt vendee cannot adopt the contract and claim further deliveries under it without first paying the price of the goods delivered prior to the bankruptcy. Mears *v.* Waples, 3 Houst. (Del.) 581. *In re* Wheeler, 2 Low. (U. S.) 252. But see *contra*, Kraft *v.* Dulles, 2 Cin. Sup. Ct. Rep. (Ohio) 116. See SALES. CONDITIONAL SALES, vol. 3, p. 431.

2. Thornton *v.* Wynn, 12 Wheat. (U. S.) 183; Prentiss *v.* Russ, 16 Me. 30; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148; Voorhies *v.* Earl, 2 Hill (N. Y.) 288; 38 Am. Dec. 588; Muller *v.* Eno, 14 N. Y. 597; Day *v.* Poal, 52 N. Y. 416; 11 Am. Rep. 719; Kase *v.* John, 10 Watts (Pa.) 107; 36 Am. Dec. 148; Blythe *v.* Speake, 23 Tex. 429; Hoover *v.* Sidener, 98 Ind. 290; Dawson *v.* Pennaman, 65 Ga. 698; Bunce *v.* Beck, 43 Mo. 279; Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310; 24 Am. Rep. 558; Street *v.* Blay, 2 B. & Ad. 456; 22 E. C. L. 122. See WARRANTY, where the subject is fully treated.

3. The numerous decisions of the Massachusetts courts are unanimous in supporting this rule. See Bryant *v.* Isburgh, 13 Gray (Mass.) 607; 74 Am. Dec. 655; Perley *v.* Balch, 23 Pick. (Mass.) 283; 34 Am. Dec. 56; Morse *v.* Brackett, 98 Mass. 209; Door *v.* Fisher, 1 Cush. (Mass.) 271, in which case Shaw, C. J., said: "A warranty is not strictly a condition. . . . But to avoid circuity of action a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud."

So in *Vermont*, it was held in Pennock *v.* Stygles, 54 Vt. 226, that acceptance, after inspection of goods bought by sample, does not deprive the buyer of the right to rescind for breach of warranty where a defect was subsequently discovered which the inspection could not disclose.

For other cases in different States where rescission for breach of warranty has been allowed, see Horn *v.* Buck, 48 Md. 358; Marshall *v.* Perry, 67 Me. 78; Jack *v.* Des Moines, etc., R. Co., 53 Iowa 399; Merrill *v.* Nightingale, 39 Wis. 247; Matthews *v.* Fuller, 8 Ill. App. 529; Howe Mach. Co. *v.* Bosine, 87 Ill. 105; Gale Sulky Harrow

9. Failure of Consideration.—If a person has advanced money or goods on a contract of sale and the consideration of such contract fails, he may rescind and recover in a proper action the money or other thing advanced.[1] For example, the vendor in an executory contract may wholly fail to make a title to the vendee, in which case, there is such failure of consideration as will entitle him to rescind.[2] In case of a partial failure of consideration, a party may rescind if the contract is entire,[3] but if it is severable, and he has enjoyed any part of the consideration for which the advancement was made, he thereby loses his right.[4]

Mfg. Co. *v.* Stark, 45 Kan. 606; Jagers *v.* Griffin, 43 Miss. 134; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340; Dill *v.* O'Ferrell, 45 Ind. 268.

1. Giles *v.* Edwards, 7 T. R. 181; Kempson *v.* Saunders, 4 Bing. 5; 13 E. C. L. 321; Burchfield *v.* Moore, 3 E. & B. 683; 77 E. C. L. 682; Harlow *v.* Putnam, 124 Mass. 553; Peckham *v.* Kiernan, 13 R. I. 354; Arnold *v.* Carpenter, 16 R. I. 560; Howe Mach. Co. *v.* Willie, 85 Ill. 333. See Devine *v.* Edwards, 101 Ill. 138.

There may also be a failure of consideration on the part of the buyer, as, for example, where the defendants contracted to sell to the plaintiff goods of certain kinds, the consideration for which was the delivery of the note of a third party. The amount of each kind of goods was to be selected by the plaintiff and the whole amount was to be equal in value to the face of the note. A part of the goods were delivered, but, before complete delivery, the note fell due, and was not paid. At that time the defendants learned that the maker of the note had been insolvent when he entered into the obligation, and it was held that, as the contract in respect to the goods not yet delivered was executory, and the consideration had failed, the defendants could rescind and refuse to deliver any more goods. Bruce *v.* Burr, 5 Daly (N. Y.) 510. *Compare* Rappleye *v.* Racine Seeder Co., 79 Iowa 220.

2. Souter *v.* Drake, 5 B. & Ad. 992; 27 E. C. L. 250; Purvis *v.* Rayer, 9 Price 488; Judson *v.* Wass, 11 Johns. (N. Y.) 528; 6 Am. Dec. 392; Tallmadge *v.* Wallis, 25 Wend. (N. Y.) 117. See Siegel *v.* Brooke, 25 Ill. App. 207.

For example, where goods sold turned out to be stolen, the failure to make title gave the vendee the right to rescind. Eickholtz *v.* Bannister, 17 C. B. N. S. 708; 112 E. C. L. 706.

But in case the contract be executed the vendee cannot rescind for failure of consideration unless there be express warranty or fraud. Case *v.* Hall, 24 Wend. (N. Y.) 103; 35 Am. Dec. 605.

3. Miner *v.* Bradley, 22 Pick. (Mass.) 457; Roberts *v.* Beatty, 2 P. & W. (Pa.) 63; 21 Am. Dec. 410; Kuheman *v.* Wood, 81 Iowa 128; Smith *v.* Lewis, 40 Ind. 98. Biuce *v.* Pearson, 3 Johns. (N. Y.) 534; Wright *v.* Barnes, 14 Conn. 518; Jenness *v.* Wendell, 51 N. H. 63; 12 Am. Rep. 48; Dula *v.* Cowles, 2 Jones (N. Car.) 454; Graham *v.* Oliver, 3 Beav. 129; Hiler *v.* Buckley, 17 Ves. 194.

But if the party has accepted a partial consideration he cannot rescind. Morse *v.* Brackett, 98 Mass. 205; Carpenter *v.* Minturn, 65 Barb. (N. Y.) 297; Harnor *v.* Groves, 24 L. J. C. P. 53. See *infra*, this title, *Duty of Party Rescinding*.

4. Taylor *v.* Hare, 1 N. R. 260; Lawes *v.* Purser, 6 E. & B. 930. See Morse *v.* Brackett, 98 Mass. 205; Bowker *v.* Hoyt, 18 Pick. (Mass.) 555.

But in Chanter *v.* Leese, 5 M. & W. 698, it was held, in a case of the sale of six patents for one consideration, five of which were valid and one void, that there had been an entire failure of consideration since the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer.

Miscellaneous Grounds for Rescission.—An agreement, by several underwriters in a policy of insurance, to the effect that all suits against them for a loss should follow the event of one, could be rescinded when it was shown that there was a difference in the several cases unknown to them. Alexander *v.* Muirhead, 2 Desaus. (S. Car.) 162.

Where there is a stipulation in the contract providing for a penalty in case

of non-performance, such stipulation does not defeat the right of rescission where the amount named in the penalty is not sufficient to cover the damages at law. Wilson *v.* Roots, 119 Ill. 379.

Lynch *v.* Sellers, 41 La. Ann. 375, was a case arising out of a contract entered into by a party with the owner of a building to pull it down. While plaintiff was working in the building the owner pulled the roof to pieces in such a way that the trusses fell in and killed two of the workmen employed by the plaintiff. *Held* sufficient ground for rescission.

The repudiation of a contract upon insufficient grounds will be good, if at the time there existed sufficient grounds, of which the person repudiating was not aware. *In re* London, etc., Bank, L. R., 7 Ch. 55.

Legislative Change.—*E. g.*, where one covenants not to do a certain lawful thing, and an act of Parliament compels him to do it, this rescinds the contract. Brewster *v.* Kitchell, 1 Salk. 198.

So, where a broker agreed to pay the plaintiff half commissions on the business of those customers that the latter should bring, but such payment was afterwards prohibited by a change in the rules of the board to which the broker belonged, such change was sufficient ground for rescinding the contract. Gilbert *v.* Quinlan, 59 Hun (N. Y.) 508.

In 1766, the corporation of New York City conveyed land for purposes of a church and cemetery, with covenant of quiet enjoyment; and in 1823, pursuant to a power granted by the legislature, passed an ordinance prohibiting its use as a cemetery. *Held*, that the rescission of the covenant was valid. Brick Presbyterian Church *v.* Mayor, etc., of N. Y., 5 Cow. (N. Y.) 538.

As to the constitutional inhibition of laws impairing the obligation of contracts, see CONSTITUTIONAL LAW, vol. 3, pp. 741, 751–757.

Instances Where Relief Has Been Denied.—In a contract for the construction of a sewer it was provided that the rock taken from the excavation should be the property of the contractor. Part of the sewer ran through private property, the owner of which refused to allow the contractor to sell the stone taken therefrom. Such refusal was not ground for rescission, as the right to sell the stone did not accrue until after the contract was completed. Becker *v.* Philadelphia (Pa. 1889), 16 Atl. Rep. 625.

One who was present and voting at a meeting, under a contract of reorganization, was held to be precluded from a rescission thereof for breach of its provision for him to nominate a majority of the directors. American L. & T. Co. *v.* Toledo, etc., R. Co., 47 Fed. Rep. 343.

Where a city accepted a deed of land on which to build a hospital, the fact that the nature of the soil after its exposure was not suitable for a hospital, is not sufficient ground for rescission; nor are any other facts which did not exist or were not known at the time the deed was accepted. Worcester *v.* Kelley, 119 Mass. 535.

A party cannot plead as ground for rescinding a contract that he followed the bad advice of others if he is of sufficient mental capacity to contract, and no fraud was practiced upon him. Carroll *v.* People, 13 Ill. App. 206.

A contract to do county printing for less than the law allowed cannot, after performance, be rescinded in order that the printer may recover the compensation allowed by statute. Quigley *v.* Sumner Co., 24 Kan. 293.

In Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23, defendant contracted with plaintiff to be answerable for the perfect construction of a steamboat. The court held that the plaintiff could not rescind the contract on the ground that she drew too much water, before testing the fitness of it by actual experiment.

Where the performance of a contract is secured by bond with sureties, the insolvency of the contractor will not be considered sufficient ground for rescission. Waco Tap. R. Co. *v.* Shirley, 45 Tex. 355.

Where a vendor set aside property for a purchaser by the survey or assortment of a person other than the one agreed on, and the property was received by the purchaser, the vendor could not rescind by denying the validity of his own act, in that there was no proof that the purchaser agreed to such survey. Frost *v.* Goddard, 25 Me. 414.

Upon Insolvency of Buyer.—If goods in the city of London are sold by a broker to be paid for by a bill, the vendor has a right within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract; but the vendor must inti-

IV. DEEDS AND LAND BARGAINS[1]—1. Voluntary—*a.* AS BETWEEN THE PARTIES—(1) *Disability.*—Transactions in the transfer of real estate, whether embodied in a contract, bond for title, deed, mortgage, or other instrument, may be rescinded for any of the disabilities of a party above noted in case of contracts[2] generally—namely, coverture,[3] infancy,[4] insanity,[5] intoxication,[6] duress and stress.[7]

(2) *Mistake, etc.*—Such transaction may also be set aside in a proper case, for accident, surprise, mistake of fact or of law, or of mixed law and fact, upon the principles of equity already noted.[8]

(3) *Failure of Consideration.*—Such transaction may be rescinded for failure of consideration.[9]

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mate his dissent as soon as he has an opportunity to inquire into the solvency of the purchaser. Hodgson *v.* Davies, 2 Camp. 530.

Bills or Notes of Insolvents.—When bills of an insolvent bank or notes of an insolvent party are transferred in part payment of a debt, or sold as solvent paper, there being no fraud, the creditor or buyer may rescind such payment or sale. Harris *v.* Hanover Nat. Bank, 15 Fed. Rep. 786.

Contract of Actress.—A assumed to justify the breach of her contract with B to appear in a certain opera, on the ground that it stipulated for B to prescribe and supply her costume, and that he had refused to substitute another costume for the tights in which she had appeared, whereby her health was endangered from taking cold. It was in evidence that she had declined to obey her physician's advice to wear some protection under the costume, and that she had meanwhile been negotiating with a manager competing with B. *Held*, that in equity and good conscience, she could not be allowed the repudiation. Duff *v.* Russell, 14 N. Y. Supp. 134. *Compare* Aldine Press *v.* Estes, 75 Mich. 100.

1. See generally VENDOR AND PURCHASER.

2. See *supra*, this article, *Contracts—Disability.*

3. A conveyance by a married woman, even of her dower right, was void at common law. See MARRIED WOMEN, vol. 14, p. 626. As to enabling statutes thereon, p. 627. As to her avoidance thereof, p. 633.

4. As to avoidance of an infant's conveyances, see INFANTS, vol. 10, p. 649.

In *Missouri*, in ejectment to recover land sold by the plaintiff when a minor, he need not allege disaffirmance, nor, if it appears that he has no other property, offer to return purchase money paid. Craig *v.* Van Bebber, 100 Mo. 584.

In *Michigan*, A's conveyance to C after A's arrival of age is a disaffirmance of A's conveyance of the same land to B, made during A's minority. Corbett *v.* Spencer, 63 Mich. 731.

5. Equity will set aside a voluntary conveyance of an insane grantor at his own instance when restored to reason, or of his committee or guardian, or of his executor, administrator or heirs. See INSANITY, vol. 11, p. 149.

6. See INTOXICATION AS A DEFENSE, vol. 11, p. 773.

7. As to avoidance of a deed for duress, see DEEDS, vol. 5, p. 430. See also *supra*, this title, *Duress and Stress.*

8. See *supra*, this article, *Mistake.*

In *Texas*, a vendor's honest mistake and representation that several tracts formed one compact body, was held to be ground for rescission. Culbertson *v.* Blanchard, 79 Tex. 486. See also MISTAKE, vol. 15, p. 625.

9. See CANCELLATION, vol. 2, p. 718; VENDOR AND PURCHASER.

When a person of unsound mind makes a conveyance for an inadequate consideration, it will not always be absolutely set aside, but may be allowed to stand as a security for the money advanced by the grantee. Addison *v.* Dawson, 2 Vern. 678. *Compare In re* Slater's Trusts, 11 Ch. Div. 227.

In *Georgia* upon a promise to convey land in part payment for land bought, the promisor's inability to make title was held to be a ground for rescission. Bell *v.* Hutchins, 86 Ga. 562.

(4) *Fraud.*—Such transaction also may be rescinded for fraud upon proper and seasonable application.[1] A judgment creditor may treat an attempted fraudulent transfer by the debtor as a nullity, and sell under the execution, or he may resort to a court of equity to have it rescinded.[2] So also as to extortion under stress; thus if a mortgagee in possession for condition broken, require the mortgagor to pay more than is legally due, in order to redeem, to prevent foreclosure, the mortgagor can recover it back;[3] and rescission would be granted if, in order to get a conveyance, a party had been compelled to include in a note and mortgage an unjust claim.[4]

b. AS AGAINST STRANGERS—(1) *Cloud on Title.*—Equity will relieve by rescission of any deed, mortgage, etc., that may be used to cast wrongful suspicion upon the title of an innocent party.[5]

(2) *Forgery.*—Upon the same principle of *quia timet*, equity

In *Maryland*, the fact that a trust deed was not wholly satisfactory to the grantor, was held not to raise such a presumption that it did not conform to his directions as to justify its cancellation. Byrne *v.* Gunning (Md. 1890), 23 Atl. Rep. 1.

1. See *supra*, this title, *Fraud, Mistake.* See also DEEDS, vol. 5, p. 437; VENDOR AND PURCHASER.

2. In what cases a fraudulent conveyance will be set aside, see FRAUDULENT CONVEYANCES, vol. 8, p. 772, note 5, 807, 829.

3. McMurtrie *v.* Keenan, 109 Mass. 185; Freeman *v.* Etter, 21 Minn. 3.

4. Macloon *v.* Smith, 49 Wis. 200.

5. See EQUITY, vol. 6, p. 723; BILL QUIA TIMET, vol. 2, p. 258; BILL TO REMOVE CLOUDS, vol. 2, p. 298; VENDORS AND PURCHASERS.

For fourteen special facts, upon establishment of the existence of any one of which the plaintiff is entitled to have a deed rescinded as a cloud upon his title; also for ten facts held not to constitute ground for such relief, see Mr. Bigelow's valuable note, 2 Story's Eq. Jur. (13th ed.), § 700.

This is one of the most prolific subjects of equitable relief. Besides the multitude of illustrative cases well presented in Mr. Creswell's notes under BILL TO REMOVE CLOUDS FROM TITLE, etc., vol. 2, pp. 298–312, the following late cases may be considered:

In *Massachusetts*, one seeking to have a deed rescinded as a cloud on title must show that he is in possession or that the land is vacant; otherwise he would have a remedy by ejectment or by writ of entry. Allen *v.* Storer, 132 Mass. 372, 376. And equity refused to interfere even where fraud was alleged in procuring the deed. Bassett *v.* Brown, 100 Mass. 355.

So also in some other States, proof of the plaintiff's possession must be shown. Eldridge *v.* Smith, 34 Vt. 484; Polk *v.* Pendleton, 31 Md. 118; Burton *v.* Gleason, 56 Ill. 25; Page *v.* Montgomery, 46 Mich. 51; Harrington *v.* Williams, 31 Tex. 448; Sale *v.* McLean, 29 Ark. 612. Or that the possession is vacant. Oakley *v.* Hurlbut, 100 Ill. 204. Or that the plaintiff has a superior equity. Hodges *v.* Griggs, 21 Vt. 280; King *v.* Carpenter, 37 Mich. 363; Branch *v.* Mitchell, 24 Ark. 431. Or that he has a judgment to be enforced. Stowell *v.* Hazlett, 57 N. Y. 637; Hager *v.* Shindler, 29 Cal. 47. Or that the judgment debtor has made a fraudulent conveyance. Gould *v.* Steinburg, 84 Ill. 170. Or that the plaintiff holds a mortgage affected. Wofford *v.* Board of Police, 44 Miss. 579.

In *Tennessee*, proof of the plaintiff's possession, or a vacancy is not prerequisite; it being desirable that a plaintiff who had obtained judgment by default against a non-resident defendant should not have to resort to a second action to show the invalidity of the deed. Almony *v.* Hicks, 3 Head (Tenn.) 39.

In *Alabama*, relief was granted, though the defendant was in possession of part of the land. Marston *v.* Rowe, 39 Ala. 722. But *compare* Baines *v.* Barnes, 64 Ala. 375.

will order a forged deed or other instrument to be delivered up and canceled.[1]

2. Sheriff's, etc.—A deed given in consummation of a sheriff's or other forced transfer of real estate, will be rescinded if equity so demands, and the rights of all the parties can thereby be adjusted.[2]

V. Bonds—1. Private.—A sealed obligation to pay money, either absolutely or conditionally, may be void or voidable for fraud, mistake, duress, or disability of the obligor, on the principles stated above; and so a bond may be decreed to be delivered up and canceled as *functus officio*.[3]

2. Official.—An official bond executed in furtherance of an illegal purpose is void.[4]

An official bond is void if its condition be contrary to the statute,[5] or if a material prescribed condition be omitted.[6] But no breach can be assigned on a mere surplus condition.[7] A variance in other portions of the bond from what the statute prescribes is not always fatal.[8]

VI. Negotiable Instruments.—Notes, drafts, and checks may be rescinded for fraud, duress, disability of the maker, etc., on the principles stated above.

An accommodation note can be rescinded by the maker at any time before it has been negotiated for value.[9]

1. See Bill to Remove Clouds, vol. 2, p. 299. As to evidence, etc., see Forgery, vol. 8, p. 534.

2. See Judicial Sales, vol. 12, p. 235; Sheriff's Sales.

3. See *supra*, this title, *Fraud, etc.*

The presumption of payment of a bond after twenty years may be repelled by the fact that the obligor had no opportunity or means of paying. Fladong *v.* Winter, 19 Ves. 196.

Producing a receipt for interest within twenty years indorsed on a bond by the obligee, was held sufficient to take off the presumption, though there was no proof that such receipt had been written and signed. Barrington *v.* Searle, 3 Bro. C. C. 593.

A and B entered into a joint and several bond to C, who was A's mother, and D and E. C delivered it to A for safekeeping—received the interest for some time, and died. B and D also died. B's executors, without the privity of E, arranged with A whereby the name and seal of B were erased. *Held*, that this did not invalidate the bond against A. *Ex parte* Smith, 3 M. D. & De G. 378.

4. See Bonds, vol. 2, p. 466.

The sureties upon the bond of the agent of a foreign corporation doing business without compliance with the local law, may set up the illegality in defense. Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15; 21 Am. Rep. 89.

5. "The statute is a tyrant," etc. Maleverer *v.* Redshaw, 1 Mod. 35.

6. U. S. *v.* Gordon, 7 Cranch (U. S.) 287. *Compare* Shunk *v.* Miller, 5 Pa. St. 256; U. S. *v.* Gordon, 1 Brock. (U. S.) 195.

7. Hall *v.* Cushing, 9 Pick. (Mass.) 404.

8. See Bonds, vol. 2, p. 467. Where the statute requires a bond to be payable to an A, the successors of a B, obligee, cannot maintain an action thereon. White *v.* Quarles, 14 Mass. 451; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670.

As to civil restrictions upon the making by alien enemies, felons, bankrupts, etc.; natural restrictions upon idiots, lunatics, drunkards, etc.; legal restrictions upon infants, married women and corporations, see Bills and Notes, vol. 2, p. 313.

See Negotiable Instruments, vol. 16, p. 479.

9. Where a bank officer, on receiving notice of rescission from an accommodation maker, by false and fraudulent statements concerning the financial

In cases of fraud, equity will order a bill of exchange to be given up and canceled only where its possession, but for the fraud, would be that of the plaintiff.[1]

VII. Insurance Policies.—A policy of insurance, unless the right of rescission be therein reserved, cannot be canceled by either party without consent of the other.[2] Mere notice of intention to cancel does not operate as a rescission.[3] It is otherwise, however, in case of express provision therefor.[4] A clause allowing the insurers to terminate the risk at their option, imports no right to rescind when a fire is approaching the property.[5] A compromise, stipulating for a cancellation of the policy, ends the risk, and the insurer is not liable for an after-occurring loss.[6] But a member of a mutual company stands as a stockholder, and after it has in fact become insolvent he cannot escape liability by an agreement with its officers to cancel his policy on his paying a small percentage.[7] As to an agent's power to cancel, the authorities are not fully harmonious.[8]

standing of the payee, induces the maker to withdraw the rescission, the bank receiving the note from the payee becomes responsible, although disinterested at the time of the statements. Second Nat. Bank *v.* Howe, 40 Minn. 390.

The mere fact of canceling the signatures of the makers of a dishonored note, and writing "paid" on the note, corrected before the note is sent back to the holder by a memorandum thereon "canceled in error," cannot be effectual to charge a bank with receipt of the money. Prince *v.* Oriental Bank Corp., L. R., 3 App. Cas. 325.

1. Jones *v.* Lane, 3 Y. & C. 281.

2. See the case of a "non-forfeiting life policy." Chase *v.* Phœnix Mut. L. Ins. Co., 67 Me. 85.

As to when an agent could not rescind a fire policy without consent of both parties, see the complicated case of Massasoit Steam Mills Co. *v.* Western Assur. Co., 125 Mass. 110.

As to an insurer's erroneous classification of a fire policy, also constructive notice to the insured of a statutory provision for rescission, see Fabyan *v.* Union Mut. F. Ins. Co., 33 N. H. 203; Scott *v.* Sun Fire Office, 133 Pa. St. 332.

3. Hathorn *v.* Germania Ins. Co., 55 Barb. (N. Y.) 28; Ætna Ins. Co. *v.* Maguire, 51 Ill. 342; Joliffe *v.* Madison Mut. Ins. Co., 39 Wis. 111. An equivocal notice is good against the party giving it, if acted upon by the other. Columbia Ins. Co. *v.* Masonheimer, 76 Pa. St. 138.

4. Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

Where insurance is terminable "on giving notice to that effect, and refunding a ratable proportion of the premium," the notice must, in order to rescind be that the policy is then and there canceled (not "will be"), and the entire *pro rata* premium must be tendered therewith. Van Valkenburgh *v.* Lenox F. Ins. Co., 51 N. Y. 465; Planters' Ins. Co. *v.* Walker Lodge (Tex. 1880), 11 Rep. 142.

5. Home Ins. Co. *v.* Heck, 65 Ill. 111.

6. King *v.* Ætna Ins. Co., 36 Mo. App. 128.

7. Doane *v.* Millville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522. But *compare* Akers *v.* Hite, 94 Pa. St. 394; 39 Am. Rep. 792. See Mutual Insurance, vol. 16, p. 37.

8. See Insurance, vol. 11, p. 323. Authorization to procure insurance does not import power in the agent to cancel a policy. Latoix *v.* Germania Ins. Co., 27 La. Ann. 113. Or to receive notice of cancellation. Body *v.* Hartford F. Ins. Co., 63 Wis. 157. Broadwater *v.* Lion F. Ins. Co., 34 Minn. 465.

Notice to a mere procuring agent will not terminate the policy. Hermann *v.* Niagara F. Ins. Co., 100 N. Y. 411. Parol evidence of custom would be inadmissible. Grace *v.* American Cent. Ins. Co., 109 U. S. 283.

In *Alabama*, it has been held that even though the policy provides that

Where the minds of the parties have met on rescission, tender or other minor formalities prescribed by the policy are deemed to have been waived.[1]

A temporary insurance contract upon an agent's intermediary receipt, reciting that it is subject to the insurer's approval to be notified to the insured, may be meanwhile canceled on notice of disapproval.[2]

Equity will order cancellation of a policy that is void for lack of interest in the assured,[3] or for fraud in effecting it.[4] But in

notice of cancellation may be given to the person who procured the insurance, this would not apply to one who acted for both parties in procuring and issuing the policy. Insurance Companies *v.* Raden, 87 Ala. 311.

In *Illinois* it has been held that under a clause that the broker effecting the insurance shall be deemed the agent of the insured, notice to the broker to cancel is notice to the insured. Newark F. Ins. Co. *v.* Sammons, 11 Ill. App. 230.

Otherwise in *Indiana*. Indiana Ins. Co. *v.* Hartwell, 100 Ind. 566.

A obtained five policies, one in the S and four in the X company, paying to B, whom he had employed to obtain them, sufficient to pay the premiums on three, with which C, whom B employed to get the policies, paid the premiums on three of the X policies. A, on being asked by B for the balance, returned two of the X policies, neither A nor B knowing which had been paid. B ordered the two to be canceled, but C discovering they were two of the paid ones, reported to the S that A had refused to pay, and had returned two policies by mistake. C promised to exchange, and requested D, who was authorized by the S to cancel policies, to mark off the one issued by the S, which D assented to. A on being asked for the two unpaid policies, promised to get them and give them to C and pay the premium for the time they had run if C would deliver back the two paid policies. Next day the insured goods were destroyed by fire. *Held*, that the S policy had been rescinded. Von Wien *v.* Scottish Union, etc., Ins. Co., 118 N. Y. 94.

Where a policy on stocking machinery was terminable on notice "to the person who may have procured this insurance" notice to a broker who procured the "binding slip" (for temporary insurance pending issuance) was held sufficient. Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454.

1. Where a policy on theater properties was terminable on notice "and on refunding or tendering a ratable proportion of the premium for the unexpired term," and the assured, on being notified by the local agent of the company's direction to cancel the policy, proceeded to negotiate for other insurance, without demanding the refunding or tender, this was held to preclude a denial of rescission. Hopkins *v.* Phœnix Ins. Co., 78 Iowa 344. *Compare* Kirby *v.* Phœnix Ins. Co., 13 Lea (Tenn.) 340; Hillock *v.* Traders' Ins. Co., 54 Mich. 531.

2. Goodfellow *v.* Times, etc., Assur. Co., 17 U. C. Q. B. 411.

But in such case the conditions prescribed in the policy for cancellation must be strictly complied with. Landis *v.* Home Mut. F. & M. Ins. Co., 56 Mo. 598.

An interim receipt recited that one had paid a certain sum for a three months' insurance, subject to the approval of the directors, and that the property was to be held insured for thirty days from date "unless notified to the contrary," the insurance to be subject to all the conditions in "the printed form of policy in use by the company at the date hereof." One of these conditions made the insurance terminable by the company "by giving ten days' notice to that effect, and by repaying a ratable portion of the premium for the unexpired term." *Held*, that the interim insurance could not be rescinded without such notice and repayment. Grant *v.* Reliance Mut. F. Ins. Co., 44 U. C. Q. B. 229.

3. Goddart *v.* Garrett, 2 Vern. 269.

4. Fenn *v.* Craig, 3 Y. & C. 216.

But equity will not cancel a life policy simply because the assured has become intemperate; he may reform and outlive the expectation. Connecticut L. Ins. Co. *v.* Bear, 26 Fed. Rep. 582.

As to circumstances insufficient to justify rescission of the contract upon

case of a paid-up policy, or of a surrender of one to obtain another, a court of equity has held it sufficient for a rescission that a desire therefor was expressed within the term, without dissent, and the old policy delivered after expiration of the term.[1]

VIII. Settlements and Executive Returns.—A marriage settlement, a composition in bankruptcy, an official report of an executor, administrator, guardian, or lunacy committee, an executive return of a sheriff, constable, or marshal, may be set aside by the application of principles stated above (if the amendment or other adjustment be impracticable) for mistake, fraud or disability.[2]

IX. How Effected—1. Mutual Consent.—While a valid executed contract cannot be discharged by a simple agreement, but only by performance, by release under seal, or by an accord and satisfaction,[3] one that is executory, that is, one that has not been

accident insurance ticket, see Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

Where one's life is insured for the sole use of his wife, payable to her, if living, in thirty days after proof of his death, a cancellation on his fraudulent representation that he is dead, does not affect her rights. Knapp *v.* Homeopathic Mut. L. Ins. Co., 117 U. S. 411.

1. Train *v.* Holland Purchase Ins. Co., 68 N. Y. 208; Morrison *v.* Am. Pop. L. Ins. Co. (U. S. C. Ct.), 5 Ins. L. J. 752. *Compare* Morrison *v.* Ins. Co. of North America, 64 N. H. 137; Farmers' Mut. Ins. Co. *v.* Wenger, 90 Pa. St. 220.

2. See Marriage Settlements, vol. 14, pp. 543, 546, 549; Composition with Creditors, vol. 3, p. 397; Bankruptcy, vol. 2, p. 86; Executors and Administrators, vol. 7, p. 445; Guardian and Ward, vol. 9, p. 144; Executions, vol. 7, p. 156; Sheriff's Sales; Master in Equity, vol. 14, pp. 944, 945.

A compromise settlement amounting to an accord and satisfaction cannot be rescinded without restoring the amount received thereunder. Bisbee *v.* Ham, 47 Me. 543; Lee *v.* Lancashire, etc., R. Co., L. R., 6 Ch. 527; McMichael *v.* Kilmer, 76 N. Y. 36.

Where a husband, to carry out a verbal promise made before marriage, executed an indenture settling large property acquired by the marriage, to the sole and separate use of his wife, the fact of his prior indebtedness was not conclusive of fraud on his creditors. Lloyd *v.* Fulton, 91 U. S. 479. *Compare* Van Wyck *v.* Seward, 18 Wend. (N. Y.) 375; Miller *v.* Wilson, 15 Ohio 108; Peaslee *v.* Peaslee, 147 Mass. 171.

A marriage settlement between A, a Protestant orphan, and B, a Catholic gentleman, to which A's uncle, C, was a party, and part of the subject thereof was two sums of money of A, one secured by C's bond, the other by B's, stipulated that if the marriage should not be solemnized within a year the trustees should become possessed of the moneys in trust for her, her executors, etc., and pay or assign the same accordingly. The marriage never took place. After C's death his bond was found with the words "Canceled, marriage never having taken place," written across its face. *Held*, that A was not entitled as *cestui* of the bond. Mitford *v.* Reynolds, 16 Sim. 130.

3. As to the rescission of executed contracts generally, see Equity, vol. 6, p. 720; Release, vol. 19, p. 739. "The remedy by cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with setting up the illegality to defeat a recovery at law, and thus to get rid of the contract as a binding obligation. The parties are left undisturbed as their property rights." 2 Pom. Eq. Jur. § 940.

In an action by a married woman to annul a deed and enjoin the collection of a note, made without duress or undue influence, for the purpose of securing payment of her insolvent husband's debts, relieving her father, one of his sureties, from liability, and procuring the dismissal of a prosecution against her husband for larceny, it was held, that as to the deed, neither inadequacy of consideration or the illegality of

acted upon, may be discharged by an agreement of the parties that it shall no longer bind either of them.[1] The consideration on the part of each is the other's renunciation; the agreement

the agreement in regard to the criminal prosecution, afforded ground for rescission, it being an executed contract and the parties *in pari delicto*. Booker *v.* Wugo, 29 S. Car. 116.

1. Bishop on Contracts, § 812; Parsons on Contracts (7th ed.), 812; Johnson *v.* Reed, 9 Mass. 78; 4 Am. Dec. 36; Ward *v.* Walton, 4 Ind. 75; Mills *v.* Riley, 7 Ind. 137; Babcock *v.* Huntington, 9 Ala. 869; Borum *v.* Garland, 8 Ala. 452; Cooper *v.* McIlwain, 58 Ala. 296; Phelps *v.* Seely, 22 Gratt. (Va.) 573; Green *v.* Wells, 2 Cal. 584; Beach *v.* Covillard, 4 Cal. 315; Moore *v.* Shenk, 3 Pa. St. 13; Lauer *v.* Lee, 42 Pa. St. 165; Blood *v.* Enos, 12 Vt. 625; 36 Am. Dec. 363; Hopkins *v.* Sickles, Wright (Ohio) 376; Gilbert *v.* Sanderson, 56 Iowa 349; 41 Am. Rep. 103; Townsend *v.* Empire, etc., Co., 6 Duer (N. Y.) 208; Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Guthrie *v.* Thompson, 1 Oreg. 353; Collyer *v.* Moulton, 9 R. I. 90; 98 Am. Dec. 370; Gatlin *v.* Wilcox, 26 Ark. 309; Buel *v.* Miller, 4 N. H. 196; Waugh *v.* Blevins, 68 N. Car. 167; Natchez *v.* Minor, 9 Smed. & M. (Miss.) 544; 48 Am. Dec. 727; Forbes *v.* Smiley, 56 Me. 174; Chouteau *v.* Jupiter Iron Works, 94 Mo. 388; Mathewson *v.* Lydiate, 1 Cro. & K. B. 546; Gorman *v.* Salisbury, 4 Vern. 240; Coles *v.* Trecothick, 9 Ves. 234, 250; Stead *v.* Dawber, 10 A. & E. 57; 37 E. C. L. 40.

Where a written contract is rescinded by a parol agreement, evidence of such rescission must be clear and positive. Falls *v.* Carpenter, 1 Dev. & B. Eq. (N. Car.) 237; 28 Am. Dec. 592.

A rescission of an agreement requires proof of an actual agreement to rescind. Rockcliffe *v.* Pearce, 1 F. & F. 300.

In *New York*, an executory parol contract fully carried out, discharges a former sealed contract for which it was substituted. McCreery *v.* Day, 119 N. Y. 1.

In *Illinois*, a sealed contract to lease definite ground for freight purposes could not by parol be extended to other ground. Illinois Cent. R. Co. *v.* Baltimore, etc., R. Co., 23 Ill. App. 531.

In *Minnesota*, parties to a sealed executory contract may modify it by parol if they have executed it as modified. McClay *v.* Gluck, 41 Minn. 193.

In *Connecticut*, a written construction contract may be abrogated by parol directions, so far as inconsistent therewith, obeyed by the contractor. West Haven Water Co. *v.* Redfield, 58 Conn. 39.

Where one party to a contract applies for a rescission by mutual consent, such application does not amount to rescission. Picot *v.* Douglas, 46 Mo. 497. Nor will proof that negotiations were being carried on for the abandonment of a contract be sufficient to set up a rescission. Chadbourne *v.* Davis, 9 Colo. 581; Murray *v.* Harway, 56 N. Y. 337.

An agreement for rescission by parties to a contract implies a total rescission. Thompson *v.* Lyons, 54 N. Y. Super. Ct. 101. But in Menne *v.* Neumeister, 25 Mo. App. 300, it was held that, where some of the items in a building contract were omitted by consent of the parties, it does not amount to a rescission of the entire contract, the residue of which will remain in full force. See White *v.* Soto, 82 Cal. 654; also McFadden *v.* O'Donnell, 18 Cal. 160, where it was held that parties may rescind provisions in a parol contract by mutual consent.

Where there is an agreement to rescind a contract at some future time unless certain conditions are fulfilled, either party to the contract, if he so desires, may waive any advantage he may have under such agreement, if the other consents, and comply with the terms of the original contract. Echols *v.* Butler, 28 Miss. 114.

The validity of a contract may be presumed from an offer of mutual rescission, and the refusal of such offer leaves the parties in the same relation as before. Gillepsie *v.* Battle, 5 Ala. 276.

Where a contract is rescinded by mutual consent, which was accompanied by a settlement, there can be no recovery for a breach thereof. Grannemann *v.* Kloepper, 24 Ill. App. 277.

In Reed *v.* Hayt, 109 N. Y. 659, the defendant failed to pay the purchase money for stock, as stipulated in the contract of sale. At the request of the

must be mutual and not one's mere waiver of rights.[1] The mutual consent necessary to the rescission of the contract need not in all cases be express, but may be implied from the conduct

defendant, an option was given him to take the shares which were still undelivered upon the payment of the money which was due under the contract. An option was also given, at the request of the defendant, to a third person to receive those shares, upon payment by such third person of a certain sum, which was to be applied to the defendant's debt. The options did not constitute an abandonment or rescission of the contract by mutual consent of the parties.

Page *v.* Summers, 70 Cal. 121, arose out of an agreement stipulating for the prospecting and locating of mining claims for the benefit of all the parties thereto. Where such agreement was rescinded by mutual consent, neither party was bound to perfect locations already commenced in pursuance of the agreement; and subsequent locations by the same parties, covering the same ground were not to be held in trust for the others.

B engaged to let land to A on building leases, and to lend him £4,000 to assist him in the erection of twenty houses, the money to be repaid by June, 1828. A agreed to build the houses, to convey them as security for the loan, and repay the money. When six houses were built, and £1,168 had been advanced, B requested A not to go on with the other fourteen houses; A desisted. *Held*, that, after June, 1828, B might recover the £1,168 as money lent; and that it was not necessary to sue on the agreement, which was rescinded by consent. James *v.* Cotton, 7 Bing. 266.

In the case of an agreement under seal to withdraw an action in court, one party to the action cannot rescind. Hutchings *v.* Buck, 32 Me. 277.

When a contract is rescinded by mutual agreement, such rescission forms a consideration for a new promise whereby one party is to account for all moneys he has received under the contract. Cutter *v.* Cochrane, 116 Mass. 408.

Contract for Benefit of Third Person.— In case of a contract, by the terms of which a third party is to receive some benefit, rescission cannot be effected by mutual consent of the parties without the consent also of such third party. Thompson *v.* Parker, 83 Ind. 96; Cucullu *v.* Walker, 16 La. Ann. 198. See also Attorney-Gen'l *v.* Purmort, 5 Paige (N. Y.) 620. But if the third party has not accepted, the parties may rescind. Jordan *v.* Laverty, 53 N. J. L. 15. See Hill *v.* Gomme, 8 L. J. N. S. Ch. 258.

A had an endowment policy issued payable to B, to whom he was betrothed, and deposited it with C, but afterwards, without B's knowledge or consent, retook it, and surrendered it to the insurance company, who canceled it, and issued one payable to D, as surety for A's debt. After D had paid one premium, A died. It was held that B was entitled to the avails, the surrender of the former policy being consideration for issuance of the last; and equity would relieve her. Lemon *v.* Phœnix Mut. L. Ins. Co., 38 Conn. 294.

1. Morrill *v.* Colehour, 82 Ill. 618; Kent *v.* Reynolds, 8 Hun (N. Y.) 559; McCreery *v.* Day, 6 N. Y. S. 49; Kelly *v.* Bliss, 54 Wis. 187; Whittaker *v.* Fox, 14 W. R. 192.

A rescission of a contract can only be by mutual consent, and any expression of wish to rescind uttered by one party, and not communicated to the other, is immaterial. Heinckey *v.* Earle, 8 El. & Bl. 410. *E. g.*, where one claimed to have been exonerated from a breach of promise of marriage. Blood *v.* Enos, 12 Vt. 625.

Under the early common law, there was no remedy for a breach of an executory parol contract. Gilbert's Action of Debt, p. 363.

A, after contracting to deliver ice to B, was notified by B that B would not continue the contract, but would take ice at market prices, and A answered assenting to the rescission. *Held*, that subsequent deliveries of ice by A did not reinstate the contract. DeKlyn *v.* Silver Lake Ice Co., 58 N. Y. Super. Ct. 801.

In *Wisconsin*, the original consideration is considered to be imported into the oral agreement. Lynch *v.* Henry, 75 Wis. 631. But in *Illinois*, there must be a new consideration in order to alter a sealed executory contract by parol. Equitable L. Assur. Soc. *v.* Smith, 25 Ill. App. 471.

of the parties.[1] The same rules apply also to rescission of contracts of sale.[2]

2. By Act of Party.—Where a party to a contract has sufficient ground for rescinding it, he need not generally apply for relief to a court of equity;[3] rescission may be simply at law, where it is not necessary to ask for a judgment, but the effects of one are

1. Paul *v.* Meservey, 58 Me. 419; Fletcher *v.* Cole, 23 Vt. 114; Jones *v.* Neale, 2 Pat. & H. (Va.) 339; Wheedon *v.* Fiske, 50 N. H. 125; Wehrli *v.* Rehwoldt, 107 Ill. 60; Washabaugh *v.* Stauffer, 81½ Pa. St. 497; Jewell *v.* Reddington, 57 Iowa 92.

In Fine *v.* Rogers, 15 Mo. 315, Gamble, J., said: "That a parol contract may be rescinded by the parties, is a familiar principle of law, and that such rescission may be inferred from the acts of the parties, is equally clear; very slight circumstances will be sufficient to show the assent of a party when it is obviously for his interest that the contract should be terminated."

Such implication may arise where both parties are in default. Harris *v.* Bradley, 9 Ind. 166; see also Parmlee *v.* Buckley, 103 Ill. 115. Or when one party notifies the other of his inability to perform his part of the contract, whereupon the other may rescind, which amounts to rescission by mutual consent. Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286.

B, being about to erect seats for viewing a public funeral, entered into an agreement with A, a foreign agent, to make the scheme known abroad and dispose of tickets for the seats. A was to be paid for his work and expenses by a percentage on the tickets which he sold. After he had incurred expenses, but before he had sold any tickets, B desired him not to dispose of them, as he would sell them himself. A, accordingly, sent all applicants for the tickets to him, and after the funeral delivered to B a bill for work done and expenses incurred. B paid the expenses, but refused to pay for the work. *Held*, that it was a question for the jury whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that A should be paid for the work actually done, as upon a *quantum meruit*. De Bernardy *v.* Harding, 8 Exch. 822.

The plaintiff agreed with the defendants in writing, signed by them, to sell and deliver, at a future day, goods above 10*l.* in value. Afterwards, and before breach, the time for performing the contract was verbally extended for a fortnight. *Held* (there being neither acceptance nor payment under the verbal arrangement), that the verbal arrangement was void, and could not rescind the written contract, which the plaintiff might therefore enforce. Noble *v.* Ward, 4 H. & C. 149; 1 L. R. Exch. 117.

2. Dount *v.* Harris, 1 Smed. & M. (Miss.) 185; 40 Am. Dec. 89; Tomlinson *v.* Roberts, 25 Conn. 477; 68 Am. Dec. 367; Folsum *v.* Cornell, 150 Mass. 115; Steen *v.* Harris, 81 Ga. 681; Smith *v.* Field, 5 T. R. 402. See Alden *v.* Thurber, 149 Mass. 271.

If the purchaser becomes dissatisfied with goods, and returns them at the instance of the vendor, receiving back the money paid, the transaction constitutes a rescission of the contract, which will prevent the plaintiff from suing afterward for breach of contract. Alden *v.* Thurber, 149 Mass. 271.

So, where the seller resumes possession of goods unpaid for, with the concurrence of the buyer, a mutual rescission is presumed. Sloan *v.* Van Wycke, 4 Abb. App. Dec. (N. Y.) 250. But not where the seller forcibly repossesses himself of his goods, and notifies the buyer that he will resell at the latter's risk. Page *v.* Cowasjee, L. R., 1 P. C. 127; Stephens *v.* Wilkinson, 2 B. & Ad. 320; 22 E. C. L. 86.

Where a seller of goods, upon the buyer's refusal to accept them, requested the buyer to sell them for him, which the buyer agreed to do, if he could, but did not, it was held that the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under ignorance of the law, and the impression that his remedy was gone. Gommery *v.* Bond, 3 M. & S. 378.

3. See *infra*, this title, *In Equity*.

obtained indirectly.[1] This rescission at law may be effected on the part of him who has the right, by simply notifying the other party of his intention,[2] and such notice need not always be express, but may be constructive, as, for example, where the party

1. "The rescission at law does not require a judgment of rescission or cancellation. It would not be in accord with the course of procedure in the common-law courts." Bishop on Cont., § 831.

If the parties to a sale once completed by delivery and without fraud, agree to rescind the sale, the same formalities of delivery are necessary as against creditors of the vendee as were necessary to pass the property in the first instance to him. Miller *v.* Smith, 1 Mason (U. S.) 437; Gleason *v.* Drew, 9 Me. 81.

To the report of the case of Metropolitan El. R. Co. *v.* Manhattan R. Co., 14 Abb. N. Cas. (N. Y.) 102, is appended a note on the rescission of contracts, from which we quote as follows: "It is elementary law that a party defrauded by a contract for the sale of chattels, and in some cases of land, has at law his election either to sue for the damages suffered by the fraud, or to treat the contract as rescinded, and recover in an appropriate action the consideration paid by him, and that he can if suing on the contract set up the fraud as a defense. The legal judgment in such a case proceeds upon the assumption that one of the parties had himself rescinded the contract or conveyance prior to the suit and that he was justified in doing so. See Pom. Eq. Jur., § 110, n. The remedy of cancellation is not expressly asked for as in an equity action, but its effects are obtained indirectly. The action of assumpsit, which in a majority of cases will be the one adopted, has for this reason been likened to a bill in equity in its spirit and object. Lockwood *v.* Kelsea, 41 N. H. 185; Moore *v.* Mandlebaum, 8 Mich. 433; Wright *v.* Butler, 6 Wend. (N. Y.) 284."

One of several joint contractors cannot rescind the contract unless the others assent to it. Brewster *v.* Wooster, 9 N. Y. Supp. 312. Nor can a contract be rescinded by husband alone when he and his wife are united as one party. Spencer *v.* St. Clair, 57 N. H. 9.

2. McKay *v.* Carrington, 1 McLean (U. S.) 50; Brashier *v.* Gratz, 6 Wheat. (U. S.) 528; Henderson *v.* Hicks, 58 Cal. 364; De Gellert *v.* Poole, 2 N. Y. Supp. 651; Jay *v.* DeGroot, 28 How. Pr. (N. Y.) 107; Mayor, etc., of N. Y. *v.* Moore, 52 Hun (N. Y.) 139; Ackerman *v.* Voorhis, 33 N. Y. Super. Ct. 487; Textor *v.* Hutchings, 62 Md. 150; Carney *v.* Newberry, 24 Ill. 203; Ireland *v.* Dick (Pa. 1891), 18 Atl. Rep. 735; Hatton *v.* Johnson, 83 Pa. St. 219; Mullin *v.* Bloomer, 11 Iowa 360; Storr *v.* Slavik, 33 Ill. App. 140; Parmlee *v.* Adolph, 28 Ohio St. 10.

Renunciation by one party does not amount to rescission unless the other party accept and treat the contract as broken. Plumb *v.* Taylor, 27 Ill. App. 238. See also in case of a contract with a town. Allen *v.* Taunton, 19 Pick. (Mass.) 485.

In case of rescission by notice, when it is stipulated for in the contract, the notice must be brought home to the party. DeGellert *v.* Poole, 2 N. Y. Supp. 651; Hooper *v.* Taylor, 4 E. D. Smith (N. Y.) 486. And service of such notice may be made by leaving it at the house of the party with some person of mature age. Mayor, etc., N. Y. *v.* Moore, 52 Hun (N. Y.) 139.

If it is provided in the contract that it may be rescinded by giving notice and repaying the money received, the party who desires to rescind can do so in no other way. McKay *v.* Carrington, 1 McLean (U. S.) 50. See also Davis *v.* Parrish, Litt. Sel. Cas. (Ky.) 153; 12 Am. Dec. 287.

In Patrick *v.* Richmond, etc., R. Co., 93 N. Car. 422, it was held that where a contract contained a stipulation to the effect that the same could be rescinded by a written notice continuing for thirty days, such notice after being given could be itself rescinded before the expiration of that time and the contract remain in force.

A party wishing to rescind should give clear notice, unless the contract dispenses with it, or it becomes unnecessary from the conduct of the other party. Hennesy *v.* Bacon, 137 U. S. 78. See National Bank, etc., Co. *v.* Dunn, 106 Ind. 110. And so the necessity of giving notice is done away with unless the party rescinding has received some benefit or advantage under the contract which must be surrendered. Ripley *v.* Hazelton, 3 Daly (N. Y.) 329.

seeking to rescind institutes legal proceedings against the other to recover back the consideration of the contract;[1] so, there may

A contract between two railroad companies whereby one has the use of the depots and tracks of the other at a fixed rate of compensation, may be rescinded by either party at any time upon giving reasonable notice, where there is no provision in the contract as to its duration. Chattanooga, etc., R. Co. *v.* Cincinnati, etc., R. Co., 44 Fed. Rep. 456; and so of a contract between an express company and a shipper, by the terms of which the latter is allowed to ship jugs of liquor unboxed, for which privilege he relieves the company from any liability for damage not arising from gross neglect. Vicksburg Liquor, etc., Co. *v.* U. S. Express Co., 68 Miss. 149. Likewise where a wharfinger was employed by a merchant to receive all his goods, the merchant could rescind at any time, the contract not being for a fixed period. Butler *v.* Smith, 35 Miss. 457. So where A and B executed a written agreement by which B agreed to give "during the term of not exceeding three years" his exclusive time and skill to the business and not to connect himself during that period with any other person in the same business, and A agreed to pay him $30 per week as compensation, the court held that A could terminate the contract at any time by giving reasonable notice. Harper *v.* Hassard, 113 Mass. 187.

But generally in order to effect rescission of a contract there must be some positive act by the party wishing to rescind, sufficient to show his intention. Mullen *v.* Bloomer, 11 Iowa 360.

If the father of an illegitimate child has consented to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to discontinue the payment of such annual sum. Cameron *v.* Baker, 1 C. & P. 268; Nichols *v.* Allen, 3 C. & P. 36. See Mortimore *v.* Wright, 6 M. & W. 482.

In *Nevada* notice given of rescission of a contract on Sunday may be valid. Pence *v.* Langdon, 99 U. S. 578.

As to time of giving notice see *infra*, this title, *Duty of Party Rescinding.*

1. Moore *v.* Rogers, 19 Ill. 347; Graham *v.* Halloway, 44 Ill. 385; Howard *v.* Hunt, 57 N. H. 467; Skellman Hardware Co. *v.* Davis, 53 N. J. L. 144.

In Kuhns *v.* Gates, 92 Ind. 66, a colt was delivered to a party under agreement that upon the approval of a third party it should become the property of the person to whom it was delivered. Afterwards such approval was given, but the other party took possession of the colt, whereupon he was sued for its board; but the suit was dismissed before trial. The court held that this was not a conclusive evidence of rescission on the part of the person instituting the suit, nor did it deprive him of his right to bring replevin against a subsequent purchaser.

Where a party employed by a person who originally carried on the business alone, but subsequently formed a partnership with another, continued to work for the firm, a suit by him against the original partner does not alone amount to a rescission of the old contract and substitution of another. Tilfield *v.* Adams, 3 Iowa 487.

The plaintiff, by bringing an action for damage because he was induced by fraudulent representations to enter a contract, elects to affirm such contract, and cannot thereafter maintain a suit in equity for rescission. Wheeler *v.* Dunn, 13 Colo. 428. So by bringing an action for fraud and deceit in being induced to take a lease. Stevens *v.* Pierce, 151 Mass. 207.

A seller brought replevin, his affidavit covering all the items of goods sold. He then brought an action for the price, alleging that the disaffirmance extended only to the last two items, the only portion he had been able to retake; but it appeared that he did not know what goods were in the defendant's possession, and had seized all he could find. *Held*, that he disaffirmed the entire contract of sale. Thompson *v.* Fuller (Supreme Ct.), 16 N. Y. Supp. 486.

A stipulation in a contract for the manufacture of barbed wire, that any judicial or legal interference shall act as a cancellation of the same, is not effective in bringing about cancellation by reason of the mere fact that an action was brought to enjoin a sale of the wire, but the defendant must give notice of his intent to rescind on account of such suit. Crescent Mfg. Co. *v.* Nelson Mfg. Co., 100 Mo. 325.

The rule that the institution of legal proceedings against the other party for the recovery of the consideration effects a rescission, applies equally to

be various other circumstances or acts of a party which will constitute rescission.[1]

contracts of sale; so held in T ompson *v.* Peck, 115 Ind. 512; Ma oney *v.* Gano (Ind. 1891), 27 N. E. Rep. 315. So in Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, it was held that where in an action for the price of grates sold by plaintiff to defendant, the defense set up was that the grates did not fulfill the warranty, a judgment against the plaintiff amounted to rescission of the contract.

The buyer of a machine instituted action after the return thereof against the vendor, and claimed a greater recovery than the price at which it was formerly purchased; the court held this to be for rescission of the contract and not for damages. Clark v. McGetchie, 49 Iowa 437.

Where an agent purchases goods for his principal, and afterwards rescinds the contract, the seller by bringing an action of trover against the agent, assents to such rescission. Bacon *v.* Sondley, 3 Strobh. (S. Car.) 542; 51 Am. Dec. 646.

1. Thus the making of an executed contract inconsistent with the terms of a prior executory contract which is illegal will rescind the latter. Lafferty *v.* Jelley, 22 Ind. 471.

A written contract was executed between a man and woman to live together as long as they should both live, to take care of each other, and to marry when they should see fit. The court held that a release by the woman of the promise of marriage and his marriage with another, rescinded the contract. Dean *v.* Skiff, 128 Mass. 174.

Where one has agreed to insure a building for a number of years and afterwards neglects to do so, the owner by assuming the duty of insuring rescinds the contract and releases the party from the duty of insuring after that time. Brant *v.* Gallup, 111 Ill. 487; 53 Am. Rep. 638.

A stipulated with B to furnish castings to B as B should order, and B stipulated to furnish fourteen tons of iron wherewith to make them. After some were delivered B denied liability to pay for any until all be received. A refused to deliver any more, and B replevied the unused iron. *Held*, that this was disaffirmance and disruption. State *v.* Davis, 53 N. J. L. 144.

In an action by A against B, to set aside a deed of A's ancestor, as executed when the grantor was of unsound mind, an allegation that B had taken possession against A's protest without showing the grounds of A's objection, was held not to be a sufficient averment of disaffirmance for maintenance of the suit. Ashmead *v.* Reynolds, 127 Ind. 441.

One's refusal to continue, because of alleged deceptive weights, has been held not to be an exercise of the right of cancellation reserved in the contract. Crescent Mfg. Co. *v.* N. O. Nelson Mfg. Co., 100 Mo. 325.

And where a purchaser became insolvent before the delivery of the goods and requested an adjustment to be made at the existing market price, the court held that such action amounted to a rescission precluding him from a subsequent tender and suit thereon. Follansbee *v.* Adams, 86 Ill. 13.

But after the consummation by delivery of a verbal contract of sale of chattels the subsequent change in the mode of payment or the acceptance of a bill of sale will not operate as a rescission of the contract. Sanders *v.* Stokes, 30 Ala. 432; McClure *v.* Williams, 5 Sneed (Tenn.) 718. See also Sparks *v.* Leavy, 19 Abb. Pr. (N. Y.) 364.

And where a buyer refuses to deliver up goods that he rejected on account of some defect, because he is mistaken as to a point of law, the subsequent notification of his willingness to do so does not amount to a rescission of the sale. Norton *v.* Dreyfuss, 51 N. Y. Sup. Ct. 191.

Where there was a contract to deliver goods in ten days' notice by buyer, such contract was not rescinded by the sale of the goods by the purchaser through brokers to the first seller at a price less than that of the original contract, the goods not having passed out of the actual possession of such seller. Warden *v.* Marshall, 99 Mass. 305.

An unaccepted offer to rescind or the declaration of the purchaser that he does not want the goods does not amount to a rescission or impair the title of the purchaser. Robinson *v.* Pogue, 86 Ala. 257.

And a request to suspend the performance of work, until the receipt of further instructions, within a fixed

3. In Equity.—The principle upon which a court of equity generally undertakes to rescind a deed or other contract is what is technically called *quia timet*,[1] that is, for fear that the instrument may be vexatiously used after the evidence to impeach it shall be lost, or that it may cast a cloud or suspicion over the title or interest of an innocent party,[2] and this especially where he may have had a defense thereto good in equity, but unavailable at law.[3]

time, is not a rescission of the contract, but at the expiration of the time the party notified may go on with the work. Gill Mfg. Co. *v.* Hurd, 18 Fed. Rep. 673. So a promise to "do or pay what is right," will not rescind an old contract for work where the party promising does so to induce the other party to begin his work which he has neglected because the pay is too small. Festerman *v.* Parker, 10 Ired. (N. Car.) 474.

Again where there is a parol promise which is substantially the same as a written one which is binding on the promisor and everything done in pursuance of the parol promise is no more than a fulfillment of the written one and there is no new consideration, the enforcement of the former cannot operate as a rescission of the latter. Hansbrough *v.* Peck, 5 Wall. (U. S.) 497.

Nor will a distinct agreement in regard to the subject-matter of the controversy be rescinded by an agreement to set aside an award. Sunplot *v.* Sunplot, 14 Iowa 449.

A party who has executed an agreement and delivered it cannot discharge himself from liability thereon by erasing his signature without the consent of the other parties. Natchez *v.* Minor, 9 Smed. & M. (Miss.) 544; 48 Am. Dec. 727.

In Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498, it was decided that the death of one party to an executory contract which does not require personal skill or attention will not rescind such contract, but the estate of the deceased will be liable for breach.

Where the actions of a party having the right to rescind are ambiguous and it cannot be clearly that he meant to rescind he will be deemed not to have done so. Bridge *v.* Penniman, 51 N. Y. Super. Ct. 183.

But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, *held* that the vendor could not recover the goods from the packer by action in trover. Smith *v.* Field, 5 T. R. 402.

If it is set up as a defense to an action to recover the price of goods sold, that the contract has been disaffirmed by intermediate acts of the seller, such acts must be shown to have been effective and to have extended to the entire contract. Kinney *v.* Kiernan, 2 Lans. (N. Y.) 492. See Hartt *v.* McNeil, 47 Mo. 526.

As to what has been held to constitute rescission in particular cases, see Second Nat. Bank *v.* Larson, 80 Wis. 469; Ballantyne *v.* Appleton, 82 Me. 570; Weber *v.* Leonard, 56 Hun (N. Y.) 364; Claflin *v.* Continental Jersey Works, 85 Ga. 27.

By Infant.—An infant sold land to A, and afterwards to B, falsely representing herself to be of age. After she arrived of age, she conveyed the land to A, who was an innocent purchaser. *Held*, that this was a sufficient disaffirmance of the sale to B. Vallandingham *v.* Johnson, 85 Ky. 288. *Compare* Rundle *v.* Spencer, 67 Mich. 189.

1. See EQUITY, vol. 6, p. 723; BILL QUIA TIMET, vol. 2, p. 258; BILL TO REMOVE CLOUDS, vol. 2, p. 298; Field *v.* Holbrook, 6 Duer (N. Y.) 597.

2. Pettit *v.* Shepherd, 5 Paige (N. Y.) 493; 28 Am. Dec. 437.

3. Reed *v.* Bank of Newburgh, 1 Paige (N. Y.) 215.

And, conversely, in a case free from fraud, equity will not rescind a conveyance on account of a defect in the title, but will leave the purchaser to his remedy at law, if he has not abandoned or restored possession, unless its retention is necessary to his reimbursement or indemnity. Thompson *v.* Sheppard, 85 Ala. 611. *Compare* Harris *v.* Piatt, 64 Mich. 105; Barth *v.* Denel, 11 Colo. 494.

In *Pennsylvania*, equity will take jurisdiction of a bill by a county to set aside a tax sale to the county, on the

While the aid of equity is sought most frequently where the contract relates to realty, yet, upon a proper case being made, equity will also rescind contracts relating to personal property.[1] The jurisdiction arises principally where the transaction is viti-

ground that one of the commissioners who made the sale was interested therein. Schuylkill Co. *v.* Petery, 129 Pa. St. 121.

In *Oregon*, equity will cancel a lease of an orchard to prevent irreparable damage to the lessor's fruit trees from insects, water spouts, etc. Anderson *v.* Hammon, 19 Oregon 446.

1. Bradbery *v.* Keas, 5 J. J. Marsh. (Ky.) 446.

In Bishop on Contracts, §§ 830, 831, it is said: "In cases within the equity jurisdiction—in most of which, not all, the party has a sort of concurrent remedy at law—he can apply to equity for a decree of rescission or cancellation. And as, while seeking equity, he must do equity, and the forms of equity procedure are flexible, the court will adjust the rights of the parties to the equities of the particular case. Commonly it is not necessary to resort to this method, and the rescission is simply at law."

"There is an important difference between the doctrine recognized in *England* as to the jurisdiction of courts of equity to entertain suits for the rescission and cancellation of contracts and the decisions of the American courts upon the same subject. . . . In *England* . . . it is settled that the special jurisdiction of courts of equity to order the cancellation of an instrument is not affected by the probability or practical certainty that the plaintiff in equity would have a good defense to an action on the instrument. 'He is entitled not only not to have the contract enforced against him, but to have it judicially annulled.' (Pollock on Cont. 519.) A different rule is adopted in this country. The great majority of cases hold that equity will only interfere when the remedy at law is not complete and adequate. In some States courts of equity decline in such a case to entertain a suit for rescission on the ground that the statutes of the State do not give them all the powers of the English court of chancery, but expressly limit their power to cases where the remedy at law is not complete and adequate. Jones *v.* Newhall, 115 Mass. 244; 15 Am. Rep. 97; Phoenix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616." Note to report of Metropolitan El. R. Co. *v.* Manhattan R. Co., 14 Abb. N. Cas. (N. Y.) 102.

In Travis' Appeal (Pa. 1887), 8 Atl. Rep. 601, it was said that a court of equity will not interfere to rescind an executed contract, particularly if the rights of third parties are involved, if there be a full and adequate remedy at law.

In Bellows *v.* Cheek, 20 Ark. 424, it was held that the rescission of a contract must be effected in the court of chancery and not of probate, where a party has the right to rescind but the circumstances arising out of it are complicated, upon a proceeding by one of the parties for an allowance against the estate of one of the deceased contracting parties for the purchase money.

Equity will only give relief to a party seeking its aid by rescission in case of an executed contract, where there has been accident, mistake or fraud in the procurement of the instrument or fraudulent use of it afterwards. Rowand *v.* Finney, 96 Pa. St. 192; Graham *v.* Pancoast, 30 Pa. St. 89; Rockafellow *v.* Baker, 41 Pa. St. 319; 80 Am. Dec. 624; Murray *v.* King, 7 Ired. Eq. (N. Car.) 19.

In Moore *v.* Brown, 15 Tex. 129, it was said that the action for rescission of contracts does not come within the purview of statutes regulating actions of trespass to try title, and is consequently not controlled by them.

A court of chancery will not take any action towards the rescission of a contract unless some substantial ground for such rescission is given, or unless the reasons or purposes of the transaction are shown. Scanlan *v.* Gillan, 5 Cal. 182.

In Fisher *v.* Shaw, 42 Me. 32, it was held that the equity jurisdiction of a court will not attach to the case of a contract by which a party agrees to do something for the benefit of another, or to pay a certain sum as liquidated damages for the omission, since there is a remedy at law.

In order to rescind or cancel a written instrument in equity, it must be shown that a necessity exists to prevent an irreparable injury which equity alone can avert. The mere fact that a

ated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation.[1]

X. Loss of Right—1. By Default of Party.—The right to rescind belongs only to the party who is himself without default. Thus, if one having sufficient ground therefor, wishes to avoid a contract, but has done some act which hinders performance by the other, or has failed in any way to perform his own part of the stipulations, his right is thereby lost to him.[2]

2. Waiver—*a.* AFFIRMANCE.—Although a party may have a valid and substantial ground for rescinding a contract, he may, by certain acts, waive the right. This may be done, first, by affirmance, express, or implied by any act of ratification, after knowledge of facts which entitle him to rescission.[3] Thus, if a

defense exists or that evidence may be lost is not sufficient. Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Venice *v.* Woodruff, 62 N. Y. 462; 20 Am. Rep. 495. See also Allerton *v.* Belden, 49 N. Y. 373.

But it is held that equity will not rescind every contract of which it would not decree specific performance. Thompson *v.* Jackson, 3 Rand. (Va.) 504. Although it will generally do so. Kirby *v.* Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

If a court of equity is justified in declaring a contract rescinded it will generally order the instrument to be delivered up for cancellation. Wilson *v.* Getty, 57 Pa. St. 266.

Where contracts have been fairly entered into, equity will not apply strict technical rules of law and rescind them, especially if the ends of justice are thereby defeated. Galway *v.* Fullerton, 17 N. J. Eq. 389.

1. Adams Eq., p. 174.

In Terry *v.* Horn, 59 Hun (N. Y.) 492, it was held that a suit in equity will not lie to rescind a contract obtained by duress, as the complainant has a perfect defense to an action at law to enforce the contract.

2. See *infra*, this title, *Duty of Party Rescinding;* Hughes *v.* Palmer, 19 C. B. N. S. 393; 115 E. C. L. 391; Malins *v.* Freeman, 6 Scott 187; Doe *v.* Bancks, 4 B. & Ad. 401; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Protho *v.* Smith, 6 Rich. Eq. (S. Car.) 324; Salmon *v.* Hoffman, 2 Cal. 138; 56 Am. Rep. 322; State *v.* McCauley, 15 Cal. 429; Leonard *v.* Smith, 80 Iowa 194; Prior *v.* Hunter, 31 Neb. 678; Piper *v.* Shoneker, 2 Grant (Pa.) 113.

The purchaser of a mare at auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price, and was casually told that the description was untrue. Nevertheless, he removed the mare to his own stables, and while being so removed, she ran away and injured herself severely, without any negligence on the purchaser's part. The description was, in fact, untrue, and on that ground the purchaser returned her to the seller within the specified time. *Held*, that since the purchaser had, in removing her, done no more than he was entitled to do under the contract, and since the injuries were not owing to any negligence on his part, he had not lost his right to rescind the contract, and could recover the price from the seller as money had and received. Head *v.* Tattersall, L. R., 7 Exch. 7.

3. Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458; Wheeler *v.* Dunn, 13 Colo. 428; Myers *v.* King, 48 Hun (N. Y.) 106; Bach *v.* Tuck, 126 N. Y. 53; Brinley *v.* Tibbetts, 7 Me. 70; Flagg *v.* Dryden, 7 Pick. (Mass.) 52; Gale Sulky Harrow Mfg. Co. *v.* Moore, 46 Kan. 324; Evans *v.* Montgomery, 50 Iowa 325; Ormes *v.* Beadel, 2 De G. F. & J. 333; Morrison *v.* Universal Marine Ins. Co., 21 W. R. 774.

An act done under a contract, which was valid in its inception, but which the party acting has a right to rescind, on the ground of forfeiture, will be a ratification or confirmation, though such party was not at the time of the act aware of his right to insist upon for-

feiture. Falls *v.* Carpenter, 1 Div. & B. Eq. (N. Car.) 237; 28 Am. Dec. 592.

A purchaser of bonds desiring to rescind his contract on the ground of false representation by a seller, should not, after knowledge of the fact, exchange the bonds for new ones issued by another corporation, it succeeding the one whose bonds he first bought, without the vendor's consent. If he does so he waives his right to rescind. Cohen *v.* Ellis, 52 Hun (N. Y.) 133.

Although a party may have objections to a contract, still, if he afterwards affirm it without being induced thereto by fear or duress, he can sustain no claim for rescission. Edwards *v.* Handley, Hard. (Ky.) 611.

A builder contracted to build a house within a given time, under conditions, one of which was that if the builder did not progress as the architect might consider necessary, he, the architect, might purchase such materials and employ such workmanship as he might consider necessary, and deduct the costs of the same from any moneys due to the contractor on account of the works. After a portion of the work had been done and paid for the architect refused to certify for further payments, on the ground of delay and the want of supply of proper materials. The builder's workmen not being paid, they became clamorous, and accompanied A to the architect's office, and A then, after remonstrating, signed an agreement, giving up the contract in consideration of 50*l.* then paid to him, and stipulating that the work should be paid for according to the valuation of an arbitrator named in the agreement. The arbitrator proceeded with the valuation, and was attended by A, but after the valuation was made, awarding A a less sum than he alleged to be proper, A filed a bill to set aside the agreement, as having been obtained by undue pressure. *Held*, that A had confirmed the agreement by acting upon it, and was therefore not entitled to relief. Ormes *v.* Beadel, 2 De G. F. & J. 333.

Where goods were sold and transferred by the vendee to the defendant, who knew at the time that forged notes had been given in payment for them, if the plaintiff had sold such notes for value to the vendee's wife pending the writ of replevin, such sale divested the plaintiff of his right to rescind the sale. Whitford *v.* Chace, 7 R. I. 322.

Continuing each month to receive benefits of a contract, though knowing the facts which were alleged to constitute a fraud for which it might be rescinded, takes away the right to rescind. Green *v.* Jackson, 66 Ga. 250. See Lockwood *v.* Fitts, 90 Ala. 150.

Where one had paid for a plantation a third more than its value, and had refused to accept the vendor's offer to release him from the bargain, he could not afterwards rescind. Martinez *v.* Moll, 46 Fed. Rep. 724.

In Davis *v.* Henry, 4 W. Va. 571, a party was induced by means of fraudulent representations to make a contract, and before discovering the same he made a second contract respecting the same subject-matter which annulled the first. Under such circumstances he was held not to have confirmed the first, but to have a right to rescind the second contract.

A's contract with a company to construct for it a bridge was made rescindable on one month's notice, A thereupon to be paid for all work done and material delivered, the company to take the working plant at a fair valuation to be determined by an arbitrator, and in case it should appear to the company's engineer "that the work does not progress with sufficient speed, or in a proper manner," the company could annul the contract, if it saw fit, and the unpaid part of the work done be forfeited. By an act of Congress regulating the construction, the original plan for the piers was rendered impracticable, and a new contract was entered into, according to the altered plan, describing each pier, but expressly providing that the work be done according to the original specifications. *Held*, that the company's right to annul on the engineer's report of insufficiency could be exercised without notice to A; that the object of the condition was merely for better guaranty of seasonable performance, and accordingly that a failure to annul within the time fixed for performance together with the acceptance of, and payment for, work done thereafter, was a waiver of the right to annul; but that A's seeking to recover for an alleged breach rendered the waiver no bar to the company's right to terminate the contract upon his refusing to complete the work within the proper period. Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303.

As to the effect of such stipulations on rescission, see O'Conner *v.* Hurley, 147 Mass. 145; Gayden *v.* Louisville,

vendee, upon the refusal of the vendor to accept his offer of return, when he has the right to rescind, takes the property and uses it as his own, he thereby loses such right.[1] Again, if one, after discovering fraud on the part of his vendee, accepts further security for the price, he waives his right to rescind.[2]

b. By Action at Law.—A party to a contract may waive his right to rescind, after it has accrued, by instituting an action to recover damages for the breach of the other,[3] or, in the case of

etc., R. Co., 39 La. Ann. 269; Trenwith *v.* Gilvery, 50 N. J. L. 18; Wright *v.* Dickinson, 67 Mich. 580.

A parol promise within the Statute of Frauds will not preclude a party from exercising the right to rescind a contract of sale. Hill *v.* Blake, 97 N. Y. 216; Clark *v.* Fey, 51 Hun (N. Y.) 639.

The right of a person dealing with a company to set aside (as against the company) a contract founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly; but cannot be easily waived by anything the person does or omits, while the falsehood of the misrepresentation remains doubtful. Bank of Hindustan China and Japan, *In re*, 42 L. J., Ch. 771.

Receipt of payment on the estimates does not estop a contractor from relief by rescission of a construction contract. If there has been an unreasonable refusal to grant him an extension of time, also obstructive conduct of the supervising engineer, indicating unfairness and prejudice, under stipulations imposing upon him the duties of arbitrator, this may be ground for interposition of a court of equity, as in case of misconduct of an umpire in an award. Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583.

Where a settler filed a bill to obtain the declaration of the court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect, held, that a subsequent deed executed by the settler, reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to his suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the court could not have upheld. Jarratt *v.* Aldam, 9 L. R. Eq. 463.

The mere effort on the part of the person defrauded to obtain payment for goods sold or to effect a compromise does not deprive him of his right to rescind unless he does some other act showing a positive intention to waive the right. Cortland Mfg. Co. *v.* Platt, 83 Mich. 419.

The alleged act of acquiescence depriving a party of his right to rescind must be plain and unequivocal, showing an election to retain the property after discovering the fraud. Tarkinson *v.* Purvis, 128 Ind. 182.

1. McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172; 56 Am. Dec. 561; Akerly *v.* Vilas, 21 Wis. 88; Grymes *v.* Saunders, 93 U. S. 55; Schiffer *v.* Dietz, 83 N. Y. 300.

But if the contract is affirmed while the party is ignorant of facts which would authorize rescission, he will not be prevented from afterwards rescinding. Pratt *v.* Philbrook, 41 Me. 132.

There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainee standing in a confidential relationship towards the donor or bargainer unless there is full knowledge on the part of the latter of all the facts and the rights arising out of them, and an absolute release from the undue influence by means of which the fraud was practiced. Moxon *v.* Payne, 43 L. J. Ch. 240.

But ignorance of the facts will not entitle him to repudiate if he retain any benefit derived from the fraudulent contract. Savage *v.* Canning, 16 W. R. 133. See *infra*, this title, *Duty to Place in Statu Quo.*

Where a party defrauded in a sale of land, pays several of the installments and then sells a portion of the land after he has discovered the fraud, he thereby waives his right to rescind. Bell *v.* Keepers, 39 Kan. 105. See also Crooks *v.* Nippolt, 44 Minn. 239.

2. Bridgford *v.* Adams, 45 Ark. 136. See Fraudulent Sales, vol. 8, p. 851.

3. Wheeler *v.* Dunn, 13 Colo. 428; Sanger *v.* Wood, 3 Johns. Ch. (N. Y.)

a contract of sale, to recover the price, when he has knowledge of the facts which give him such right.[1]

c. DELAY.—Unreasonable and inexcusable delay on the part of him to whom the right to rescind belongs will be deemed a waiver thereof.[2] The right accrues only after discovery of the

416; Nelson *v.* Carrington, 4 Munf. (Va.) 332; 6 Am. Dec. 519.

So held as to a lessee's action for fraud in inducing him to take the lease; and thus he could not afterwards recover for money paid out as lessee, as if he had rescinded. Stevens *v.* Pierce, 151 Mass. 207.

A contracted with B to manufacture paper for B, and, upon B's order, delivered it to C who had contracted to print a book thereon. A and C accepted from B in payment certain forged notes. A, on learning of B's fraud, sued B for the amount due on the contract. *Held*, that this was an affirmance precluding A from maintaining against C an action to recover the paper. Conrow *v.* Little, 115 N. Y. 387.

In an action on a note given for the price of a machine, a cross-complaint seeking cancellation of the note and alleging false representations by the plaintiff's agent that it would do good work, and that the plaintiff had threatened to bring suit on the two other notes given for the price, as soon as they mature, and that the three were executed without consideration, was held sufficient. Aultman *v.* Seichting, 126 Ind. 137.

1. Hanchett *v.* Riversdale Distillery Co., 15 Ill. App. 57; Nelson *v.* Carrington, 4 Munf. (Va.) 332; 6 Am. Dec. 519; O'Donald *v.* Constant, 82 Ind. 212; Conrow *v.* Little, 115 N. Y. 387.

But the right is not defeated if the suit is brought in ignorance of the fraud for which the plaintiff could have rescinded. Kraus *v.* Thompson, 30 Minn. 64; 44 Am. Rep. 182; Hays *v.* Midas, 104 N. Y. 602; Goodger *v.* Finn, 10 Mo. App. 226.

It was held in Crafts *v.* Belden, 99 Mass. 535, that where an assignee in insolvency, who brings suit against the buyer of goods which the debtor sold with a view to an unlawful preference, joins a count in contract for the price with a count in tort for conversion, he does not thereby waive his right to rescission when it appears that all the counts were intended as disaffirmance.

2. Fratt *v.* Fiske, 17 Cal. 380; Williams *v.* Mitchel, 87 Cal. 532; Herman *v.* Haffenegger, 54 Cal. 161; Cummins *v.* Lods, 1 McCrary (U. S.) 330; Jesup *v.* Illinois Cent. R. Co., 43 Fed. Rep. 483; Grymes *v.* Sanders, 93 U. S. 55; Sadler *v.* Robinson, 2 Stew. (Ala.) 520; Dent *v.* Long, 90 Ala. 172; Hunt *v.* Hardwick, 68 Ga. 100; Desha *v.* Robinson, 17 Ark. 228; Pintard *v.* Martin, 1 Smed. & M. Ch. (Miss.) 126; Ayres *v.* Mitchell, 3 Smed. & M. (Miss.) 683; DeArmand *v.* Phillips, Walk. (Mich.) 187; Carroll *v.* Rice, Walk. (Mich.) 373; Street *v.* Dow, Harr. (Mich.) 427; Wolverton *v.* McCabe, 81 Mich. 265; Gould *v.* Cayuga, etc., Nat. Bank, 21 Hun (N. Y.) 293; Howell *v.* Earp, 21 Hun (N. Y.) 393; Bruce *v.* Davenport, 1 Abb. App. (N. Y.) 233; Lawber *v.* Selden, 11 How. Pr. (N. Y.) 526; Hunt *v.* Singer, 1 Daly (N. Y.) 209; Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23; Kokomo Straw Board Co. *v.* Inman, 58 Hun (N. Y.) 603; Barr *v.* New York, etc., R. Co., 125 N. Y. 263; Oregon Pac. R. Co. *v.* Forrest (N. Y. 1891), 28 N. E. Rep. 137; Hammond *v.* Pennock, 61 N. Y. 145; Schultz *v.* Christman, 6 Mo. App. 338; Murdock *v.* Lewis, 26 Mo. App. 234; Williams *v.* Ketcham, 21 Wis. 432; Shepherd *v.* Fisher, 17 Ind. 229; Fisher *v.* Wilson, 18 Ind. 133; Greenwood *v.* Fenn (Ill. 1891), 26 N. E. Rep. 487; Perry *v.* Pearson, 135 Ill. 218; Wolf *v.* Dutzsch, 75 Ill. 205; Humbert *v.* Brisbane, 25 S. Car. 506; Conlan *v.* Roemer, 52 N. J. L. 53; Disbrow *v.* Secor, 58 Conn. 35; McDowell's Appeal, 123 Pa. St. 381; Hutchinson's Appeal (Pa. 1889), 16 Atl. Rep. 761; Blackman *v.* Stone, 3 Tenn. Ch. 370; Bowman *v.* Ayers (Idaho, 1889), 21 Pac. Rep. 405.

The same principle applies to rescission of contracts of sale. Jones *v.* Anderson, 82 Ala. 302; Young *v.* Arntze, 86 Ala. 116; Bailey *v.* Fox, 78 Cal. 389; Bulkley *v.* Morgan, 46 Conn. 393; Cohen *v.* Pemberton, 53 Conn. 221; 55 Am. Rep. 101; Prickett *v.* McFadden, 8 Ill. App. 197; Nichols *v.* Ginbar, 20 Ill. 285; Osborn *v.* Stanley, 35 Ill. 102; Hall *v.* Fullerton, 69 Ill. 448; Frederick *v.* Case, 28 Ill. App. 215; Lapp *v.* Ryan, 23 Mo. App. 436; Jagers *v.* Griffin, 43 Miss. 134; Morgan

v. McKee, 77 Pa. St. 228; Esty *v.* Read, 29 Vt. 278; Hoadley *v.* House, 32 Vt. 179; 76 Am. Dec. 167; Boughton *v.* Standish, 48 Vt. 594; Gridley *v.* Globe Tobacco Co., 71 Mich. 528; De Armand *v.* Phillips, Walk. (Mich.) 186; Wilber *v.* Flood, 16 Mich. 40; 93 Am. Dec. 203; Childs *v.* O'Donnell, 84 Mich. 533; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83; Upton Mfg. Co. *v.* Huiske, 69 Iowa 557; Cookingham *v.* Dusa, 41 Kan. 229; Fowler *v.* Williams, 2 Brev. (S. Car.) 304; 4 Am. Dec. 579; Brantley *v.* Thomas, 22 Tex. 270; 73 Am. Dec. 264; Venezuela R. Co. *v.* Kisch, L. R., 2 H. L. Cas. 99.

Thus it was said in Johnson *v.* Jones, 13 Smed. & M. (Miss.) 580, that where a contract is sought to be rescinded, there must be no unnecessary delay, since the duty of a court of equity is to restore the parties in *statu quo* as nearly as possible, and if, by the action of one of the parties, this cannot be done, equity will not rescind in his favor.

In case of a bill for specific performance of a contract, the petition of the defendants for rescission must be refused where they have delayed to elect to rescind until after filing their answer and cross-bill. Davis *v.* Read, 37 Fed. Rep. 418.

But where the subject-matter of a contract of sale was an article which required skill in the construction and arrangement of its parts, the purchaser was allowed a reasonable time after delivery of the same to test its adaptability to the purpose for which it was intended. Boothby *v.* Scales, 27 Wis. 626; *compare* Woodle *v.* Whitney, 23 Wis. 55; 99 Am. Dec. 102.

So the purchaser of a horse has a right to keep him a sufficient time to discover whether or not he is sound as represented, or whether the unsoundness will seriously affect his value, and an offer to return after such detention is seasonable. Gridley *v.* Globe Tobacco Co., 71 Mich. 528; *compare* Hart *v.* Haight, 57 Hun (N. Y.) 581.

Likewise where goods are bought by sample and appear to correspond thereto, a reasonable delay in examining them will be allowed, but where they are supposed not to correspond, the vendee must use as great promptness in examining them and rescinding the sale as the ordinary course of business will permit. Farrington *v.* Smith, 77 Mich. 550; *compare* Couston *v.* Chapman, L. R., 2 H. L. Cas. 250.

Again, if the purchaser do not affirm the contract after his discovery of the fraud, delay in order to deliberate will not deprive him of the right to rescind. Whitcomb *v.* Denio, 52 Vt. 382.

Where the seller was fraudulently induced to accept a worthless security, he is not precluded from rescinding the contract of sale because he delayed doing so after the discovery of the fraud. Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277.

Where the buyer of a machine used it nearly a whole year without offering to return it, he was not allowed to rescind on the ground that it did not work as warranted; Morgan *v.* Thetford, 3 Ill. App. 323; *compare* Clark *v.* Deering, 29 Neb. 293; but where a purchaser used a machine two years, it being shown that he did so in consequence of a continued effort by himself and by the seller to make it work well during the first season, and that at the end of the first season the agent of the seller agreed in writing to make it work satisfactorily the second season if he would keep it, and this could not be done, the purchaser was allowed to return the machine, thereby rescinding the contract. Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394; *compare* Aultman *v.* McFallon, 11 Fed. Rep. 836.

And in the case of an insurance policy so obscure in terms that only an expert could understand it, delay cannot be charged against one who takes it and afterwards seeks relief in equity. Knauer *v.* Globe Mut. L. Ins. Co., 48 N. Y. Super. Ct. 454.

The lessee of a coal mine cannot have the lease rescinded in equity where it has been acted upon for twenty months upon facts known to him for thirty years. Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476.

In 1841, two sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances that the transaction could not be sustained if complained of in due time. One sister died in 1852 and the other in 1857, and the brother died in 1860. In the following year a bill was filed by the representative of the sisters to set aside the transaction. *Held*, that the plaintiff wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead, and which transaction they all under-

facts which authorize it, and a person is not required to exert himself to make such discovery, but only to be prompt in taking advantage of it after it is made.[1] If a certain time is fixed by the contract, within which it may be rescinded, failure to rescind within that time waives the right.[2]

The question as to what is a reasonable time in such cases depends largely upon circumstances, and is generally a mixed question of law and fact for the jury,[3] though the delay may be so long

stood at the time. Mackintosh *v.* Stuart, 36 Beav. 21.

The *English* rule regarding lapse of time is stated as follows: "When it would be practically unjust to give a remedy either because a party has by his conduct done what might fairly be considered a waiver of it, or where by his conduct or neglect he has, though not perhaps waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material." Lindsay Petroleum Co. *v.* Hurd, L. R., 5 P. C. 221.

1. Lane *v.* Latimer, 41 Ga. 171; Whitcomb *v.* Denio, 52 Vt. 382; Baker *v.* Lever, 67 N. Y. 304; 23 Am. Rep. 117.

Upon the examination of goods bought by defendant he discovered a defect which the seller corrected when requested to do so. A portion of the goods were then sold and after several weeks another examination was made when a defect was discovered which could have been easily ascertained. Upon proof that he had no reasonable excuse for delaying the second examination, it was held that he had waived his right to rescind on account of the defect. Winelander *v.* Jones, 77 Iowa 401.

Where A seeks rescission of his contract with B, and establishes fraud, B, alleging laches in A, must show when A discovered the truth, and that A knowingly forbore to assert his right. Lindsay Petroleum Co. *v.* Hurd, L. R., 5 P. C. 221. *Compare* Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583.

2. Wilson *v.* Davis, 5 W. & S. (Pa.) 521; Hinderson Bridge Co. *v.* O'Connor, 88 Ky. 303.

Where a windmill was ordered and an ageement made that the vendor should be notified of any defect within thirty days after its erection, one defect was complained of within that time and corrected, but the contract could not be rescinded on the ground that there was a defect which was not complained of until after the expiration of the thirty days. Phelps, etc., Windmill Co. *v.* Piercy, 41 Kan. 763.

3. Andrews *v.* Hensler, 6 Wall. (U. S.) 254; Collins *v.* Townsend, 58 Cal. 608; Morgan *v.* McKee, 77 Pa. St. 228; Rothchild *v.* Rowe, 44 Vt. 389; Whitcomb *v.* Denio, 52 Vt. 382; Chamberlin *v.* Fuller, 59 Vt. 247; Boothby *v.* Scales, 27 Wis. 626; Hill *v.* Hobart, 16 Me. 164.

Thus in one case a delay of six months was held not unreasonable. Marston *v.* Simpson, 54 Cal. 189. In another where the action was brought to rescind a contract between partners, delay of three months after discovery of the fraud did not defeat the right. Hasberg *v.* McCarthy, 127 N. Y. 655.

Where the purchaser of a yoke of oxen kept them five days after finding out the falsity of the seller's representations as to age, the rescission was not too late. Matteson *v.* Holt, 45 Vt. 336.

Upon an infant's purchase of a thrashing machine, a notice of disaffirmance given thirty-two days after his arrival of age, was within reasonable time. Leacox *v.* Griffith, 76 Iowa 89.

Where complainants were strangers and citizens of another State, and in the meantime yellow fever had broken out in the place where the vendors lived, an offer to return made after six months was held not too late after they learned of the vendor's want of title. Orendorff *v.* Tallman, 90 Ala. 441.

Again, where goods were sold under an agreement that the vendee might return them at the end of four months upon certain conditions, which he offered to do, but nearly two months were taken up in corresponding and negotiations, at the end of which time the goods were destroyed, it was

that the court will, as a matter of law, consider the offer to rescind too late.[1]

3. Intervention of Third Persons.—Loss of the right to rescind after it has once accrued, by reason of the intervention of the rights of third persons, arises most frequently where the contract is one of sale. In order for such intervention to be effective to preclude the right, the third persons must be *bona fide* purchasers or holders for value.[2] But this rule does not apply to general creditors of a fraudulent vendee who take possession by attachment or execution, or by assignment as security for a pre-exist-

held that the delay was not so unreasonable as to throw the loss on the vendor. Newburger *v.* Hoyt, 86 Ga. 508.

But where goods were sold upon condition as to kind and quality, the vendor should have been prompt in examining them and in notifying the vendor of his refusal to accept, and a delay of six weeks in doing so was held unreasonable and inexcusable. Rosenfield *v.* Swenson, 45 Minn. 190.

But where one, who was also a married woman when she executed a deed of conveyance of improved city property, waited forty years after the execution of such deed and five after her disability of coverture was removed, she was guilty of unreasonable delay and could not have the contract set aside. Amey *v.* Cockey, 73 Md. 297.

And so in the case of a marriage settlement, where both parties, having considerable property, and a general knowledge of the affairs of the other, agreed by the contract not to claim any part of the property of the other except as provided therein. After two years they separated, and sixteen years later, the wife, with a view to conveying lands in another State without the husband joining in the conveyance, had her copy of the contract recorded in that State. Twenty-four years after the marriage, her husband being dead, she sued to have the contract rescinded on the ground of misrepresentations, but it was held too late. Fargo *v.* Fargo, 58 Hun (N. Y.) 602.

For other instances of what has and what has not been held reasonable time, see Nunn *v.* Burger, 76 Ga. 705; MacIntyre *v.* Cotton States L. Ins. Co., 82 Ga. 478; Rosenfield *v.* Swenson, 45 Minn. 190.

1. Page *v.* McMillan, 41 Wis. 337; see Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Greene *v.* Dingley, 24 Me. 131; Flemming *v.* Weagley, 32 Ill. App. 183, where it was said that what constitutes laches is largely within the discretion of the chancellor who tries the case.

See LACHES, vol. 12, p. 603; FRAUDULENT SALES, vol. 8, p. 846.

2. Cochran *v.* Stewart, 21 Minn. 435; Donaldson *v.* Farwell, 93 U. S. 631; Fechheimer *v.* Baum, 37 Fed. Rep. 167; Henshaw *v.* Bryant, 5 Ill. 97; Johnson *v.* O'Donnell, 75 Ga. 453; Nichols *v.* Michael, 23 N. Y. 264; 80 Am. Dec. 259; Bidault *v.* Wales, 20 Mo. 546; 64 Am. Dec. 205; Goodger *v.* Finn, 10 Mo. App. 226; Stewart *v.* Emerson, 52 N. H. 301; Noble *v.* Adams, 7 Taunt. 59; Bristol *v.* Wilsmore, 1 B. & C. 513; 8 E. C. L. 218; Morrison *v.* Universal Marine Ins. Co., 21 W. R. 774.

A vendee who has become insolvent cannot rescind the contract by agreement with vendor, in order to defeat the right of the assignee of the goods to pay the price and take them, after proceedings in insolvency have been commenced against him. Arnold *v.* Delano, 4 Cush. (Mass.) 33; 50 Am. Dec. 754. See Matthews *v.* Buck, 43 Me. 265.

The right to rescind cannot be exercised by a vendor who has given credit on a false statement of assets at the expense of other creditors, who, relying upon representations of the vendor as to the standing of the vendee, had discounted his paper in ignorance of the fraud. Preston *v.* Spalding, 120 Ill. 208.

But the original owner of property may rescind a sale if procured by fraud, and the vendee resells to an innocent purchaser, the only consideration of such resale being the partial payment of a pre-existing debt of the vendee. Henderson *v.* Gibbs, 39 Kan. 679.

ent debt,[1] though if there were no fraud, as, for example, where a buyer on credit was solvent at the time of the sale and purchased goods with no fraudulent intent, but afterwards failed, and his other creditors attached the goods, the vendor cannot rescind.[2]

XI. Duty of Party Rescinding—1. Notice of Disaffirmance.—A party intending to terminate a running contract, or to disaffirm a sale must within a reasonable time so signify to the other party.[3] This may be done by ordinary notice, or by some act incompatible with its continued existence, *e. g.*, stopping in transit, reclamation or replevin.[4]

The bringing of an action to rescind a contract may be a sufficient disaffirmance for the purpose of the action.[5]

2. To Place Other Party in Statu Quo.—Where a contract is sought to be rescinded by one of the parties thereto,

1. Bidault *v.* Wales, 20 Mo. 546; 64 Am. Dec. 205; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573; 42 Am. Rep. 53; Buffington *v.* Gerrish, 15 Mass. 156; 8 Am. Dec. 97. In this case it was said: "The plaintiffs' endeavor to recover their merchandise as soon as the fraud practiced upon them is discovered. It never had become the property of Walker (the original vendee) and the right of the plaintiffs to reclaim it against him is indisputable. He had done no act by which any of his creditors had been deceived with respect to this property; for their debts all existed before he acquired the possession. They claim title to it as his, not as their property; yet they cannot, under the circumstances proved, and the fact of fraud found by the jury, establish it as his. They are in the same condition as to them as they were in before the commission of the fraud; and they ought not to reap the fruits of it, no credit having been given on account of this property."

2. Mack *v.* Adley, 48 Ark. 70; Kelsey *v.* Harrison, 29 Kan. 143; Meyer *v.* Harrison, 29 Kan. 147.

3. Parmlee *v.* Adolph, 28 Ohio St. 10; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409; Carney *v.* Newberry, 24 Ill. 203.

But where the purchaser did not see the article bought, but took it upon the faith of misrepresentations by the seller, he is not bound to give notice of rescission in order to defend an action for the price. Foulk *v.* Eckert, 61 Ill. 318.

Nor, where one buys a machine "on approval," is he bound to give notice of dissatisfaction, or opportunity to remedy the defects before maintaining an action for the price. Aiken *v.* Hyde, 99 Mass. 183.

4. As to prerequisites of suit on election to rescind, see Assumpsit, vol. 1, p. 887.

A, having a contract with B's decedent to cut and deliver logs, wrote inquiring if B would continue to receive them. B promptly answered that he would fulfill the contract so far as unexecuted, and would investigate how far. A week afterwards, B wrote that he had done so, and considered the contract fully executed. *Held*, that this was a sufficient notification, and that such disaffirmance of continuance was not affected by B's answer to A's reply thereto, that B, without waiver, would receive certain logs already at the place of delivery. Sullivan *v.* McMillan, 26 Fla. 543.

Where the right belongs to one to rescind the contract after notice, the fact that one notice refers to a previous one, and to the contract as being already rescinded, does not defeat its effect as a notice of the intention to rescind. Lyon *v.* Pollard, 20 Wall. (U. S.) 403.

5. Knappen *v.* Freeman (Minn. 1891), 50 N. W. Rep. 533.

See *supra*, this title, *By Act of Party*.

As to seller's option to affirm or to disaffirm for the buyer's fraud, see Fraudulent Sales, vol. 8, pp. 829, 837.

As to stoppage in transit, see Carriers of Goods, vol. 2, p. 855; Stoppage In Transitu.

he must place the other *in statu quo*.[1] He will not be allowed to repudiate a contract and retain the benefit

1. Hunt *v.* Silk, 5 East 449; Gay *v.* Alter, 102 U. S. 79; Garland *v.* Bowling, 1 Hempst. (U. S.) 710; Farmers' Bank *v.* Groves, 12 How. (U. S.) 51; Burnett *v.* Stanton, 2 Ala. 181; Jones *v.* Anderson, 82 Ala. 302; Pettus *v.* Roberts, 6 Ala. 811; Johnson *v.* Walker, 25 Ark. 196; Desha *v.* Robinson, 17 Ark. 228; Buckner *v.* Pacific, etc., R. Co. (Ark. 1890), 13 S. W. Rep. 332; Ellington *v.* King, 49 Ill. 449; Underwood *v.* West, 52 Ill. 397; Buchenan *v.* Horney, 12 Ill. 336; Wolf *v.* Dietzsch, 75 Ill. 205; Smith *v.* Brittenham, 109 Ill. 540; Prickett *v.* McFadden, 8 Ill. App. 197; Jarrett *v.* Morton, 44 Mo. 275; Estes *v.* Reynolds, 75 Mo. 563; Cahu *v.* Reid, 18 Mo. App. 115; Manahan *v.* Noyes, 52 N. H. 232; Young *v.* Stevens, 48 N. H. 133; 2 Am. Rep. 202; 97 Am. Dec. 592; Moore *v.* Bare, 11 Iowa 198; Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101; Potter *v.* Titcomb, 22 Me. 300; Tisdale *v.* Buckmore, 33 Me. 461; Houghton *v.* Nash, 64 Me. 477; Handforth *v.* Jackson, 150 Mass. 149; Brown *v.* Witter, 10 Ohio 142; Williamson *v.* Moore, 2 Disney (Ohio) 30; Waters *v.* Lemmon, 4 Ohio 229; Stanton *v.* Hughes, 97 N. Car. 318; Wood *v.* Wheeler, 106 N. Car. 512; Lane *v.* Latimer, 41 Ga. 171; Doughton *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556; Blake *v.* Nelson, 29 La. Ann. 245; Williams *v.* Wilson, 1 Dana (Ky.) 157; Bell *v.* Hartman, 9 Phila. (Pa.) 1; Hammond *v.* Buckmaster, 22 Vt. 375; Masson *v.* Bovet, 1 Den. (N. Y.) 69; 43 Am. Dec. 651; Moyer *v.* Shoemaker, 5 Barb. (N. Y.) 319; Stoddard *v.* Graham, 23 How. Pr. (N. Y.) 518; Utter *v.* Stuart, 30 Barb. (N. Y.) 20; Griffiths *v.* Frederick Co. Bank, 6 Gill. & J. (Md.) 424; Calhoun *v.* Davis, 2 Ind. 532; Buell *v.* Tate, 7 Blackf. (Ind.) 55; McGuire *v.* Callahan, 19 Ind. 128; Joest *v.* Williams, 42 Ind. 565; 13 Am. Dec. 377; Thompson *v.* Peck, 115 Ind. 512; Red Jacket Tribe *v.* Gibson, 70 Cal. 128; Cocke *v.* Rucks, 34 Miss. 105; Hamilton *v.* Halpin, 68 Miss. 99; Jagers *v.* Griffin, 43 Miss. 134; Dawes *v.* Harness, L. R., 10 C. P. 166; Clarke *v.* Dickson, E. B. & E. 148.

If it is not entirely practicable to place the other party *in statu quo*, the party wishing to rescind must, nevertheless, show that he has done all in his power to do so. Rynear *v.* Neilin, 3 Green (Iowa) 310; Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178; Stewart *v.* Ludwick, 29 Ind. 230.

Even where there has been a partial performance of a contract, if one party refuses to perform some other essential part notwithstanding such partial performance, the contract may be rescinded if the first party can be placed in *statu quo*. Preble *v.* Bottom, 27 Vt. 249; Allen *v.* Webb, 24 N. H. 278; Webb *v.* Stone, 24 N. H. 282.

It has been said, however, in Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487, that the rule that a contract cannot be rescinded unless the parties can be placed in *statu quo* does not apply where one party has obtained advantage over the other by means of fraud, and such rescission would further the ends of justice, and the court can still reach and enforce equities between them; or if fraud or the act of the parties prevent such placing in *statu quo*. See Turner *v.* Clay, 3 Bibb (Ky.) 52; Conlan *v.* Roemer, 52 N. J. L. 53; Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Downer *v.* Smith, 32 Vt. 1; 76 Am. Dec. 148; Hendrickson *v.* Hendrickson, 51 Iowa 68; Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 18; Baker *v.* Ziegler, 56 Hun (N. Y.) 405. Likewise, where a party who wishes to rescind a contract restores or offers to restore what he has received under the contract without unreasonable delay, the fact that the other party by his default renders full restoration impossible will not defeat the former's right to rescind. Hammond *v.* Pennock, 61 N. Y. 145.

The doctrine that where a party has done some act in respect to the subject-matter of the contract, which cannot be undone, he cannot demand rescission, does not apply where the thing was left undone with the knowledge that the contract is repudiated. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373.

But the right of rescission is taken away when it appears that at the time of the offer to rescind the whole stock of goods had become partnership property, in which one had an interest who was not a party to the action, making it impossible to place the parties in *statu quo*. Bailey *v.* Fox, 78 Cal. 389.

So in Dent *v.* Long, 90 Ala. 172, it

derived thereunder against equity and good conscience, but must return, or offer to return, such benefit.[1] So, in re-

was said that unless a party can be placed in *statu quo*, equity will be reluctant to rescind, and will only do so where clear and strong equity compels it.

But where one party would rescind a contract for default of the other party, such defaulting party cannot defeat the rescission by showing that he has committed certain acts which render complete restoration impossible. Hammond *v.* Pennock, 61 N. Y. 145.

In the absence of any proof to the contrary, the parties will be considered as placed in *statu quo*. Gamble *v.* Gamble, 11 Ala. 966.

1. Herman *v.* Haffenegger, 54 Cal. 161; Newman *v.* Smith, 78 Cal. 22; Wainwright *v.* Weeks, 82 Cal. 193; More *v.* Calkins, 85 Cal. 177; Sanborn *v.* Batchelder, 51 N. H. 426; Smade *v.* Mann (Ark. 1890), 14 S. W. Rep. 1095; State *v.* Morgan, 52 Ark. 150; Blake *v.* Nelson, 29 La. Ann. 245; Savoie *v.* Meyers, 40 La. Ann. 677; Complin *v.* Burton, 2 J. J. Marsh. (Ky.) 216; Gould *v.* Cayuga, etc., Nat. Bank, 21 Hun (N. Y.) 293; Howell *v.* Earp, 21 Hun (N. Y.) 293; Snow *v.* Alley, 144 Mass. 546; Keen *v.* Springfield Engine, etc., Co., 34 Mo. App. 485; Van Tratt *v.* Weise, 36 Wis. 439; Westhafer *v.* Patterson, 120 Ind. 459; Home Ins. Co. *v.* McRichards, 121 Ind. 121; Disbrow *v.* Secor, 58 Conn. 35; East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558; Cates *v.* Sparkman, 73 Tex. 619; Brown *v.* Norman, 65 Miss. 369; Latham *v.* Davis, 44 Fed. Rep. 862.

Thus a party rescinding a contract must return a note taken as consideration even though the maker thereof be insolvent. Spencer *v.* St. Clair, 57 N. H. 9; Bowman *v.* Ayers (Idaho, 1889), 21 Pac. Rep. 405. And so in Bertram *v.* Burkholder, 69 Pa. St. 249, it was held that the rule that anything which is worthless need not be returned, does not apply to a rescission of a sale of stock of a company which is alleged to be insolvent.

However, a forged promissory note need not be returned, since it is worthless. Haase *v.* Mitchell, 58 Ind. 213.

Where the consideration of a contract was in depreciated currency, restoration should be made in value and not in kind. Bodley *v.* McChord, 4 J. J. Marsh. (Ky.) 475.

Where notes of a certain person were deposited with a third party to be delivered to the maker upon performance by him of work extending over an indefinite period, and which might cost more than the whole amount of the notes, and such person performed some of the work but could not complete it, the conditional gift could not be rescinded until there was a return to the maker of the notes of the money he had already expended on the work. Pugh *v.* Cantey, 33 La. Ann. 786. See Kelly *v.* Kershaw, 5 Utah 295; Home Ins. Co. *v.* Howard, 111 Ind. 544.

In the case of a fraudulent exchange, the defrauded party cannot replevy the goods, either from the other party or from a subsequent purchaser, without first rescinding by a return, or offer of return, of what he has received by the exchange. Haase *v.* Mitchell, 58 Ind. 213.

In *Texas*, where a bond for title, although contravening a statute, recites a consideration as paid, the grantor's heirs cannot enforce their title against those claiming under the bond, without refunding the consideration. Houston *v.* Killough (Tex. 1890), 13 S. W. Rep. 959.

In *North Carolina*, where a married woman gave for the price of land a note which, under *North Carolina* Code, § 1826, was void for not being signed by her husband, and she offered to restore the property, an accounting for the rents and profits and purchase money was ordered. Wood *v.* Wheeler, 106 N. Car. 512. *Compare* Trout *v.* Trout, 86 Va. 295.

So in *England*, in decreeing the cancellation and delivering up of an annuity security, for not being duly registered, equity can direct an account of all receipts and payments on each side, and require the balance to be paid by the proper party. Holbrook *v.* Sharpey, 19 Ves. 131. *Compare* Hunt *v.* Silk, 5 East 449.

But, conversely, if the party seeking relief has been guilty of any unconscionable conduct, a court of equity will not help him escape from the toils wherein he has tried to entangle others. St. John *v.* St. John, 11 Ves. 535. *Compare* a case of mutual misrepresentations in an exchange of land in Texas for land in Tennessee. Chaney *v.* Coleman, 77 Tex. 100.

scinding a contract of sale, the consideration must be restored.[1]

A purchaser cannot rescind a contract induced by misrepresentation and fraud after he has disposed of the property purchased, by offering to restore to the vendor what he obtained for it, although it was disposed of before discovering the fraud. McCrillis *v.* Carlton, 37 Vt. 139; 86 Am. Dec. 700; Bailey *v.* Fox, 78 Cal. 389; Neal *v.* Reynolds, 38 Kan. 432. But *compare* Bell *v.* Keepers, 39 Kan. 105.

So, a party desiring to rescind cannot exchange the property received under a contract and then return or offer to return the new article, even though of more value than the original consideration. Cohen *v.* Ellis, 52 Hun (N. Y.) 133.

But in seeking to have set aside a fraudulently procured release of a judgment, the plaintiff need not offer to return the costs paid by the defendant as a consideration of the release; in either event he would be entitled to the costs. Kley *v.* Healy, 127 N. Y. 555.

Time of Restoration.—The general rule is that the return must be made within a reasonable time after the fraud or other ground for rescinding is discovered. See *supra*, this title, *Loss of Right*. But in an action to rescind it has been held sufficient tender, where notes were the consideration, if they are produced at the trial, and an offer made to cancel them. Hathorne *v.* Hodges, 28 N. Y. 486; Stearns *v.* Hyde, 32 Barb. (N. Y.) 171; Green *v.* Smith, 29 Hun (N. Y.) 166; White *v.* Dodds, 42 Barb. (N. Y.) 554; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700; Ryan *v.* Brant, 42 Ill. 86; Wood *v.* Garland, 58 N. H. 154.

So, in Duff *v.* Hutchinson, 57 Hun (N. Y.) 152, it was held that restitution or tender thereof is not necessary before a suit is brought, but must be offered in the complaint. See Martin *v.* Martin, 35 Ala. 560.

Again, in *Louisiana*, it was held that the plaintiff in a suit to rescind a contract is not bound to repay what he has received under it before instituting his suit, if a liquidation between the parties is necessary to ascertain their respective rights. Millard *v.* Farley, 15 La. Ann. 518.

Where a vendor refused to accept goods, and the return of them was offered within a reasonable time because they were not of the quality warranted, a delay of some days in the actual return did not deprive the purchaser of his right to rescind. Matthews *v.* Fuller, 8 Ill. App. 529.

As to the necessity of restoring payments of installments or of taxes on rescission of a land patent or contract, see State *v.* Morgan, 52 Ark. 150; Newman *v.* Smith, 77 Cal. 22; Savoie *v.* Meyers, 40 La. Ann. 677; Brown *v.* Norman, 65 Miss. 369; Cates *v.* Sparkman, 73 Tex. 619.

1. Return of Chattel or Consideration.—In order to rescind a contract for the sale of a chattel, there must be a return or offer of return, unless such chattel is valueless to both parties. Morse *v.* Brackett, 98 Mass. 205; Christy *v.* Cummins, 3 McLean (U. S.) 386; Henckley *v.* Hendrickson, 5 McLean (U. S.) 170; Simpson *v.* Wiggin, 3 Woodb. & M. (U. S.) 413; Righter *v.* Roller, 31 Ark. 170; Dill *v.* Camp, 22 Ala. 249; Jones *v.* Anderson, 82 Ala. 302; Young *v.* Arntze, 86 Ala. 116; Hancock *v.* Tucker, 8 Fla. 435; Coghill *v.* Boring, 15 Cal. 213; Love *v.* Oldham, 22 Ind. 51; Vogel *v.* Demorest, 97 Ind. 440; Cates *v.* Bales, 78 Ind. 285; Field *v.* Kinnear, 4 Kan. 476; Cookingham *v.* Dusa, 41 Kan. 229; Minor *v.* Kelley, 5 T. B. Mon. (Ky.) 272; Buford *v.* Brown, 6 B. Mon. (Ky.) 553; Stewart *v.* Dougherty, 3 Dana (Ky.) 479; Clark *v.* Baker, 11 Met. (Mass.) 186; 45 Am. Dec. 199; Miller *v.* Smith, 1 Mason (U. S.) 437; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700; Bassett *v.* Brown, 105 Mass. 551; Sharp *v.* Ponce, 76 Me. 350; Tisdale *v.* Buckmore, 33 Me. 461; Quincy *v.* Tilton, 5 Me. 277; Hoopes *v.* Strasburger, 37 Md. 390; 11 Am. Rep. 538; Ferguson *v.* Oliver, 8 Smed. & M. (Miss.) 332; Ware *v.* Houghton, 41 Miss. 370; 93 Am. Dec. 258; Benson *v.* Littlefield, 2 Mill. (S. Car.) 180; Carter *v.* Walker, 2 Rich. (S. Car.) 40; Shephard *v.* Temple, 3 N. H. 455; Sanborn *v.* Osgood, 16 N. H. 112; Cook *v.* Gilman, 34 N. H. 556; Rogers *v.* Miller, 62 N. H. 131; Smalley *v.* Hendrickson, 29 N. J. L. 371; Moyer *v.* Shoemaker, 5 Barb. (N. Y.) 319; Pierson *v.* McCurdy, 33 Hun (N. Y.) 520; Babcock *v.* Case, 61 Pa. St. 427; Williams *v.* Hurt, 2 Humph. (Tenn.) 68; Poor *v.* Woodburn, 25 Vt. 234; Smith *v.* Smith, 30 Vt. 139; Paige *v.* McMullen, 41 Wis. 337; Becker *v.*

Trickel (Wis. 1891), 50 N. W. Rep. 406; Woodruff *v.* Peterson, 51 Barb. (N. Y.) 252; Burton *v.* Stewart, 20 Am. Dec. 692; Brantley *v.* Thomas, 22 Tex. 270; Miller *v.* Steen, 30 Cal. 402.

Offer to Return.—An offer to return goods within a reasonable time after a breach of warranty or the discovery of fraud by the vendor, will be as effectual to rescind as if the offer had been accepted. Barnett *v.* Stanton, 2 Ala. 181.

But a mere proposal by a purchaser to return it to the seller, the chattel itself not being present, does not amount to such an offer of return as will effect a rescission. Carter *v.* Walker, 2 Rich. (S. Car.) 40.

Again where there is an express agreement to rescind the contract of sale, if there be any breach of warranty, the buyer cannot maintain an action for the purchase money until the goods are returned to the seller in the same condition substantially as when sold, or until an unconditional tender has been made. The tender must be such that the mere signification of acceptance by the seller will vest the property in him. Walls *v.* Gates, 6 Mo. App. 242.

A stipulation in the contract of sale of a thrashing machine, provided that if the sellers should fail to make it do good work, the buyer could return it and the payments would be refunded or another machine furnished. The court held that an offer to return the machine together with a demand for the return of the purchaser's note was not sufficient compliance with the contract to authorize him to claim a rescission. Pitt's Sons Mfg. Co. *v.* Spitznogle, 54 Iowa 36.

In case of an exchange of horses a party deceived by false representations cannot maintain an action in replevin against the party deceiving until the contract has been rescinded and he has returned, or offered to return, the horses received by him. Thayer *v.* Turner, 8 Met. (Mass.) 550.

In case of an exchange of goods when one party is defrauded, for which he wishes to rescind the contract, he must himself return the goods before an action accrues; it is not enough merely to give notice to the defrauding party and call on him to come and get the property. Norton *v.* Young, 3 Me. 30; Rutter *v.* Blake, 2 Har. & J. (Md.) 302; 3 Am. Dec. 550.

In Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700, Shaw, C. J., said: "The rule undoubtedly is, that if the vendor would rescind the sale," for fraud or other good reason, "and take back his property, if he has received a valuable consideration, he must restore it whether it be goods or money or the negotiable security of a third person. (Kimball *v.* Cunningham, 4 Mass. 502)."

But there is a sufficient constructive redelivery, if, after rescission, the buyer retains the goods solely to repair them for the seller. Beecher *v.* Mayall, 16 Gray (Mass.) 376.

At whatever stage of the execution of a contract the fraud was discovered, the contract can be rescinded, provided the parties can be put *in statu quo.* Farris *v.* Ware, 60 Me. 482; Butler *v.* Northumberland, 50 N. H. 39; Waters' Patent Heater Co. *v.* Smith, 120 Mass. 444; Gates *v.* Bliss, 43 Vt. 299; Baker *v.* Lever, 67 N. Y. 304; 23 Am. Rep. 117; Croyle *v.* Moses, 90 Pa. St. 250; 35 Am. Rep. 654; History Co. *v.* Flint (Tex. 1891), 15 S. W. Rep. 912; Collins *v.* Townsend, 58 Cal. 608; McMahon *v.* Plummer, 6 Dak. 42; Pence *v.* Langdon, 99 U. S. 578.

But where a purchaser wishes to rescind for breach of warranty, he cannot do so if he has misused and damaged the article bought by him. Bradley *v.* Palen, 78 Iowa 126.

What Will Excuse Failure to Return.—A notification by the seller to the buyer that he will not receive back the goods, excuses the buyer from making any effort to return them. Padden *v.* Marsh, 34 Iowa 522. See Tibbs *v.* Timberlake, 4 Litt. (Ky.) 12; Sycamore Marsh Harvester Co. *v.* Grundrad, 16 Neb. 529.

So where a buyer obtains goods by fraud and absconds after paying part of the price, there need be no offer to return. Johnson *v.* Frew, 33 Hun (N. Y.) 193.

A vendor received in payment, for personal property sold by him, the surrender of certain notes of the firm to which he belonged. By a subsequent contract between the vendor and his firm, the notes were canceled, and upon the bankruptcy of the firm the contract was rescinded, and also the contract between the vendor and his firm, and the purchaser under this contract agreed to file a claim against the estate of the bankrupt partner, which one partner agreed to see paid if he lives; under these circumstances the court held the rescission to be

The fact that the parties cannot be placed *in statu quo* generally precludes rescission as a remedy.[1] But a party bringing an action as if to rescind, and offering to reassign and redeliver the property acquired, may obtain relief even though complete restoration be impossible.[2]

complete, although the notes were not returned to the purchaser, having been destroyed. Nash v. Caywood, 39 Ind. 457.

So in an action to recover the price of an article sold for a particular use, the plaintiff cannot recover if the article was not genuine, and the rule that the buyer, in order to rescind, must return the property, cannot be enforced where it has been destroyed necessarily in discovering the falsity. Smith *v.* Love, 64 N. Car. 439.

Where an accepted draft upon the accommodation acceptor was given for the price of goods obtained by fraud, it is not necessary to return the draft to the purchaser in order to rescind the sale. Frost *v.* Lowry, 15 Ohio 200.

So, the vendee of stock, wishing to rescind his contract on the ground of fraud, is not bound to accept the certificate of stock left on deposit for him by the vendor, and tender it before bringing his action. Pence *v.* Langdon, 99 U. S. 578.

Driving oxen into the vendor's neighborhood and turning them loose is not sufficient return to sustain a rescission. Branson *v.* Turner, 77 Mo. 489.

Worthless Goods.—In *Massachusetts*, where worthless lime in casks was sold for good, it was held that on rescission, the lime need not be returned, but the casks must be. Conner *v.* Henderson, 15 Mass. 319; 8 Am. Dec. 103. *Compare* Thayer *v.* Turner, 8 Met. (Mass.) 550; Morse *v.* Brackett, 98 Mass. 205.

The buyer of a fertilizer, which, when tested, turns out to be worthless, may rescind the sale without returning the goods. Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

And so where a seller agreed to accept "customers' paper," if the makers had good commercial rating, it was held that worthless notes need not be tendered back before bringing suit to rescind. Sheldon Axle Co. *v.* Scofield, 85 Mich. 177.

To support the rule that, if the article is worthless for the purposes for which it was bought, the contract may be rescinded, the following cases may be cited: Barr *v.* Baker, 9 Mo. 850; Compton *v.* Parsons, 76 Mo. 455; Branson *v.* Turner, 77 Mo. 489; Wolf *v.* Dietzsch, 75 Ill. 205; Morrow *v.* Rees, 69 Pa. St. 368.

1. For example, where a railroad company has built its road on a right of way granted to it on its agreement to erect machine shops in a certain town, the deed will not be canceled for its failure to fulfill. Buckner *v.* Pacific, etc., R. Co. (Ark. 1890), 13 S. W. Rep. 332.

So as to a case involving the transfer of the good will of a business. Handforth *v.* Jackson, 150 Mass. 149.

See EQUITY, vol. 6, p. 720.

2. A, B, C and D, owning Ohio lands that cost them $30,000, procured a subscription paper to be drawn, in which the subscribers agree to pay the sums set opposite their names "for the purchase of property" in Ohio at the sum of $125,000. They subscribed, not intending to pay, and knowing they would not have to pay, their subscriptions, obtained *bona fide* subscriptions from E and others, and completed it in nearly half the amount by decoy subscriptions. The money was paid to A, who acted as trustee, retaining his share and paying the balance to B, who divided it between himself, C and D, the four thus sharing profits exceeding $30,000 in money, besides having as much stock as those who paid their subscriptions in cash. In E's action for relief, the court by Earl, J., said: "The four defendants may be compelled to account for the profits they made upon the real estate, and which they fraudulently appropriated to the exclusion of their associates. The court can ascertain what the land actually cost the four defendants, and hold them to account for the balance. This balance equitably belongs to those who paid the money, and the plaintiffs can, in this action, recover their *pro rata* share thereof. It may be that the four defendants should account for their own subscriptions as if paid, and also for such subscriptions as they gave away; and it may also be that there should be a distribution of stock among the *bona fide* subscribers alone. But these mat-

As to the return required of infants upon the rescission of a contract, the true doctrine seems to be that they are not required to restore the other party *in statu quo*, unless they have the consideration in possession at the time of rescission.[1]

In the case of a lunatic, the rule is, that if the contract was made with a party who was ignorant of his condition, and such contract was not oppressive or unjust, there must be a restoration;[2] but

ters of detail we do not determine; it is sufficient that the plaintiffs are entitled to some relief of the character indicated." Getty *v.* Devlin, 54 N. Y. 403. *Compare* Baker *v.* Ziegler, 56 Hun (N. Y.) 405; Gould *v.* Cayuga Co. Nat. Bank, 86 N. Y. 75; 99 N. Y. 333; Wright *v.* Dickinson, 67 Mich. 580.

A, who was B's tenant at will, agreed to vacate the premises in favor of C, if C would pay A for certain fixtures the sum A had paid for them. A falsely stated a larger price, for which C gave his note, and received from B a lease for a term of years and possession. *Held*, that C could not be required, as a condition of rescission of the note for fraud, to surrender the lease or assign it to A. Preston *v.* Reeve, 65 N. H. 6.

1. Sims *v.* Eberhardt, 102 U. S. 300; Green *v.* Green, 69 N. Y. 553; 25 Am. Rep. 233; Robinson *v.* Weeks, 56 Me. 102; Ruchizky *v.* De Haven, 97 Pa. St. 202; Miller *v.* Smith, 26 Minn. 248; 37 Am. Rep. 407; Whitcomb *v.* Joslyn, 51 Vt. 79; 31 Am. Rep. 678; White *v.* Branch, 51 Ind. 210; Dill *v.* Bowen, 54 Ind. 204; Manning *v.* Johnson, 26 Ala. 446; 62 Am. Dec. 732; Kinnen *v.* Maxwell, 66 N. Car. 45.

An infant will not be allowed to disaffirm his contract without returning the consideration, unless it appears that this was not within his power, or that the contract was not beneficial to him, or that his infancy was known to the other party. Dickerson *v.* Gordon, 52 Hun (N. Y.) 614.

See *supra*, this title, *Infancy*.

Some cases have held, however, that an infant must restore the consideration received by him, else he is precluded from rescinding. Stafford *v.* Root, 9 Cow. (N. Y.) 626; Smith *v.* Evans, 5 Humph. (Tenn.) 70; Curtiss *v.* McDougal, 26 Ohio St. 66; Cogley *v.* Cushman, 16 Minn. 397; Kerr *v.* Bell, 44 Mo. 120; Stout *v.* Merrill, 35 Iowa 47.

In Chandler *v.* Simmons, 97 Mass. 508; 93 Am. Dec. 117, Wells, J., said: "We do not understand that such a condition (return of consideration) is ever attached to the right of a minor to avoid his deed. If it were so the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. (Gibson *v.* Soper, 6 Gray (Mass.) 279; 66 Am. Dec. 414; Boody *v.* McKenney, 23 Me. 517.) If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. (Badger *v.* Phinney, 15 Mass. 359; 8 Am. Dec. 105; Bigelow *v.* Kenney, 3 Vt. 353; 21 Am. Dec. 589.) Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. (Boyden *v.* Boyden, 9 Met. (Mass.) 519; Robbins *v.* Eaton, 10 N. H. 561.) But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. (Dana *v.* Stearns, 3 Cush. (Mass.) 372.) It is not necessary in order to give effect to the disaffirmance of the deed or contract of a minor that the other party should be placed *in statu quo*. (Tucker *v.* Mouland, 10 Pet. (U. S.) 65; Shaw *v.* Boyd, 5 S. & R. (Pa.) 309; 9 Am. Dec. 368.)"

2. Molton *v.* Camroux, 2 Exch. 487; Sprague *v.* Duel, 11 Paige (N. Y.) 480; Scanlan *v.* Cobb, 85 Ill. 296; Wilder *v.* Weakley, 34 Ind. 184; Mus-

where the insanity is known to the other party, or the contract is unfair, and such as a sane man would not have made, there need be no return.[1]

3. To Rescind in Toto.—Upon the same principle that requires a restoration *in statu quo*, by the party seeking to rescind,[2] is based the rule that the rescission must be entire, or not at all. For example, upon the discovery of sufficient ground for avoidance, a person will not be allowed to avoid the contract as to those parts which would work him an injury, and affirm it as to those which would be profitable to him.[3]

selman *v.* Cravens, 47 Ind. 1; Behrens *v.* McKenzie, 23 Iowa 343; 92 Am. Dec. 428; Rusk *v.* Fenton, 14 Bush (Ky.) 490; 29 Am. Rep. 413; Beals *v.* See, 10 Pa. St. 56; 49 Am. Dec. 573; Lancaster Co. Nat. Bank *v.* Moore, 78 Pa. St. 414; 21 Am. Rep. 24; Lincoln *v.* Buckmaster, 32 Vt. 658; Young *v.* Stevens, 48 N. H. 133; 2 Am. Rep. 202; 97 Am. Dec. 592; Eaton *v.* Eaton, 37 N. J. L. 108; 18 Am. Rep. 716; Matthiessen *v.* McMahon, 38 N. J. L. 536; Riggan *v.* Green, 80 N. Car. 236; 30 Am. Rep. 77. See *supra*, this title, *Insanity*.

1. Henry *v.* Fine, 23 Ark. 417; Nichol *v.* Thomas, 53 Ind. 42; Crawford *v.* Scovell, 94 Pa. St. 48; Canfield *v.* Fairbanks, 63 Barb. (N. Y.) 461; Halley *v.* Troester, 72 Mo. 73; Gibson *v.* Soper, 6 Gray (Mass.) 279; 66 Am. Dec. 414; in which case, Thomas J., in delivering the opinion said: "To say that an insane man, before he can avoid a voidable deed, must put the grantee in *statu quo*, would be to say, in effect, that in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater. One of the obvious grounds on which the deed of an insane man on an infant is held voidable, is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void, may have wasted the price and rendered the restoration of the consideration impossible. . . . If the law required restitution of the price as a condition precedent to the recovery of the estate, that would be done indirectly, which the law does not permit to be done directly; and the great purpose of the law in avoiding such contracts, the protection of those who cannot protect themselves, would be defeated. . . . Doubtless, if the grantor, having been restored to sound mind, or the infant upon coming of age, still retains and uses the consideration of the deed, without offer to restore; or seeks to enforce the securities, or avails himself of the contract which constituted such consideration, such conduct may furnish satisfactory and, it may be, conclusive evidence of a ratification. And this is the extent, we think, to which the cases have gone, upon which the tenant especially relies, of Allis *v.* Billings, 6 Met. (Mass.) 415; 39 Am. Dec. 744, and Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434."

2. See *supra*, this title, *To Place Party in Statu Quo*, and cases there cited.

3. Potter *v.* Titcomb, 22 Me. 300; Clarkson *v.* Mitchell, 3 E. D. Smith (N. Y.) 269; Utter *v.* Stuart, 30 Barb. (N. Y.) 20; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274; 7 Am. Dec. 317; California Steam Nav. Co. *v.* Wright, 8 Cal. 585; Purdy *v.* Bullard, 41 Cal. 444; Sumner *v.* Parker, 36 N. H. 449; Evans *v.* Gale, 17 N. H. 573; 43 Am. Dec. 614; Jewett *v.* Petit, 4 Mich. 508; Hendricks *v.* Goodrich, 15 Wis. 679; Wolf *v.* Dietzsch, 75 Ill. 205; Wolcott *v.* Heath, 78 Ill. 433; Kellogg *v.* Turpie, 93 Ill. 269; 34 Am. Rep. 163; Martin *v.* Broadus, Freem. Ch. (Miss.) 35; Commercial Bank of Manchester *v.* Lewis, 13 Smed. & M. (Miss.) 226; Bishop *v.* Stewart, 13 Nev. 25; Bell *v.* Keepers, 39 Kan. 105; Estes *v.* Reynolds, 75 Mo. 853; Lapp *v.* Ryan, 23 Mo. App. 436; Sheffield Nickel, etc., Plating Co. *v.* Unwin, 2 Q. B. Div. 214; Alexander *v.* Owen, 1 T. R. 225.

Of course, however, it is in the

XII. EFFECT.—The general effect of rescission is to remit both parties to the contract to their original rights in respect to the subject-matter thereof,[1] though, of course, in case of rescission

power of the parties to a contract, by their mutual consent, to rescind a part of an entire contract and allow the residue to stand. Borum *v.* Garland, 9 Ala. 452.

In Kimball *v.* Lincoln, 7 Ill. App. 470, it was held that where the entire interest of a deceased partner was sold to the surviving partner, and part of it was real and part of it personal estate, although the instruments were separate, the sale could not be rescinded as to personal and affirmed as to the real estate.

But under some circumstances partial rescission will be decreed. Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114. See Glassell *v.* Thomas, 3 Leigh (Va.) 113.

A plaintiff cannot in his bill attack an instrument as being fraudulent and void for any reason and at the same time claim any rights under it, in case the court should hold it valid, but before bringing his suit he must make his election whether to claim under or against it. Lamon *v.* McKee, 7 Mackey (D. C.) 446. See Wilkenson *v.* Dobbie, 12 Blatchf. (U. S.) 298.

For cases where the rule has been applied to contracts of sale, see Buchenau *v.* Horney, 12 Ill. 336; Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec. 476; Thompson *v.* Peck, 115 Ind. 512; Johnson *v.* McLane, 7 Blackf. (Ind.) 507; 43 Am. Dec. 102; Norton *v.* Young, 3 Me. 30; Junkins *v.* Simpson, 14 Me. 364; Cushman *v.* Marshal, 21 Me. 122; Coolidge *v.* Brigham, 1 Met. (Mass.) 550; Miner *v.* Bradley, 22 Pick. (Mass.) 457; Perley *v.* Balch, 23 Pick. (Mass.) 286; 34 Am. Dec. 56; Lapp *v.* Ryan, 23 Mo. App. 436; Voorhees *v.* Earl, 2 Hill (N. Y.) 292; 38 Am. Dec. 588; Fullager *v.* Raville, 3 Hun (N. Y.) 600; Sumner *v.* Parker, 36 N. H. 449; Weeks *v.* Robie, 42 N. H. 316; Willoughby *v.* Moulton, 47 N. H. 205; Preston *v.* Travellers' Ins. Co., 58 N. H. 76. See Roebling, etc., Co. *v.* Lock Stitch Fence Co. (Ind. 1889), 22 N. E. Rep. 518.

In Morse *v.* Brackett, 98 Mass. 205, a case arising from the sale of wool, a number of bags, each having the same distinctive mark, were bought by a party at the same time and for the same price per pound, and were delivered to him under a single bill of parcels, after he had opened some of the bags and made such examination as he saw fit. The court held that, upon a subsequent discovery that the wool in one of the bags was of an indifferent quality, the purchaser could not rescind in part, as it was an entire contract. See also Carpenter *v.* Minturn, 65 Barb. (N. Y.) 297. So in Mansfield *v.* Trigg, 113 Mass. 350, the sale of a specific number of packages of same article at the same price per package could not be rescinded as to some and affirmed as to others. But where a number of different articles are bought at the same time at a different price per article, although they are of the same general description—as, for example, india-rubber goods—and are warranted that they are all of the same particular quality and would apply to each in such case, there is not an entire contract, and the purchaser has the right to rescind as to each article if the warranty is broken. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91. See Morgan *v.* McKee, 77 Pa. St. 228; Costigan *v.* Hawkins, 22 Wis. 74; 94 Am. Dec. 583.

In an action for breach of warranty where there is not a total failure of the subject-matter, the vendee, in the absence of any fraud, cannot return the property and recover the consideration price; nor, while retaining a part of the subject-matter, recover as if there had been a total failure, unless there be proof that what remains is entirely valueless. Weston *v.* Chamberlain, 56 Barb. (N. Y.) 415.

Where an engine was sold and, on account of breach of warranty of quality, the sale was rescinded, the purchaser may rescind also as to the belt which is a mere adjunct of the engine, although it was not defective. National Bank, etc., Co. *v.* Dunn, 106 Ind. 110. *Compare* Aultman *v.* McFallon, 11 Fed. Rep. 836.

Where a portion of a cargo of flour was delivered to the purchaser, paid for and consumed by him, the contract could not be rescinded on the ground that the brand was not that described in the contract. Lyon *v.* Bertram, 20 How. (U. S.) 149; Jemison *v.* Woodruff, 34 Ala. 143.

1. Briggs *v.* Murtha, 12 Phila. (Pa.)

179; Blake *v.* Nelson, 29 La. Ann. 245; Cocke *v.* Rucks, 34 Miss. 105; Kloes *v.* Wurmser, 34 Mo. App. 453. And see cases cited *supra*, under *Duty to Place Party in Statu Quo, To Rescind in Toto.*

In order for one party to renew a contract which has been rescinded, even if such rescission was effected without sufficient ground, the consent of the other party is necessary. Lassen *v.* Mitchell, 41 Ill. 102; Kinney *v.* Kiernan, 49 N. Y. 164.

So the rescission of one contract will not revive a previous one unless there be express words to that effect, or unless such revival can be clearly implied from the circumstances. Oakley *v.* Ballard, 1 Hempst. (U. S.) 475.

In case of contracts made as auxiliary to former contracts between the same parties, the rescission of the original contract rescinds the others also. Callender *v.* Colegrove, 17 Conn. 1. So, where a contract is rescinded on the ground that it was unlawful, all contracts of the same character between the same parties must be rescinded. He cannot rescind those which are not profitable and stand to those which are. Wolcott *v.* Heath, 78 Ill. 433.

Upon the rescission of a conditional sale of personalty for default of the vendee, the vendor may recover the property, although the former has expended labor and money in converting it into specific articles if the latter pays the costs of such conversion and takes possession before the rights of creditors or *bona fide* purchasers attach. Hineman *v.* Matthews, 138 Pa. St. 204.

Upon the rescission of a contract or sale on the ground that the goods were not such as the purchaser had ordered, such purchaser has a right to demand reimbursement for freight and other expenses paid by him, and upon refusal, to sell so much as would cover such expenses. Bennett *v.* Terry, 42 Ga. 283. *Compare* Taylor *v.* Saxe, 57 Hun (N. Y.) 411. If, however, the goods were procured by fraud of the purchaser the seller is not bound to make such reimbursement. Chamberlin *v.* Fuller, 59 Vt. 247.

But where a purchaser rescinded a contract of sale for breach of warranty and returned the goods in good time, he could not be held liable for damage to them without his default. Bigger *v.* Bovard, 20 Kan. 204.

Where the vendor of a horse rescinds the contract for the sale, he is liable to the purchaser for the board of the horse during the time the latter kept him, from the day of the contract. King *v.* Price, 2 Chit. 416.

Although a court of equity will set aside a transaction as indefensible, compensation so far as practicable will be decreed to a party having a right thereto. Harding *v.* Handy, 11 Wheat. (U. S.) 126.

In an action by a party to an exchange of lands, to cancel a deed for fraudulent representations, it was held that the defendant had the right to recover for valuable improvements made on the land. Chaney *v.* Coleman, 77 Tex. 100. See also Kerr, Fraud (Bump's ed.) 618; Bishop's Cont. (ed. of 1887), § 679.

Where A and B, owning distinct petroleum lands combined with C to have D and E buy them of C for $13,750, C to keep $3,750, and D and E, not knowing A to be an owner, were influenced by a letter of A shown them, and made the purchase, it was held that D and E were entitled to a rescission and repayment on a reconveyance made to the satisfaction of the colonial court. Lindsay Petroleum Co. *v.* Hurd, L. R., 5 P. C. 221.

If a contract be made between two parties for the sale of property and the property be delivered, in pursuance of such contract, but before its completion, into possession of an agent or factor of the vendee, and the contract be afterwards rescinded by either party, the property will remain absolutely in the vendor. Spring *v.* Coffin, 10 Mass. 31.

Third Persons.—The right of a vendor to retake goods in the hands of a fraudulent and insolvent vendee where the sale has been rescinded, is superior to that of any general creditor. Jaffrey *v.* Brown, 29 Fed. Rep. 476. See Singer *v.* Shilling, 74 Wis. 396; Landauer *v.* Cochran, 54 Ga. 533; Daugherty *v.* Fowler, 44 Can. 628.

Where a seller has been fraudulently induced to sell goods, his right to reclaim them upon rescission is good against purchasers, unless they are such in good faith and for value. The right continues until he has confirmed the sale, knowing the facts and is not defeated by a mortgage, made by the buyer to a third person, which is to go in effect upon the acquisition of the goods. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

by mutual consent, the parties may agree upon any terms they see fit.[1]

Upon rescission by one party, rightfully, should the other refuse to make the requisite return of money, or other thing which formed the consideration of the contract, the former may recover such consideration in a proper action.[2]

And so where a sheriff levied upon goods by virtue of an execution and the goods had been obtained by fraud the vendor could rescind the sale and demand a return from the sheriff, and upon refusal on the part of the latter to restore, bring an action of trover against him. Hitchcock *v.* Covill, 20 Wend. (N. Y.) 167. See Hicks *v.* Campbell, 19 N. J. Eq. 183; Weed *v.* Page, 7 Wis. 503.

1. Borum *v.* Garland, 9 Ala. 452.

In Mills *v.* Riley, 7 Ind. 137, it was held that where a contract for labor was rescinded by the mutual consent of the parties, but the relation of employer and employé subsequently existed between the same parties, the rate of compensation agreed on in the first contract did not hold as to the work subsequently performed.

Where a contract has been rescinded by mutual consent, suit cannot be brought upon a note taken as part of the consideration. De Peyster *v.* Pulver, 3 Barb. (N. Y.) 284.

Where a contract for the sale of lumber is rescinded by mutual consent after delivery thereof, but the lumber is left in possession of defendant until convenient to remove, if he uses some of it no action will lie for goods sold and delivered. Folsom *v.* Cornell, 150 Mass. 115.

Again where the purchaser becomes dissatisfied with goods and returns them at the instance of the vendor, receiving back the money paid in part for them, the transaction constitutes a rescission which will prevent the plaintiff from suing afterwards for breach of contract. Alden *v.* Thurber, 149 Mass. 271.

In case of rescission by mutual consent or by virtue of an election reserved in the contract the plaintiff may recover any money which he has paid thereunder and which the defendant refuses to restore in the common count for money had and received. Payne *v.* Whale, 7 East 274; Bradford *v.* Manly, 13 Mass. 139; 7 Am. Dec. 122; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 275; 7 Am. Dec. 317; Towers *v.* Barrett, 1 T. R. 133; Davis *v.* Street, 1 C. & P. 18; 11 E. C. L. 302.

2. Crossgron *v.* Himmelrich, 54 Pa. St. 203; Brown *v.* Mahurin, 39 N. H. 156; Drew *v.* Claggett, 39 N. H. 431; Sherlburne *v.* Fuller, 5 Mass. 133; Kidder *v.* Hunt, 1 Pick. (Mass.) 328; 11 Am. Dec. 183; Allen *v.* Ford, 19 Pick. (Mass.) 217; Bacon *v.* Sondley, 3 Strobh. (S. Car.) 542; 51 Am. Dec. 646.

But upon the rescission of a contract a party will have no remedy upon a guaranty for its performance. Smethhurst *v.* Woolston, 5 W. & S. (Pa.) 106.

Nor where a contract has been previously broken no action will lie for the same party who afterwards rescinded it. Haldeman *v.* Chambers, 19 Tex. 1.

The remedy in case of the rescission of a contract and notification not to proceed is for value of work done and damages for the breach. Goodwin *v.* Kirker, 2 Hilt. (N. Y.) 401; Clark *v.* Marsiglia, 1 Den. (N. Y.) 401. See Monroe *v.* Reynolds, 47 Barb. (N. Y.) 574.

If a party has derived some benefit from the partial performance of a contract, he cannot rescind it and resort to an action for money he may have paid on it. But if a party having received part payment in advance, perform his contract in part and then receive full payment for the part performed, independently of what he has received in advance, the special contract may be considered as rescinded, and such party held liable for the payment advanced. Barber *v.* Lyon, 8 Blackf. (Ind.) 215; Stewart *v.* Ludwick, 29 Ind. 230. See also Blood *v.* Enos, 12 Vt. 625; 36 Am. Dec. 363.

Where the master and part owner of a vessel agreed to purchase the remaining moiety of his partner, and having paid the purchase money and received the title deeds, which he deposited with a third person as a security, required entire possession of the ship, but his partner afterwards refused to execute a bill of sale or refund the money, held, that an action would not lie to recover the purchase money, as the parties could not be restored to

XIII. PRACTICE, EVIDENCE, ETC.—The practice, pleadings, and proof in a suit for rescission depend, of course, on the rules of court and the code or statutory system of the particular State wherein the remedy is sought. The proceedings in equity, however, may, in general, be essentially alike, the form of relief resting largely in the discretion of the court, as the circumstances may necessitate.[1]

their original situation. Reed *v.* Blanford, 2 Y. & J. 278.

A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which, if not complied with, might have given the purchaser a right to compensation, but would not have entitled him to annul the contract. *Held*, that the heir-at-law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate. Hudson *v.* Cooke, 13 L. R. Eq. 417.

If a plaintiff rescinds a contract, as he would have a right to do upon failure of the defendant to perform the condition of sale, his proper remedy for a conversion of the property is an action of trover. And he cannot waive a tort and recover the value of the goods in an action of assumpsit. In such a form of action the contract is admitted to exist at the time of the action brought, and when there is an express contract the law will not imply one. Allen *v.* Ford, 19 Pick. (Mass.) 217. See Dellone *v.* Hull, 47 Md. 112; Kellogg *v.* Turpie, 93 Ill. 265; 34 Am. Rep. 163; Ferguson *v.* Carrington, 9 B. & C. 59; 17 E. C. L. 330.

1. See EQUITY, vol. 6, pp. 717, 720, 723; EQUITY PLEADINGS, vol. 6, p. 726; BILL TO REMOVE CLOUDS FROM TITLE, vol. 1, p. 308.

As to the requisite parties, pleadings, practice and evidence in suits to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, vol. 8, pp. 774–778.

In *California*, as to the allegations essential to a rescission under *California* Civil Code, § 1572, pl. 4, see Lawrence *v.* Gayetty, 78 Cal. 126.

In *England*, on decreeing rescission of a conveyance on the ground of the grantor's ignorance, illness, old age and want of professional advice, the court may in its direction compel him to give an undertaking to execute a proper deed to be settled by the judge in Chambers. Cartledge *v.* Radburn, 14 L. T. N. S. 187; Clark *v.* Malpas, 4 Dels. F. & J. 401.

Where a deed is declared void in equity and canceled, no reconveyance is necessary. Hoghton *v.* Hoghton, 15 Beav. 278. Otherwise on setting aside a fraudulent conveyance to a third person not privy to the fraud, or on condition of a payment. Bates *v.* Graves, 2 Ves. Jr. 295.

In *Indiana*, upon a complaint by a guardian to set aside a deed of his insane ward, alleging that the grantee had refused to reconvey, it was held unnecessary to aver that a reconveyance had been tendered him to sign. Peck *v.* Vinson, 124 Ind. 121.

In an action for breach of a promise of marriage, an averment that the contract had been rescinded sets forth a proper affirmative defense. Mabin *v.* Webster (Ind. 1891), 28 N. E. Rep. 863.

If, in an action for the price, the answer avers a warranty and breach a ground for rescinding the sale, evidence that fails to sustain the averment, may yet avail to reduce damages. Morse *v.* Brackett, 98 Mass. 205.

In *Minnesota*, in a case of fraud, the court will not merely give a money judgment, but cancel the contract, although a party may have a legal defense to its enforcement. Crump *v.* Ingersoll, 44 Minn. 84.

In *Michigan*, as to the practice in adjustment of equities, see Merrill *v.* Wilson, 66 Mich. 232.

In *Missouri*, in canceling a deed executed by a party whom the grantee had got intoxicated, it was held to be error to make the amount paid by an alleged purchaser from the fraudulent grantee a lien on the land. Kyle *v.* Powell, 96 Mo. 526.

In *Texas*, if the defendant is in pos-

In a suit for rescission, the ordinary rules of evidence apply as to burden of proof,[1] clear preponderance to establish alleged fraud, etc.[2]

session, the plaintiff may on rescission, under the prayer for general relief, have a writ of possession. De Prez *v.* De Everett, 73 Tex. 431.

In *Kentucky*, as to the refusal of rescission to a trustee, see Holmes *v.* Bramel (Ky. 1889), 12 S. W. Rep. 262.

In *Indiana*, as to refusal of cancellation of a mortgage given to secure a loan from the school fund, see Winstandley *v.* Crim, 117 Ind. 328.

Allegations. — Where a contract is sought to be rescinded for fraud, the allegations must be distinctly and clearly stated in order that the court may be able to judge whether the transaction was or was not fraudulent, and that it may appear how the defrauding party imposed upon the other. Bell *v.* Lawrence, 51 Ala. 160; Bailey *v.* Litten, 52 Ala. 282; Storer *v.* Poole, 67 Me. 217; Murphy *v.* Dunning, 30 Wis. 296; Walker *v.* Hough, 59 Ill. 375; Hall *v.* Thompson, 1 Smed. & M. (Miss.) 443; Ayres *v.* Mitchell, 6 Smed. & M. (Miss.) 683; Kilgo *v.* Castleberry, 38 Ga. 512; 95 Am. Dec. 406.

But the fraud need not be alleged in so many words, allegation of facts is sufficient. Grove *v.* Reutch, 26 Md. 367.

In an action to recover goods where a plea of rescission of the contract for fraud is put in, it is not necessary that the circumstances of the fraud are known to the defendant and the contract rescinded before action brought. The election to rescind may be made at any time, unless there has been a previous election to affirm the contract. Clough *v.* London, etc., R. Co., L. R., 7 Ex. 26. See Kirby *v.* Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

1. Burden of Proof.—The burden of proof is, of course, upon the party seeking to rescind. Teakle *v.* Bailey, 2 Brock (U. S.) 43. See BURDEN OF PROOF, vol. 2, p. 650. See also Cotheal *v.* Talmage, 1 E. D. Smith (N. Y.) 573; Butler *v.* Miller, 15 B. Mon. (Ky.) 617; Dich *v.* Ireland, 130 Pa. St. 299; Zucker *v.* Karpeles, 88 Mich. 413.

2. Walker *v.* Hough, 59 Ill. 375; Carter *v.* Muns, 55 Ark. 73; Buchanan *v.* Gibbs, 26 Kan. 277. See also cases cited *supra* in note 6.

See FRAUD, vol. 8, p. 654; EVIDENCE, vol. 7, p. 79. See also Cofer *v.* Moore, 87 Ala. 705; Goodrich *v.* Shaw, 72 Mich. 109; Lacy *v.* Rollins, 74 Tex. 566.

In an action to rescind a contract on the ground of fraud no greater evidence is required to establish the facts than is required to establish similar facts in any other kind of action, Martin *v.* Hill, 41 Minn. 337.

Fraud cannot be presumed, but must be established by a preponderance of the evidence. Where two witnesses affirm, and two others no more interested in the subject-matter, and for all that appears, fully as creditable, deny the fraud, it is not proved. Allison *v.* Ward, 63 Mich. 128. See Zucker *v.* Karpeles, 88 Mich. 413.

Although the court requires strict proof of the existence of fraud, yet where a case of fraud is proved it will draw reasonable inferences as to the time when it was committed. Panama, etc., Tel. Co. *v.* India Rubber, etc., Tel. Works Co., L. R., 10 Ch. 515; 23 W. R. 583.

In Mathey *v.* Wood, 12 Bush (Ky.) 293, it was said: "While in cases of executed contracts the general rule is that to obtain rescission, the party complaining must allege and prove a distinct case of fraud, where fraud is the ground relied on for relief, yet in cases of executory contracts equity will not assist a party, who has, even by innocent misrepresentations, induced the other party to act. (Story's Eq., p. 749.)"

Evidence.—In a suit to rescind a sale for fraud, evidence of other purchases by the buyer at the same time may be admitted to show that he was conducting his business in an unusual manner, in anticipation of failure, and the buyer will not be allowed to show that other suits brought to rescind were abandoned. In such case the seller must prove that he is a *bona fide* purchaser for value. It is also admissible to show that he overdrew his bank account daily, as tending to prove that he must have been aware of his condition. Haskins *v.* Warren, 115 Mass. 514. *Compare* Freeman *v.* Nichols, 116 Mass. 309. See Kline *v.* Baker, 106 Mass. 61.

An order for goods was delivered to the agent of a manufacturer with the stipulation that he should destroy it if

RESCRIPT—(See also COUNTERPART, vol. 4, p. 341).—At common law, a counterpart.

In *Massachusetts* the statement of the decision of the supreme judicial court in its appellate capacity, together with a brief statement of the reasons for the decision, which is sent to the court *a quo*, is called a rescript.

RESCUE is a deliverance of a prisoner from lawful custody by any third person.[1]

RESERVE—(*Compare* RESERVATION).—To hold, to keep for future use.[2]

RESERVATION.—1. A clause in a deed or other instrument of conveyance by which a grantor creates, and reserves to himself,

the signer should so desire, and the signer wrote a letter to the agent the day after the delivery of the order. Such a letter is admissible to show that the right to rescind has been exercised. Morris *v.* Brightman, 143 Mass. 149.

In an action to rescind a sale on the ground of fraud, the plaintiff may introduce evidence of the subsequent acts and dealings of the vendee to prove the fraud, nor is he restricted to evidence of fraud and fraudulent representations made by the vendee at or before the time of sale. Ross *v.* Miner, 64 Mich. 204.

The printed circular of an inventor, stating valuable qualities of the invention, which has been given to a purchaser during the negotiations for a sale, is admissible in evidence, it having been proved that the invention was worthless as to such qualities. Hicks *v.* Stevens, 121 Ill. 186.

Evidence as to the amount of stock carried by other merchants of the same town is not admissible to prove that the debtor's stock was unusually large. Chamberlain *v.* Fuller, 59 Vt. 247.

When the buyer wishes to rescind a sale on the ground of fraud, evidence of other sales made by similar misrepresentations, of which the buyer had no knowledge, will not be admissible. Bischof *v.* Coffert, 6 Ind. 23.

The suicide of a party, even where there have been several previous unsuccessful attempts, is not of itself proof of incapacity to contract. Jones *v.* Gorham (Ky. 1890), 14 S. W. Rep. 599.

As to evidence raising a presumption of mutual rescission, see Thompson *v.* Lyons, 54 N. Y. Super. Ct. 101; Reavis *v.* Orenshaw, 105 N. Car. 369.

As to evidence of confidential relations in establishing the fact of undue influence, see Worrall's Appeal, 110 Pa. St. 349; Jones *v.* Jones, 120 N. Y. 589; Sears *v.* Hicklin, 13 Colo. 143.

Of trickery upon a client signing deed supposing it to be a lease, see McGinn *v.* Tobey, 62 Mich. 252.

As to admissibility of evidence of motive, etc., see Beiser *v.* Beiser, 55 Hun (N. Y.) 607; Beville *v.* Jones, 74 Tex. 148.

As to a subsequent will validating a deed made under undue influence, see Burt *v.* Quisenberry, 132 Ill. 385.

1. 2 Bish. Cr. Law., § 1065.

A rescue is defined to be, when a man, lawfully arrested, is set at large wrongfully. State *v.* Mazyck, 3 Rich. (S. Car.) 292.

"The same offense as a voluntary escape by a jailer. Not criminal unless the rescuer knew that the person was held on a charge of crime, or that he was in charge of a public officer." And. L. Dict., *citing* 2 Bish. Cr. Law, § 1065; Findlay *v.* McAllister, 113 U. S. 114, cases. See also ESCAPE, vol. 6, p. 844.

Rescue and Pound Breach.—See IMPOUNDING, vol. 10, p. 197.

2. Metropolitan Exhibition Co. *v.* Ward, 24 Abb. N. Cas. (N. Y.) 393; Myers *v.* Conway, 90 Ala. 109.

Right to Reserve.—As to the effect of such a stipulation in a base-ball contract, and as to whether a court of equity will grant specific performance of it, by enjoining the player from engaging with another club, see SPECIFIC PERFORMANCE.

Point Reserved.—See RESERVATION.

Without Reserve.—See AUCTIONS, vol. 1, p. 989; SALES; WITHOUT RESERVE.

some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as a rent, or an easement.[1]

2. In the public land laws a reservation of reserve is a tract of the public lands withheld from sale or settlement, and appropriated to some public use, such as a park, military post, Indian reservation, etc.[2]

3. The sum of money which the National Banking Acts require national banks to always have on hand.[3]

4. Where the trial court decides a point of law provisionally, setting it aside for further consideration by the court *in banc*, the judgment being subject to alteration, if the court *in banc* arrives at a different decision, this is called a reservation of a point of law, or the point is said to be a "point reserved."[4]

RE-SETTLE—See note 5.

1. Black's L. Dict. See also DEEDS, vol. 5, p. 455; EASEMENTS, vol. 6, p. 143, n.; EXCEPTION, vol. 13, p. 113; LIMITATION IN INSTRUMENTS, vol. 13, p. 787.

The creation of a right or interest, which had no prior existence as such, in a thing or part of a thing granted. Kister *v.* Reeser, 98 Pa. St. 5; 42 Am. Rep. 608.

A reservation is a clause in a deed, whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created, or reserved out of a thing demised that was not *in esse* before. Fischer *v.* Laack, 76 Wis. 313; Graig *v.* Wells, 11 N. Y. 315; *quoting* Shep. Touch. 80.

For the Distinction Between Exceptions and Reservations, see the references cited *supra*, this note.

2. See PUBLIC LANDS.

The word "Reservation" does not imply an absolute disposition of the land in all cases, but a withholding of it from some other disposition, such as sale, or for the use of schools and other objects, while, on the contrary, the term "appropriation" would imply most clearly a setting apart or application to some particular use. McConnel *v.* Wilcox, 2 Ill. 359.

The reservation of lands for any specific purpose by the government, if expressed in the most accurate, concise, and precise form of words, is but an expression of a desire of the government to use them for that purpose. It does not part with its title by reserving them, but simply gives notice to all the world that it desires them for a certain purpose. Therefore, the same precision and accuracy are not required as in case of a conveyance. U. S. *v.* Payne, 2 McCrary (U. S.) 301.

3. The National Banking Act directs that all national banks in the sixteen largest cities shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per cent. of the aggregate amount of its notes in circulation and deposits. Fifteen per cent. is required of all other national banks. When the reserve falls below the proper limit, the bank must not increase its liability otherwise than by discounting or purchasing bills of exchange, payable at sight, nor make any dividend till the limit is reached. On a failure to make good to reserve for thirty days after notice by the Comptroller of the Currency, the latter may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the bank. Bouv. L. Dict.; U. S. Rev. Stat., § 5191.

4. See TRIAL.

5. Where, by written contract, the defendant, a physician, sold his practice to the plaintiff and agreed not to "re-settle" in the same town, it was held (construing the contract strictly, as one in restraint of trade) that he was bound thereby not again to take up his residence in such town for the practice of his profession, but that he might remain or re-settle in the town if he did not practice his profession, or that he might practice in that locality while residing elsewhere. Haldeman *v.* Simonton, 55 Iowa 144.

RES GESTÆ—(See also BOOKS AS EVIDENCE, vol. 2, p. 467 j; DECLARATIONS, vol. 5, p. 361; DOMICILE, vol. 5, p. 857; DYING DECLARATIONS, vol. 6, p. 123; HOMICIDE, vol. 9, p. 672; LARCENY, vol. 12, p. 857; MASTER AND SERVANT, vol. 14, p. 913; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 155; RAPE, vol. 19, p. 959; RIOT; ROBBERY; WILLS; WRITTEN INSTRUMENTS).

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I. DEFINITION.—*Res Gestæ* are the facts surrounding or accompanying a transaction which is the subject of legal proceedings.[1] The phrase is chiefly used to designate a rule of evidence regarding the admission of such facts on the ground that they form part of the *res gestæ*.[2]

II. STATEMENT OF GENERAL RULE.—The rule is that evidence of words or acts may be admissible (notwithstanding the general rule against derivative evidence) on the ground that they form part of the *res gestæ*, provided that the act which they accompany is itself admissible in evidence, and that they reflect light on or qualify that act.[3] But they must be so connected with the main fact un-

1. Sweet's L. Dict. See Wilson *v.* Sherlock, 36 Me. 296; Hunter *v.* State, 40 N. J. L. 538; Stirling *v.* Buckingham, 46 Conn. 461.

Mr. Wharton, in describing the acts and incidents that make up the *res gestæ*, says: "The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors." Hunter *v.* State, 40 N. J. L. 538; 1 Whart. on Ev., § 259.

In Carter *v.* Buchannon, 3 Ga. 517, the *res gestæ* is defined to mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.

2. Sweet's L. Dict. See Best on Ev. 360.

3. Best on Ev. 663; Wright *v.* Tatham,

der consideration as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction.[1] If declarations are made some time before the act and stand alone by themselves, they are not within the rule and are inadmissible.[2]

7 A. & E. 313; 34 E. C. L. 95. See Hamilton *v.* State, 36 Ind. 281; 10 Am. Rep. 22; Reiley *v.* Haynes, 38 Kan. 259; 5 Am. St. Rep. 737.

Thus, where a woman went to be examined by a surgeon with a view to effecting a policy of insurance on her life, and a few days afterwards stated to a friend that she was ill when she went, and that she was afraid that she would not live until the policy was made out, and then her husband could not get the money, evidence of these statements was held admissible in an action on the policy, on the ground that as the woman's previous statements to the surgeon were admissible in evidence, her statements to her friend were also admissible, being part of the *res gestæ;* that is, as following and explaining her previous statements. Aveson *v.* Kinnaird, 6 East 188.

So on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is admissible because it forms part of the *res gestæ.* Lord George Gordon's Case, 21 How. St. Tr. 142.

1. Leahey *v.* Cass Ave. R. Co., 97 Mo. 165; 10 Am. St. Rep. 300; Elkins *v.* Hamilton, 20 Vt. 627; Hooper *v.* Edwards, 20 Ala. 528; Bragg *v.* Massie, 38 Ala. 89; 79 Am. Dec. 82; Yarborough *v.* Moss, 9 Ala. 382; Webb *v.* Kelly, 37 Ala. 333; Sanford *v.* Howard, 29 Ala. 684; Tomkies *v.* Reynolds, 17 Ala. 109; Atherton *v.* Tilton, 44 N. H. 452; Tucker *v.* Peaslee, 36 N. H. 167; Johnson *v.* Elliot, 26 N. H. 67; Plumer *v.* French, 22 N. H. 450; Wetmore *v.* Mell, 1 Ohio St. 26; 59 Am. Dec. 607; Stitt *v.* Wilson, Wright (Ohio) 505; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Elliott *v.* Stoddard, 98 Mass. 145; U. S. *v.* O'Meara, 1 Cranch (C. C.) 165; Austin *v.* Swank, 9 Ind. 109; Strange *v.* Donohue, 4 Ind. 327; Corinth *v.* Lincoln, 34 Me. 310; Stewart *v.* Hanson, 35 Me. 506; Russell *v.* Frisbie, 19 Conn. 205; State *v.* Huntley, 3 Ired. (N. Car.) 418; 40 Am. Dec. 416; Cornelius *v.* State, 12 Ark. 782; Clark *v.* Rush, 19 Cal. 393; Hovey *v.* Stevens, 1 Woodb. & M. (U. S.) 290; Crowther *v.* Gibson, 19 Mo. 365; Blair *v.* Coffman, 2 Overt. (Tenn.) 176; Kirby *v.* State, 7 Yerg. (Tenn.) 259; Evans *v.* Jones, 8 Yerg. (Tenn.) 461; Turpin *v.* Brannon, 3 McCord. (S. Car.) 261; Martin *v.* Simpson, 4 McCord. (S. Car.) 262; Parris *v.* Jenkins, 2 Rich. (S. Car.) 106; Duvall *v.* Medtart, 4 Har. & J. (Md.) 14; Curtis *v.* Moore, 20 Me. 93; Clayton *v.* Tucker, 20 Ga. 452; Robinson *v.* Lane, 19 Ga. 337; Franklin *v.* Woodland, 14 La. Ann. 184; Rigg *v.* Cook, 9 Ill. 336; 46 Am. Dec. 462; Mack *v.* State, 48 Wis. 271; Gillet *v.* Phelps, 12 Wis. 392; Hood *v.* Hood, 2 Grant's Cas. (Pa.) 229; Rees *v.* Livingston, 41 Pa. St. 113; Jones *v.* Brownfield, 2 Pa. St. 55; Koch *v.* Howell, 6 W. & S. (Pa.) 350; Postens *v.* Postens, 3 W. & S. (Pa.) 127; Dunbar *v.* McGill, 69 Mich. 297.

2. Tomkies *v.* Reynolds, 17 Ala. 109; Gilbert *v.* Gilbert, 22 Ala. 529; 58 Am. Dec. 268; Fail *v.* McArthur, 31 Ala. 26; Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; Garrett *v.* State, 76 Ala. 18; Noyes *v.* Ward, 19 Conn. 250; State *v.* Beaudet, 53 Conn. 536; Lee *v.* Hester, 20 Ga. 588; Kramer *v.* Settle, 1 Idaho N. S. 485; Weyrich *v.* People, 89 Ill. 90; Schoolcraft *v.* People, 117 Ill. 271; Phenix Ins. Co. *v.* La Pointe, 118 Ill. 384; Boone Co. Bank *v.* Wallace, 18 Ind. 82; Brown *v.* Kenyon, 108 Ind. 283; State *v.* Maloy, 44 Iowa 104; Van Fossen *v.* Mosher, 38 Kan. 417; Terrell *v.* Com., 13 Bush (Ky.) 246; D'Aquin *v.* Barbour, 4 La. Ann. 441; Bangor *v.* Brunswick, 27 Me. 351; Corinth *v.* Lincoln, 34 Me. 310; Richmond *v.* Thomaston, 38 Me. 232; Ashland *v.* Marlborough, 99 Mass. 47; Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557; Kingsford *v.* Hood, 105 Mass. 495; Com. *v.* Sturtivant, 117 Mass. 122; Weld *v.* Boston, 126 Mass. 166; Brookfield *v.* Warren, 128 Mass. 287; Com. *v.* Sargent, 129 Mass. 115; Pickering *v.* Cambridge, 144 Mass. 244; Merrill *v.* Sawyer, 8 Pick. (Mass.) 397; Stone *v.* Segur, 11 Allen (Mass.) 568; O'Kelly *v.* O'Kelly, 8 Met. (Mass.) 436; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Ashley *v.* Wolcott, 3 Gray (Mass.) 571; Johnson *v.* Sherwin, 3 Gray (Mass.) 374; Nutting *v.* Page, 4 Gray (Mass.) 581; Brown *v.* Mooers, 6 Gray (Mass.) 451; Lane *v.* Bryant, 9 Gray (Mass.) 245; 69 Am. Dec. 282; Conlan *v.* Grace, 36 Minn. 276; Meek

If they amount to no more than a mere narrative of a past occurrence or of an isolated conversation held, or an isolated act done at a later period, they are not admissible;[1] but if declarations of a past occurrence are made under such circumstances as will raise

v. Perry, 36 Miss. 190; State *v.* Umfield, 76 Mo. 404; State *v.* Rider, 90 Mo. 54; Rollins *v.* Strout, 6 Nev. 150; Gordon *v.* Shurtliff, 8 N. H. 260; Sessions *v.* Little, 9 N. H. 271; Woods *v.* Banks, 14 N. H. 101; Mahurin *v.* Bellows, 14 N. H. 209; Plumer *v.* French, 22 N. H. 450; Carlton *v.* Patterson, 29 N. H. 580; Morrill *v.* Foster, 32 N. H. 358; 33 N. H. 379; Carter *v.* Beals, 44 N. H. 408; Ordway *v.* Sanders, 58 N. H. 132; Castner *v.* Sliker, 33 N. J. L. 95, 507; Hunter *v.* State, 40 N. J. L. 495; Moore *v.* Meacham, 10 N. Y. 207; Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100; Anderson *v.* Rome, etc., R. Co., 54 N. Y. 334; Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185; Weeks *v.* Lowerre, 8 Barb. (N. Y.) 530; People *v.* Williams, 3 Abb. App. Dec. (N. Y.) 596; Howard *v.* Upton, 9 Hun (N. Y.) 434; Trimmer *v.* Trimmer, 13 Hun (N. Y.) 182; Frank *v.* Brewer, 54 Hun (N. Y.) 635; Wetmore *v.* Mell, 1 Ohio St. 26; 59 Am. Dec. 607; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77; State *v.* Glass, 5 Oregon 73; Patten *v.* Minesinger, 25 Pa. St. 393; Duvall *v.* Darby, 38 Pa. St. 56; Tawney *v.* Long, 76 Pa. St. 106; Kirby *v.* State, 7 Yerg. (Tenn.) 259; 9 Yerg. (Tenn.) 383; 30 Am. Dec. 420; Bassham *v.* State, 38 Tex. 622; Continental Ins. Co. *v.* Pruitt, 65 Tex. 125; Penniman *v.* Patchin, 6 Vt. 325; State *v.* Howard, 32 Vt. 380; Barber *v.* Bennett, 62 Vt. 50; Joyce *v.* Com., 78 Va. 287; Ganson *v.* Madigan, 15 Wis. 144; 82 Am. Dec. 659.

1. 1 Taylor's Ev. (7th ed.) 537. See Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112; 18 Am. & Eng. R. Cas. 194; 47 Am. Rep. 403; Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181; Fordyce *v.* McCants, 51 Ark. 509; 14 Am. St. Rep. 69; Durkee *v.* Central Pac., etc., R. Co., 69 Cal. 533; 58 Am. Rep. 562; Edmunds *v.* Curtis, 8 Colo. 605; Sims *v.* Macon, etc., R. Co., 28 Ga. 94; East Tennessee, etc., R. Co. *v.* Duggan, 51 Ga. 212; Marsh *v.* South Carolina, etc., R. Co., 56 Ga. 274; Newsom *v.* Georgia R. Co., 66 Ga. 57; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237; 31 Am. & Eng. R. Cas. 352; Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257; 41 Am. & Eng. R. Cas. 196; 14 Am. St. Rep. 158; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452; 41 Am. & Eng. R. Cas. 307; Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438; 92 Am. Dec. 281; Michigan Cent. R. Co. *v.* Gougar, 55 Ill. 503; Chicago, etc., R. Co. *v.* Fillmore, 57 Ill. 265; Chicago, etc., R. Co. *v.* Lee, 60 Ill. 501; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Chicago, etc., R. Co. *v.* Becker, 128 Ill. 545; Chicago, etc., R. Co. *v.* Howard, 6 Ill. App. 569; Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335; 5 Am. Rep. 201; Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 183; 5 Am. & Eng. R. Cas. 628; Hancock Co. *v.* Leggett, 115 Ind. 544; Gray *v.* McLaughlin, 26 Iowa 279; Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526; Verry *v.* Burlington, etc., R. Co., 47 Iowa 549; Armil *v.* Chicago, etc., R. Co., 70 Iowa 130; 28 Am. & Eng. R. Cas. 467; Tennis *v.* Interstate Consolidated, etc., R. Co., 45 Kan. 503; Chesapeake, etc., R. Co. *v.* Reeves (Ky. 1889), 11 S. W. Rep. 464; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray (Mass.) 92; Chapin *v.* Marlborough, 9 Gray (Mass.) 244; 69 Am. Dec. 281; Lane *v.* Bryant, 9 Gray (Mass.) 245; 69 Am. Dec. 282; Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146; 83 Am. Dec. 621; Roosa *v.* Boston Loan Co., 132 Mass. 439; Williamson *v.* Cambridge R. Co., 144 Mass. 148; 30 Am. & Eng. R. Cas. 636; McKinnon *v.* Norcross, 148 Mass. 533; Detriot, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Mabley *v.* Kittleberger, 37 Mich. 360; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; Merkle *v.* Bennington, 58 Mich. 156; 55 Am. Rep. 666; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472; 40 Am. & Eng. R. Cas. 271; Dundas *v.* Lansing, 75 Mich. 499; 13 Am. St. Rep. 457; Van Dusen *v.* Letellier, 78 Mich. 492; Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79; 41 Am. & Eng. R. Cas. 376; Moore *v.* Chicago, etc., R. Co., 59 Miss. 243; 9 Am. & Eng. R. Cas. 401; Rogers *v.* McCune, 19 Mo. 557; McDermott *v.* Hannibal, etc., R. Co., 73 Mo. 516; 2 Am. & Eng. R. Cas. 85; 39 Am. Rep. 526; Adams *v.* Hanni-

the reasonable presumption that they are the spontaneous utterances of thoughts created by, or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*.[1]

III. DECLARATIONS AS TO PERSONAL INJURIES—1. In General.—Declarations regarding personal injuries are admissible as part of the *res gestæ*, when there is a concurrence in point of time between the act and the declaration; otherwise, it is but a narrative of what has been or an assertion of what will be done.[2] Exclama-

bal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; 41 Am. Rep. 333; Kelly *v.* Chicago, etc., R. Co., 88 Mo. 534; Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165; 10 Am. St. Rep. 300; Wengler *v.* Missouri Pac. R. Co., 16 Mo. App. 493; Luby *v.* Hudson River R. Co., 17 N. Y. 131; Whitaker *v.* Eighth Ave. R. Co., 51 N. Y. 295; Furst *v.* Second Ave. R. Co., 72 N. Y. 542; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274; 19 Am. & Eng. R. Cas. 400; 47 Am. Rep. 41; Martin *v.* New York, etc., R. Co., 103 N. Y. 626; Page *v.* New York Cent. R. Co., 6 Duer (N. Y.) 523; Sherman *v.* Delaware, etc., R. Co., 106 N. Y. 542; 31 Am. & Eng. R. Cas. 15; McCabe *v.* Dry Dock, etc., R. Co., 15 Daly (N. Y.) 504; Whalen *v.* Standard Gaslight Co., 32 N. Y. St. Rep. 48; Southerland *v.* Wilmington, etc., R. Co., 106 N. Car. 100; Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185; Sullivan *v.* Oregon R., etc., Co., 12 Oregon 392; 21 Am. & Eng. R. Cas. 391; 53 Am. Rep. 364; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339; Huntingdon, etc., R. Co. *v.* Decker, 82 Pa. St. 119; Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259; Bradford *v.* Downs, 126 Pa. St. 622; Patterson *v.* South Carolina R. Co., 4 S. Car. 153; Parkey *v.* Yeary, 1 Heisk. (Tenn.) 157; Travis *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 231; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628; Prideaux *v.* Mineral Point, 43 Wis. 513; 28 Am. Rep. 558; Mutcha *v.* Pierce, 49 Wis. 231; 35 Am. Rep. 776; Fitzerald *v.* Weston, 52 Wis. 354; Galveston *v.* Barbour, 62 Tex. 172; 50 Am. Rep. 519; Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222; Austin *v.* Ritz, 72 Tex. 391; Gulf, etc., R. Co *v.* York, 74 Tex. 364; Richards *v.* Moore (Vt. 1890), 19 Atl. Rep. 390; Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528; Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99; 27 Am. & Eng. R. Cas. 232.

1. People *v.* Vernon, 35 Cal. 49; 95 Am. Dec. 49; International, etc., R. Co. *v.* Anderson, 82 Tex. 516; Pilkenton *v.* Gulf, etc., R. Co., 70 Tex. 226; Mitchum *v.* State, 11 Ga. 615; Handy *v.* Johnson, 5 Md. 450.

To make declarations a part of the *res gestæ* they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at the time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. State *v.* Garrand, 5 Oregon 216.

2. Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113; 15 Am. St. Rep. 701; Tennis *v.* Interstate Consolidated, etc., R. Co., 45 Kan. 503; State *v.* Pomeroy, 25 Kan. 350; Jenkins *v.* Levis, 25 Kan. 479; Swenson *v.* Aultman, 14 Kan. 273; State *v.* Montgomery, 8 Kan. 351; Union Pac. R. Co. *v.* Fray, 35 Kan. 700; Dodge *v.* Childs, 38 Kan. 529; Richards *v.* Moore, 60 Vt. 449; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566; 38 Am. & Eng. R. Cas. 152; 9 Am. St. Rep. 883; Augusta Factory *v.* Barnes, 72 Ga. 217; 53 Am. Rep. 838; Texas, etc., R. Co. *v.* Hall (Tex. 1892), 19 S. W. Rep. 121.

In an action for the death of a boy caused by injuries received under a horse-car, his declarations as to how he got under the car, made at the scene of the accident and when first picked up, are admissible in evidence, but his declarations made after he had been removed and the persons connected with the accident have separated, and in answer to questions as to how he got injured, are inadmissible though made only a short time after the accident.

tions of bodily or mental pain, and contemporaneous statements as to where the pain is, are admisssble in evidence of the existence and locality of the pain.[1]

Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165; 10 Am. St. Rep. 300.

In an action by the widow for the wrongful death of her husband through defendant's negligence, statements made by him immediately after the accident that it was caused by his fault, are admissible on behalf of the defendant. Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390.

So statements made by a street-car driver just after the car had stopped, and while plaintiff was still under it, are admissible as part of the *res gestæ.* Quincy Horse Car R., etc., Co. *v.* Gnuse (Ill. 1891), 27 N. E. Rep. 190.

The plaintiff alighted from one of defendant's trains, on which he was a passenger, on a dark night, and fell against a pile of wood. Within 15 minutes after the accident, while lying where he fell, and still uttering groans and exclamations of pain, he made a statement to one who assisted him, that the conductor made him get off where he fell. *Held*, that this statement was admissible as *res gestæ.* International, etc., R. Co. *v.* Smith (Tex.), 44 Am. & Eng. R. Cas. 324.

But in an action for injuries by a person in being thrown into a ditch, evidence of what she said while being helped out is not part of the *res gestæ*, but an account of a past transaction. Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185. So declarations of a passenger found near where he fell from the train about half an hour afterwards, held not a part of the *res gestæ.* Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257; 41 Am. & Eng. R. Cas. 196; 14 Am. St. Rep. 158.

1. Stone *v.* Watson, 1 Ala. Sel. Cas. 236; Phillips *v.* Kelly, 29 Ala. 628; Sanders *v.* Reister, 1 Dakota 151; Carthage Turnpike Co. *v.* Andrews, 202 Ind. 138; 52 Am. Rep. 653; Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Hyatt *v.* Adams, 16 Mich. 180; Elliott *v.* Van Buren, 33 Mich. 49; 20 Am. Rep. 668; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537; 31 Am. Rep. 321; Harris *v.* Detroit City R. Co., 76 Mich. 227; Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord R. Co., 44 N. H. 223; Norris *v.* Haverhill, 65 N. H. 89; Caldwell *v.* Murphy, 11 N. Y. 416; Baker *v.* Griffin, 10 Bosw. (N. Y.) 140; Lewke *v.* Dry Dock, etc., R. Co., 46 Hun (N. Y.) 283; Kennedy *v.* Rochester, etc., R. Co., 54 Hun (N. Y.) 183; People *v.* Williams, 3 Park. Cr. Rep. (N. Y.) 84; Thomas *v.* Harrall, 18 Oregon 546; Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113; 15 Am. St. Rep. 701; Texas, etc., R. Co. *v.* Barron, 78 Tex. 421; Kent *v.* Lincoln, 32 Vt. 591; Bridge *v.* Oshkosh, 67 Wis. 195.

In an action by a passenger for an internal injury, sustained in a railroad wreck, where defendant contended that the injury was feigned, and was an afterthought, the testimony of one who was present that some fifteen minutes after the accident plaintiff complained of feeling strangely in his stomach and bowels, and expressed a fear that he was hurt, was admissible, when the injury was of a nature to produce the symptoms then complained of. Texas, etc., R. Co. *v.* Barron, 78 Tex. 421.

In Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264; 54 Am. Rep. 312, it was held that in an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness, and declarations as to its seat, at the time of or subsequent to the occurring of the injury, and without regard to whom made, is competent. The court said: "Counsel for appellant insist that exclamations of pain, in order to be admissible in evidence, must be contemporaneous with the alleged injury and the then existing facts, and that they must have been made before sufficient time elapsed to enable the person making them to form plans for future lawsuits. They insist, further, that they must have been made *ante litem motam*, not only before suit brought, but before the controversy existed in any form. In a general sense, and as applicable to a different class of cases, the rule as stated by counsel is approximately correct. Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evi-

Statements of past suffering and pain, when not made to a medical expert for the purpose of enabling him to form an opinion with a view to treatment or other legitimate purpose, are clearly inadmissible.[1] And statements of the cause of the injury,[2] or statements of past occurrences made to any one, unless made

dence. Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138; 23 Am. & Eng. R. Cas. 492; 52 Am. Rep. 653; Elkhart *v.* Ritter, 66 Ind. 136; Howe *v.* Plainfield, 41 N. H. 135; Towle *v.* Blake, 48 N. H. 92; Kennard *v.* Burton, 25 Me. 39; 43 Am. Dec. 249; Hyatt *v.* Adams, 16 Mich. 180; Elliott *v.* Van Buren, 33 Mich. 49; 20 Am. Rep. 668; Brown *v.* New York Cent. R. Co., 32 N. Y. 597; 88 Am. Dec. 353; Matteson *v.* New York Cent. R. Co., 35 N. Y. 487; 91 Am. Dec. 67; Johnson *v.* McKee, 27 Mich. 471; Earl *v.* Tupper, 45 Vt. 275.

"Expressions of present existing pain, and of its locality are exceptions to the general rule which excludes hearsay evidence. They are admitted on the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent and of more weight when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry. Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513; 33 Am. Rep. 821; Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463; 8 Am. & Eng. R. Cas. 72.

"It is only when such declarations assume the form of a narrative of past experience or suffering, or a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert, under the condition above mentioned, that their admissibility becomes the subject of serious discussion." Roosa *v.* Boston Loan Co., 132 Mass. 439.

1. Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Roosa *v.* Boston Loan Co., 132 Mass. 439; Olp *v.* Gardner, 48 Hun (N. Y.) 169; Winter *v.* Central Iowa R. Co., 74 Iowa 448; Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294; 59 Am. Rep. 506; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537; 31 Am. Rep. 321.

The complaints of pain made the day after an accident are not evidence against the party charged with liability for the accident. Olp *v.* Gardner, 48 Hun (N. Y.) 169.

In Laughlin *v.* Street R. Co., 80 Mich. 154; 44 Am. & Eng. R. Cas. 449, it was held in an action for personal injuries that expressions of pain made more than four years after receiving the injuries and after the action was commenced, were not admissible in evidence as part of the *res gestæ*. But in Kane *v.* Troy (Supreme Ct.), 1 N. Y. Supp. 536, evidence that plaintiff, when taken out in a carriage some weeks after the accident, complained of pain, was admitted. So in Nichols *v.* Brooklyn City R. Co., 30 Hun (N. Y.) 437, it was held that a girl might testify that three months after the accident plaintiff, with whom the witness slept, would sit upon the edge of the bed and complain of pain in her arm and shoulder. See Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641; 6 Am. & Eng. R. Cas. 421.

2. Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181; Hellmuth *v.* Katschke, 35 Ill. App. 21; Chicago, etc., R. Co. *v.* Johnson, 56 Ill. App. 564; Downs *v.* New York, etc., R. Co., 47 N. Y. 83; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274; 19 Am. & Eng. R. Cas. 400; 47 Am. Rep. 41; Martin *v.* New York, etc., R. Co., 103 N. Y. 626; Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222.

Declarations as to how an injury occurred made by one injured by a street car in the middle of the street, eighty feet wide, after he has arisen and walked to the sidewalk in answer to a question, "What is the matter?" are not admissible as *res gestæ* in an action for such injury. Chicago, etc., R. Co. *v.* Becker, 128 Ill. 545; 15 Am. St. Rep. 144.

The evidence was that a caboose in which plaintiff was riding broke loose,

so nearly contemporaneous with the principal fact to which they relate, or unless they are made while the transaction is in progress so as to constitute a part of the *res gestæ*, are also inadmissible.[1] The rule is not to be extended beyond the necessity upon which it is founded.[2] Past events and the manner in which an injury was received are ordinarily susceptible of proof by direct evidence. For that reason, such statements, not made contemporaneous with the occurrence or so near it as to become part of the transaction, no matter to whom made, are inadmissible.[3]

2. Statements to Physicians.—A statement or narrative given by a patient to a physician in relation to his condition, symptoms, sensations and feelings, both past and present, are part of the *res gestæ* when received during professional treatment, and are admissible.[4] But statements made after a physician is called, which

and collided with a train from behind, but was conflicting as to whether the caboose had stopped before the accident. *Held*, that evidence of declarations of railroad men and others, an hour or two after the accident, as to the circumstances of it, were inadmissible to show that plaintiff had no time to get out. Missouri Pac. R. Co. *v.* Ivey, 71 Tex. 409; 10 Am. St. Rep. 758.

1. Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99; 27 Am. & Eng. R. Cas. 232; Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112; 18 Am. & Eng. R. Cas. 194; 47 Am. Rep. 403; Durkee *v.* Central Pac. R. Co., 69 Cal. 533; 58 Am. Rep. 562; Newsom *v.* Georgia R. Co., 66 Ga. 57; Ferguson *v.* Columbus, etc., R. Co., 75 Ga. 637; Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304; 34 Am. & Eng. R. Cas. 439; Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 182; 5 Am. & Eng. R. Cas. 628; Moore *v.* Chicago, etc., R. Co., 59 Miss. 243; 9 Am. & Eng. R. Cas. 401; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; 41 Am. Rep. 333; Sullivan *v.* Oregon R., etc., Co., 12 Oregon 392; 21 Am. & Eng. R. Cas., 391; 53 Am. Rep. 364; Travis *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 231; Mutcha *v.* Pierce, 49 Wis. 231; 35 Am. Rep. 776.

Statements by a passenger who is injured by a fall while leaving the train, made about half an hour afterwards, are not part of the *res gestæ*. Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257; 41 Am. & Eng. R. Cas. 196; 14 Am. St. Rep. 158.

In an action for injuries to a child, the declarations of the child made some time after the injury are not admissible for defendant. Bradford *v.* Downs, 126 Pa. St. 622.

The deceased having been run over by a train, declarations of the engineer are not *res gestæ* when made after he had stopped the train and five minutes after the accident. Tennis *v.* Interstate Consolidated, etc., R. Co., 45 Kan. 503.

Where a boy who had driven against a foot-passenger on the street, immediately stopped his horse, and came back and said he did not mean to, held a part of the *res gestæ*. Cleveland *v.* Newsom, 45 Mich. 62.

A child died, as alleged, from an injury by a bolt carelessly left projecting from the curb of a city sidewalk. Immediately after the injury he told his mother the cause of the injury, weeping from pain at the time, and the next day he told his father. In an action for damages against the city by the father, the father testified to the son's declaration to him, and that he and the son together went to see the bolt in consequence of the son's declaration, and found drops of blood on it. *Held*, that the declaration to the mother was competent, but that to the father incompetent. Galveston *v.* Barbour, 62 Tex. 172; 50 Am. Rep. 519.

2. Chapin *v.* Marlborough, 9 Gray (Mass.) 244; 69 Am. Dec. 281.

3. Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438; 92 Am. Dec. 81.

4. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544; Bridge *v.* Oshkosh, 71 Wis. 363; Wabash Co. *v.* Pearson (Ind. 1889), 22 N. E. Rep. 134; Norris *v.* Haverhill, 65 N. H. 89; Thomas *v.* Herrall, 18 Oregon 546; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513; 33 Am. Rep. 821; Barber *v.* Merriam, 11 Allen (Mass.) 322; Eckles *v.* Bates, 26 Ala. 655; Yeatman *v.* Hart, 6 Humph.

do not purport to have been made in connection with professional treatment, are not admissible,[1] as where a patient narrates to the physician the cause of an injury.[2] Especially is this so where the narration is made days or months after the injury has been received.[3]

3. Acts and Declarations of Employes. — The declarations of employés are not admissible, unless shown to be a part of the *res gestæ* of the accident, and to have been made in the course of their duties.[4] No inflexible rule can be formulated as to the time when the declarations must be made in order to be a part of the *res gestæ.* The general rule is that declarations of employés are not competent as part of the *res gestæ* unless made at the time of the accident and directly connected with the main fact.[5] See MASTER AND SERVANT, vol. 14, p. 913.

(Tenn.) 375; Looper *v.* Bell, 1 Head (Tenn.) 373; Martin *v.* Wood, 52 Hun (N. Y.) 613; Mutual L. Ins. Co. *v.* Tillman (Tex. 1892), 19 S. W. Rep. 294; State *v.* Gedicke, 43 N. J. L. 86; Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125; Earl *v.* Tupper, 45 Vt. 275; Barber *v.* Merriam, 11 Allen (Mass.) 322.

1. Merkle *v.* Bennington, 58 Mich. 156; 55 Am. Rep. 666; Equitable Mut. Accident Assoc. *v.* McCluskey (Colo. 1892), 29 Pac. Rep. 383.

A doctor drove twelve or thirteen miles before he reached the place where one injured by an accident had been taken. *Held*, that the statements made to him by the injured party as to how he was injured, were not a part of the *res gestæ*, and that their admission was reversible error. Fordyce *v.* McCants, 51 Ark. 509; 14 Am. St. Rep. 69.

2. Chapin *v.* Marlborough, 9 Gray (Mass.) 244; 69 Am. Dec. 281; Dundas *v.* Lansing, 75 Mich. 499; 13 Am. St. Rep. 457.

3. Chapin *v.* Marlborough, 9 Gray (Mass.) 244; 69 Am. Dec. 281.

Statements made by the plaintiff to her physician as to the circumstances of the accident three or four days after it occurred, are inadmissible as a part of the *res gestæ.* Dundas *v.* Lansing, 75 Mich. 499; 13 Am. St. Rep. 457.

4. Petrie *v.* Columbia, etc., R. Co., 27 S. Car. 63; Ohio, etc., R. Co. *v.* Stein (Ind. 1892), 31 N. E. Rep. 180. See *Acts and Declarations of Agents and Employés, infra.*

Where an engineer made a report of an accident to his superior officer two or three miles from the scene of the accident, his declarations in such report were of the *res gestæ*, since the making of the report was a duty imposed by the company. Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390; 31 Am. & Eng. R. Cas. 399. *Compare* Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452; 41 Am. & Eng. R. Cas. 307.

In an action against an elevated railway company for injuries to a passenger alleged to have been sustained by the acts of one of its conductors, declarations of the conductor at the time of the accident that he was sorry he had "done it" were competent, as tending to explain the nature of the act complained of. Koetter *v.* Manhattan R. Co., 59 Hun (N. Y.) 623.

5. Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149; 37 Am. & Eng. R. Cas. 308; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628. See Ohio, etc., R. Co. *v.* Stein (Ind. 1892), 31 N. E. Rep. 180; Wells *v.* Alabama, etc., R. Co., 67 Miss. 24; 40 Am. & Eng. R. Cas. 645; St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491; 37 Am. & Eng. R. Cas. 94; Wormsdorf *v.* Detriot, etc., R. Co., 75 Mich. 472; 40 Am. & Eng. R. Cas. 271.

In Luby *v.* Hudson River R. Co., 17 N. Y. 131, where the suit was for alleged negligence in running against the plaintiff, the plaintiff was allowed to prove by a policeman, who was present when the accident occurred, that he being called on by the crowd then present, arrested the driver of the car, and while getting out of it and out of the crowd, being asked why he did not stop the car, he said that the brake was out of order. The court of appeals reversed the case, because this evidence was admitted, holding that

this declaration of the driver was not a part of the *res gestæ*. It was no part of the driver's act for which the company was sued. The court said: "It was not made at the time of the act so as to give it quality and character. The alleged wrong was complete, when he made the statement, and the driver was only endeavoring to account for what he had done."

So in Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335; 5 Am. Rep. 201, the court decided that in an action against a railroad company by an administrator to recover damages for the death of his decedent, occasioned by the collision of a locomotive and train of cars and a wagon in which the decedent was crossing the track, the declarations of the fireman employed on the locomotive at the time of the collision, made on the arrival of said train bearing the body of the deceased at a station one mile from the place of the accident, were not admissible as a part of the *res gestæ*. So a remark by the engineer of the train which ran over plaintiff made in plaintiff's presence two or three hours after the accident, to the effect that he did not see him until struck by the locomotive, is not admissible. Travis *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 231. And in Lane *v.* Bryant, 9 Gray (Mass.) 245; 69 Am. Dec. 282, in an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriages, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision, and while defendant was being taken from his carriage, and while the crowd was about, said the plaintiff was not to blame, yet the court held that this declaration of the defendant was not admissible as a part of the *res gestæ*. The court said: "It was made after the accident occurred and the injury to the plaintiff's carriage had been done. It did not accompany the principal act or tend in any way to elucidate it. It was only the expression of opinion about a past occurrence and not a part of the *res gestæ*." Admissions of a conductor, made after a passenger fell from his train, that he kicked him off, are not part of the *res gestæ*. Moore *v.* Chicago, etc., R. Co., 59 Miss. 243; 9 Am. & Eng. R. Cas. 401. In an action against a railroad company for injuries resulting from the negligence of a brakeman in leaving open a switch, the admissions of the brakeman that he caused the accident, not made in the execution of his duty or at the time, were inadmissible against the company. Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91; 18 Am. & Eng. R. Cas. 130. Just after a woman had fallen from a street car the conductor told her that it was his fault. *Held*, that this admission was not evidence against the railroad company. Williamson *v.* Cambridge R. Co., 144 Mass. 148; 30 Am. & Eng. R. Cas. 636. And in an action for damages resulting from the blowing of a whistle, which frightened the plaintiff's horse, what he said soon afterwards as to the engineer's shaking his fist at him, and what the engineer said on arriving at the next station, indicating malice, are not part of the *res gestæ*. Newsom *v.* Georgia R. Co., 66 Ga. 57. And so in an action to recover damages from a railroad company for killing plaintiff's stock, evidence of the statements of a section foreman as to the fact of the killing, made after the event, are inadmissible as a part of the *res gestæ*. Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58.

In some cases the rule is not applied so stringently. Thus declarations made a few seconds after a railroad accident, by the engineer of one of the trains as to facts connected with the accident, were held admissible against his company as part of the *res gestæ*. McLeod *v.* Ginther, 80 Ky. 399; Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542; 41 Am. & Eng. R. Cas. 498. In an action against a railroad company for wrongful expulsion from one of its trains a conversation had immediately after the expulsion, and serving to illustrate its character, between plaintiff and the offending brakeman, was held part of the *res gestæ*. Bass *v.* Chicago, etc., R. Co., 42 Wis. 654; 24 Am. Rep. 437. See Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390; 31 Am. & Eng. R. Cas. 399. In an action against a railroad company for the killing of a child, evidence as to what the engineer said about the accident within a few minutes after the child was killed was held admissible as part of the *res gestæ*. Hermes *v.* Chicago, etc., R. Co. (Wis. 1891), 50 N. W. Rep. 584. The court went still further in Wengler *v.* Missouri, etc., R. Co., 16 Mo. App. 493, and held, in an action against a railroad company for an injury caused by negligence that declarations made a few days after the injury by the conductor who had charge of the train to

4. Declarations to or by Strangers.—The declarations of strangers are sometimes admissible, but they should be shown to be a part of the thing done, contemporaneous with it, or so connected with it as to give it character; they should amount to verbal acts that would be attributed to the party whose acts or conduct they explain.[1] Similarly, declarations of the party injured made to strangers or bystanders are admissible.[2]

IV. Acts and Declarations of Agents and Employes.—Where an agent is acting within the scope of his agency, his declarations made to the person whose interests are directly involved at the place where the transaction or occurrence happened, so near the

the effect that the bell was not rung and the train was running at an excessive rate of speed, were admitted as part of the *res gestæ*.

Where declarations are made by an agent or servant, who tries to excuse himself and throw the blame on a fellow servant, and neither his statements nor the reply to them by the other are made in the transaction of business of their employer and in no wise immediately proceed or accompany the act which led to the accident, or constitute any part of the act, they are not part of the *res gestæ* and therefore inadmissible. Thus, a witness cannot be allowed to testify in an action brought by a widow against a railroad company, that after deceased was struck and after the train was stopped, two of the trainmen, whom he took to be the fireman and the engineer, came up and one of them said to the other: "If you had stopped the train when I told you, you would not have killed him," and the other replied. "It cannot be helped now; it is too late." Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; 41 Am. Rep. 333.

1. Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157; New York, etc., Min. Co. *v.* Rogers, 11 Colo. 6; Greenfield *v.* Camden, 74 Me. 56; Powers *v.* West Troy, 25 Hun (N. Y.) 561; Hitchcock *v.* Burgett, 38 Mich. 501; Jacksonville, etc., R. Co. *v.* Peninsular Land Trans., etc., Co., 27 Fla. 157; 49 Am. & Eng. R. Cas. 603; Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; Haase *v.* Oregon, etc., R. Co., 19 Oregon 354; 44 Am. & Eng. R. Cas. 360; Missouri Pac. R. Co. *v.* Ivey, 71 Tex. 409; 37 Am. & Eng. R. Cas. 46.

Thus, in an action of a passenger on a street car who is injured in jumping from the car in apprehension of a collision of the car with a locomotive at a railroad crossing, evidence of the acts of the passengers, and of outcries by them, is admissible as part of the *res gestæ*. Klieber *v.* People's R. Co. (Mo. 1891), 17 S. W. Rep. 946.

In an action for the death of a child, who was run over by defendant's street car, the declaration of the child's father, who did not see the accident, but reached the place two or three minutes later, was not part of the *res gestæ*, and was inadmissible. Senn *v.* Southern R. Co. (Mo. 1892), 18 S. W. Rep. 1007.

In an action for the death of a boy caused by injuries received under a horse car, evidence that a disinterested bystander shouted "murder" after the accident, is inadmissible. Leahey *v.* Cass Ave. R. Co., 97 Mo. 165; 10 Am. St. Rep. 300.

2. Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657; Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42; 33 Am. & Eng. R. Cas. 511; 7 Am. St. Rep. 823; International, etc., R. Co. *v.* Anderson, 82 Tex. 516; Ferguson *v.* Columbus, etc., R. Co., 75 Ga. 637.

In an action against a railroad company to recover damages for personal injuries inflicted by a brakeman of the company, a witness was allowed to testify that on the morning of the accident he heard cries for help, and hurried to the place where plaintiff was lying, badly hurt, and alone, and that plaintiff cried out to him several times that a brakeman knocked him off the train and it ran over him. International, etc., R. Co. *v.* Anderson, 82 Tex. 516.

The plaintiff, a passenger upon the railway, who left the train late at night and in so doing was injured by a fall, which broke his leg, having pulled off his coat, detached his suspenders,

occurrence or transaction in point of time as to be justly and reasonably regarded as part of it, are ordinarily to be regarded as part of the *res gestæ*. But they must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time.[1] If the declarations are made at a

bound up his broken limb, crawled through a culvert from one side of the railway to the other, seated himself on the cross-ties, and cried for help, his account of the manner of leaving the train and receiving the injury given to a person who reached him about half an hour after first hearing his cries, was held no part of the *res gestæ*, it being a mere narrative of a past event and was not admissible evidence in his own behalf. Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257; 41 Am. & Eng. R. Cas. 196; 14 Am. St. Rep. 158.

1. Kirkland *v.* Trott, 66 Ala. 417; Byers *v.* Fowler, 14 Ark. 86; Mateer *v.* Brown, 1 Cal. 221; Christy *v.* Dana, 42 Cal. 174; Green *v.* Ophir Copper, etc., Min. Co., 45 Cal. 522; Jenks *v.* Burr, 56 Ill. 450; Chicago, etc., R. Co. *v.* Lee, 60 Ill. 501; Chicago, etc., R. Co. *v.* Riddle, 60 Ill. 534; Mix *v.* Osby, 62 Ill. 193; Linblom *v.* Ramsey, 75 Ill. 246; Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461; 30 Am. & Eng. R. Cas. 590; Toledo, etc., R. Co. *v.* Fisher, 13 Ind. 258; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83; Heller *v.* Crawford, 37 Ind. 279; U. S. Express Co. *v.* Rawson, 106 Ind. 215; Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433; Marion *v.* Chicago, etc., R. Co., 64 Iowa 568; McPherrin *v.* Jennings, 66 Iowa 622; Winch *v.* Baldwin, 68 Iowa 764; Armil *v.* Chicago, etc., R. Co., 70 Iowa 130; 28 Am. & Eng. R. Cas. 467; McLeod *v.* Ginther, 80 Ky. 399; Baring *v.* Clark, 19 Pick. (Mass.) 220; Kingsley *v.* Slack, 5 Cush. (Mass.) 585; Morse *v.* Connecticut River R. Co., 6 Gray (Mass.) 450; Fogg *v.* Pew, 10 Gray (Mass.) 409; 71 Am. Dec. 662; Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; Lowry *v.* Harris, 12 Minn. 255; Greene *v.* Dockendorf, 13 Minn. 70; Presley *v.* Lowry, 25 Minn. 114; O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166; 38 Am. Rep. 288; Rogers *v.* McCune, 19 Mo. 557; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; 41 Am. Rep. 333; Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; 28 Am. & Eng. R. Cas. 524; Ryan *v.* Gilmer, 2 Mont. 517; 25 Am. Rep. 744; Homan *v.* Boyce, 15 Neb. 545; Meyer *v.* Virginia, etc., R. Co., 16 Nev. 341; 9 Am. & Eng. R. Cas. 178; Sussex Co. Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Thallhimer *v.* Brinkerhoff, 6 Cow. (N. Y.) 90; 15 Am. Dec. 309; Webb *v.* Alexander, 7 Wend. (N. Y.) 281; First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153; Anderson *v.* Rome, etc., R. Co., 54 N. Y. 335; Hoag *v.* Lamont, 60 N. Y. 96; First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; White *v.* Miller, 71 N. Y. 118; 27 Am. Rep. 13; Pierson *v.* Atlantic Nat. Bank, 77 N. Y. 304; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493; Curtis *v.* Avon, etc., R. Co., 49 Barb. (N. Y.) 148; Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364; Kasson *v.* Mills, 8 How. Pr. (N. Y.) 377; Whittaker *v.* Eighth Ave. R. Co., 5 Robt. (N. Y.) 650; Dick *v.* Cooper, 24 Pa. St. 217; 64 Am. Dec. 652; Patton *v.* Minesinger, 25 Pa. St. 393; Woodwell *v.* Brown, 44 Pa. St. 121; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339; Mullan *v.* Philadelphia, etc., Steamship Co., 78 Pa. St. 25; 21 Am. Rep. 2; Huntingdon, etc., R. Co. *v.* Decker, 82 Pa. St. 119; McAlpin *v.* Cassidy, 17 Tex. 449; Tuttle *v.* Turner, 28 Tex. 759; Stiles *v.* Danville, 42 Vt. 282; Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. (Va.) 328; U. S. *v.* Gooding, 12 Wheat. (U. S.) 460; U. S. *v.* The Burdett, 9 Pet. (U. S.) 682; Luby *v.* Hudson River R. Co., 17 N. Y. 132; Southerland *v.* Wilmington, etc., R. Co., 106 N. Car. 100; Thallhimer *v.* Brinkerhoff, 4 Wend. (N. Y.) 396; 21 Am. Dec. 155; O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166; 38 Am. Rep. 288; Stebbins *v.* Keene Tp., 60 Mich. 214; St. Louis, etc., R. Co. *v.* Barger, 52 Ark. 78; Wengler *v.* Missouri, etc., R. Co., 16 Mo. App. 493; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91; 18 Am. & Eng. R. Cas. 130. See also AGENCY, vol. 1, p. 351.

In an action to recover damages for killing a horse and injuring a mule

different place and are separated from the occurrence or transaction by such an interval of time as requires the inference or conclusion that they were not part of the act, transaction, or occurrence, they are not part of the *res gestæ* and cannot be given in evidence against the principal.[1] Where his right to act in any particular matter in question has ceased, the principal can no longer be affected by his declarations, they being mere hearsay.[2]

and harness and wagon by a railway company, the brakeman cannot be permitted to testify to a conversation which he had with the driver of the plaintiff after the accident had happened and the train stopped, to the effect that he was not looking, noticing or thinking about the train. Kelly *v.* Chicago, etc., R. Co., 88 Mo. 534.

The accident being the running of a railroad train against a peddler's wagon and the destruction of his goods, the trial court admitted evidence of what was said at the time of the accident by the engineer in charge of the train as to negligence in running it. This was held no error by the supreme court, which said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." Hanover R. Co. *v.* Coyle, 55 Pa. St. 396. So in an action against a railroad company to recover for damages from a fire that had spread from a burning of grass and weeds, declarations by the defendants' servants as to the setting of the fire were held to be admissible against defendant as part of the *res gestæ*. Ohio, etc., R. Co. *v.* Porter, 92 Ill. 437.

So where the action was for injury from a train of cars running over plaintiff's wagon and horses, driven by his servant, it was held the defendant might prove a conversation with the servant at the time of the accident and relative to it. Toledo, etc., R. R. Co. *v.* Goddard, 25 Ind. 185. See McLeod *v.* Ginther, 80 Ky. 399.

In an action against a railroad company for damages, caused by delay in the carriage of cattle, the statements relating to the delay of the conductor, made while he had control of the train in which the cattle were, were held part of the *res gestæ*. Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489; 90 Am. Dec. 252.

Acts Not Within the Scope of Agency. —In an action against the owners of a newspaper for libel, it was error to admit testimony of a conversation between plaintiff and an agent of such owners, during which plaintiff sought to learn the reasons for the publication of the libel, it not being part of the *res gestæ*, and having no connection with the agent's duties. Belo *v.* Fuller (Tex. 1892), 19 S. W. Rep. 616.

1. Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259; Southerland *v.* Wilmington, etc., R. Co., 106 N. Car. 100; Smith *v.* North Carolina R. Co., 68 N. Car. 107; Branch *v.* Wilmington, etc., R. Co., 88 N. Car. 575; 18 Am. & Eng. R. Cas. 621; McComb *v.* North Carolina R. Co., 70 N. Car. 178; Ohio, etc., R. Co. *v.* Stein (Ind. 1892), 31 N. E. Rep. 180; Chesapeake, etc., R. Co. *v.* Reeves (Ky. 1889), 11 S. W. Rep. 464; Dodge *v.* Childs, 38 Kan. 526; St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491; 37 Am. & Eng. R. Cas. 94; 10 Am. St. Rep. 766; Oil City Fuel Co. *v.* Boundy, 122 Pa. St. 449; Garth *v.* Howard, 8 Bing. 451; 21 E. C. L. 341; Mortimer *v.* McCallan, 6 M. & W. 58; Plumer *v.* Brisco, 11 Q. B. 46; 63 E. C. L. 44; Brannen *v.* U. S., 20 Ct. of Cl. 219; City Bank *v.* Bateman, 7 Har. & J. (Md.) 104; Barring *v.* Clark, 19 Pick. (Mass.) 220; Dorne *v.* Southworth Mfg. Co., 11 Cush. (Mass.) 205; Haven *v.* Brown, 7 Me. 421; 22 Am. Dec. 208; Griffin *v.* Montgomery, etc., R. Co., 26 Ga. 111; Stewartson *v.* Watts, 8 Watts (Pa.) 392; Hydorn *v.* Cushman, 16 Hun (N. Y.) 107; Fogg *v.* Child, 13 Barb. (N. Y.) 246; Thallhimer *v.* Brinckerhoff, 4 Wend. (N. Y.) 394; 21 Am. Dec. 155.

2. Stiles *v.* Western R. Co., 8 Met.

V. APPLICATION OF THE RULE IN CRIMINAL CASES—1. In General.—Acts or declarations unconsciously associated with and relative to the principal act charged as an offense against the accused from its inception to its consummation and final completion, are admissible as part of the *res gestæ*;[1] but declarations made after all

(Mass.) 44; 12 Am. Dec. 486; Reynolds *v.* Rowley, 3 Rob. (La.) 201; 38 Am. Dec. 233; Burnham *v.* Ellis, 39 Me. 319; 63 Am. Dec. 625; Stiles *v.* Danville, 42 Vt. 282; Hydorn *v.* Cushman, 16 Hun (N. Y.) 107.

1. People *v.* Ching Bing Quong, 79 Cal. 553; State *v.* Euzebe, 42 La. Ann. 727; Keyes *v.* State, 122 Ind. 527; Head *v.* State, 44 Miss. 751; Fulcher *v.* State, 28 Tex. App. 465; State *v.* Schmidt, 73 Iowa 469; State *v.* King, 9 Mont. 445; Greenfield *v.* People, 85 N. Y. 75; 39 Am. Rep. 636; Flynn *v.* State, 43 Ark. 293; Bradberry *v.* State, 22 Tex. App. 273; Jones *v.* State, 22 Tex. App. 324. See Mitchell *v.* State, 71 Ga. 128; Kirby *v.* Com., 77 Va. 681; 46 Am. Rep. 247; Smith *v.* State, 53 Ala. 486; Jackson *v.* State, 53 Ala. 472; State *v.* Wagner, 61 Me. 178; State *v.* Evans, 65 Mo. 574; See Gulf, etc., R. Co. *v.* York, 74 Tex. 364; Terrell *v.* Com., 13 Bush (Ky.) 246; Rutherford *v.* Com., 13 Bush (Ky.) 608; People *v.* Callaghan, 4 Utah 49; Foster *v.* State, 28 Tex. App. 45; Irby *v.* State, 25 Tex. App. 203; State *v.* Rutledge, 37 La. Ann. 378.

In the case of homicide if the declarations are part of a quarrel which continues as one transaction until it culminates in the homicide, then the declarations made at any time during its progress and connected with it, become part of the thing done, and as such competent evidence. State *v.* Umfried, 76 Mo. 404; Wood *v.* State, 92 Ind. 272. See Jones *v.* State, 71 Ind. 66.

Where a quarrel commenced at one groggery and terminated in a homicide at another, during the same night, in the same village, it was held that all that transpired at both groggeries was admissible as of the *res gestæ*, though some interval of time might have intervened between the beginning and the end of the encounter. Stiles *v.* State, 57 Ga. 183; Carr *v.* State, 43 Ark. 99.

Under an indictment for murder evidence that, a few minutes before the killing, prisoner had a quarrel with another person in another bar-room where deceased was not present and in which he was in no wise connected, held not admissible as part of the *res gestæ*. Joyce *v.* Com., 78 Va. 287. See People *v.* Williams, 3 Abb. App. Dec. (N. Y.) 596.

Threats by the deceased against defendant which are frequent and continuous down to the time of killing and all blending together and inseparable, are part of the *res gestæ*, and evidence touching them is admissible to explain the act and show whether the defendant acted in necessary self-defense. State *v.* Sloan, 47 Mo. 604; State *v.* Keene, 50 Mo. 357; State *v.* Gregor, 21 La. Ann. 473.

Threats against the accused by the person slain are also admissible in evidence for the purpose of showing what was in the mind of the accused when the homicide was committed. State *v.* Maloy, 44 Iowa 104; Wood *v.* State, 92 Ind. 273; Holler *v.* State, 37 Ind. 57; 10 Am. Rep. 74.

Threats of the deceased toward the accused made after the fatal wound constitute no part of the *res gestæ*. Cane *v.* People, 3 Neb. 357.

Outcries of the party injured during the perpetration of the assault which resulted in death, or upon the approach of the assailant, are competent evidence. State *v.* Wagner, 61 Me. 178.

The witnesses heard the gun fire and the outcry of the deceased, and ran up to him immediately after the gun fired. Upon reaching the deceased they asked him who shot him, whereupon he replied: "Wash Washington shot me." This answer was held strictly competent as *res gestæ*. Washington *v.* State, 19 Tex. App. 521; 53 Am. Rep. 387.

Defendant killed B by driving over him. C saw the cabriolet drive by, but did not see the accident. Immediately afterwards, on hearing B groan, C went up to him, when B made a statement as to how the accident had happened. *Held*, receivable in evidence. Rex *v.* Foster, 6 C. & P. 325; 25 E. C. L. 421.

What was said and done by others at the time and in company with the defendant is admissible when inseparably connected with the history of the conduct at the time and necessary to an intelligent appreciation of his

doings. Barrow *v.* State, 80 Ga. 191; Kernan *v.* State, 65 Md. 253; State *v.* Middleham, 62 Iowa 150; Cook *v.* State, 22 Tex. App. 511.

The exclamation of defendant's wife: "Oh, you have missed him," upon hearing the cap snap, and a second before the second barrel was fired which killed the deceased, was held properly admitted, having been made at the time of the homicide, in the presence and hearing of the prisoner, and the circumstances in evidence strongly tending to show complicity between him and his wife in the killing. People *v.* Murphy, 45 Cal. 137.

In State *v.* Walker, 78 Mo. 380, it appeared that immediately after the shot was fired, defendant's right hand fell to his side and he struck out at the deceased with his left, and that a bystander exclaimed: "Don't strike him for you have shot him now." *Held*, admissible.

In Mitchum *v.* State, 11 Ga. 615, on hearing the report of the pistol, the witness saw a person, whom he took to be the accused, run out of the house a few paces, then back again into the house, then immediately out again to where witness stood. He seemed greatly agitated and troubled. It was held that his exclamation at the moment of coming up that he would not have done it for the world was admissible under the circumstances.

Where the issue was whether the deceased had died by his own hand, his death having been caused by a pistol shot, the declaration of the occupant of a room adjoining that of deceased, made immediately after the report of the pistol was heard, to the landlord of the hotel, that deceased had shot himself, was held part of the *res gestæ* in Newton *v.* Mutual Ben. L. Ins. Co., 2 Dill. (U. S.) 154.

The declaration of the wife of the accused at or about the time of the arrest was said to be admissible in evidence against him, if it shed light on his reply to such declaration. Liles *v.* State, 30 Ala. 24; 68 Am. Dec. 108.

It was held no error to admit the statements made by the deceased to his father fifteen or twenty minutes after he had been shot, these statements being made as soon as the deceased could talk. Irby *v.* State, 25 Tex. App. 203.

The deceased was shot in the neck. His articulation was affected by blood collecting in his throat. About fifteen minutes after he was shot, brandy and camphor were administered to him to clear his throat. About fifteen minutes afterwards, when he was able to talk, he made statements which, under the circumstances, were held admissible as of the *res gestæ*. Fulcher *v.* State, 28 Tex. App. 465.

But declarations by a person who is not linked with the affair in some way, are not admissible as part of the *res gestæ*. Beck *v.* State, 76 Ga. 452; Kaelin *v.* Com., 84 Ky. 354; Crookham *v.* State, 5 W. Va. 510; Com. *v.* James, 99 Mass. 438; State *v.* Elkins, 101 Mo. 344.

Upon a trial for murder, evidence was offered of a conversation heard three-fourths of a mile away from the place of the murder, between three men other than defendant, one of whom said: "You were fools to do it;" and another replied: "If we had not done it, we should all have been hung." *Held*, that the evidence offered was no part of the *res gestæ*, and was inadmissible. Greenfield *v.* People, 85 N. Y. 75; 39 Am. Rep. 636.

All declarations must come from the participant in the transaction which the declarations are intended to explain or enlarge to come within the rule. Flynn *v.* State. 43 Ark. 293. See State *v.* Brown, 64 Mo. 367.

In Felder *v.* State, 23 Tex. App. 477; 59 Am. Rep. 777, where a person introduced as a witness arrived at the place where the homicide had been committed, a person in the crowd pointed to the defendant and said: "There is the man that did the shooting." *Held*, that the evidence of this exclamation was inadmissible.

In Bradshaw *v.* Com., 10 Bush (Ky.) 576, the court said: "Contemporaneous expressions or exclamations of the assailant or of his coadjutors, or of the deceased in cases of homicide may be proved for the purpose of illustrating the character or quality of the act. In the case of Lord George Gordon, the cries of persons constituting the mob by which he was accompanied, and which recognized him as its leader, were admitted to show that his intentions were unlawful and traitorous; but they were held admissible because they were uttered by parties who were themselves participants in the riotous and disorderly proceedings charged to have been instigated by the accused. We are aware of no case in which it was held that the cries or exclamations of

action on the part of the wrongdoer, actual or constructive, has ceased,[1] or declarations made before the commission of the offense and entirely disconnected therewith,[2] are not part of the *res gestæ* and should not be admitted. No inflexible rule as to the length of the interval between the act charged against the accused and the act or declaration of the complaining party can be formulated. In that matter the facts of each case stand alone, and must speak for themselves. In each case, the particular facts and instances must be considered as an independent group and the judge must determine whether they fall within or without the operation of the rule.[3] In some cases, as, for instance, where a

persons in no way connected with the main facts were admissible as part of the *res gestæ*. If either party is desirous of making available the facts known to such third persons, they must be put upon the witness-stand to prove, not what they said at the time of the transaction, but what they then saw or heard. 1 Greenl. Ev., § 108; Roscoe Crim. Ev. 20, 21; Tayl. Ev., § 581."

1. Webber *v.* Com., 119 Pa. St. 223; State *v.* Estoup, 39 La. Ann. 219. See State *v.* Daugherty, 17 Nev. 376; State *v.* Ching Ling, 16 Oregon 419; Giebel *v.* State, 28 Tex. App. 151; People *v.* Ah Lee, 60 Cal. 89; State *v.* Molisse, 38 La. Ann. 381; 58 Am. Rep. 181. See People *v.* Simpson, 48 Mich. 474; Thomas *v.* State, 67 Ga. 460; Lynch *v.* State, 24 Tex. App. 350; State *v.* Deuble, 74 Iowa 509; Fitzgerald *v.* Com. (Ky. 1887), 6 S. W. Rep. 152; Territory *v.* Clayton, 8 Mont. 1; State *v.* Rider, 90 Mo. 54.

Declarations of the deceased just after the affray: "Now we'll see whether I am to be knocked down with a chair in my own house," was said to be a verbal act expressive of his hopes and feelings, in State *v.* Porter, 34 Iowa 131.

Where the deceased, a few moments after he was shot, told who shot him, the statement was held admissible. Boothe *v.* State, 4 Tex. App. 202.

What was said within a few moments of the firing, which caused the death of the deceased was held admissible, the declaration tending to identify defendant as a perpetrator of the crime. State *v.* Schmidt, 73 Iowa 469.

Defendant was tried for killing A by stabbing him. After A was stabbed he ran, and while running cried murder and said defendant had stabbed him. A witness who saw him run and heard him cry was asked by the prosecuting attorney whether, "immediately after" running, A said that defendant had stabbed him. *Held* inadmissible, as not referring to a declaration that was part of the *res gestæ*. People *v.* Ah Lee, 60 Cal. 85.

2. Joyce *v.* Com., 78 Va. 287.

3. In Flanegan *v.* State, 64 Ga. 52, the conversation occurred while the deceased was still bleeding with the wounds of which he died. It was almost instantaneous with the stabbing which the witness swore he gave; therefore, being *res gestæ*, it became an act done during the fight or evidence thereof, and was testimony not only to impeach another witness, but to show that he did the stabbing by mistake.

The exclamation, "Banks has shot me," by the deceased when struck by the pistol-ball, was held admissible in State *v.* Banks, 10 Mo. App. 111.

In People *v.* Simpson, 48 Mich. 474, the exclamation of the deceased immediately after the shot was fired: "My God, Simpson, you have shot me;" also her answer to a man who came up as quickly as he could, that John Simpson had shot her, were held admissible.

Declarations by the party shot immediately after the shooting were held admissible in State *v.* Euzebe, 42 La. Ann. 727.

People *v.* Callaghan, 4 Utah 49, held the exclamation of the deceased: "Patsey Callahan has shot me," made five or six seconds after the shooting, to be part of the *res gestæ*.

Immediately upon seeing the deceased fall, the witness, who was 150 yards distant, went to the spot and asked the deceased: "How in the world did you shoot yourself?" The reply, "I did not do it; I was shot from up yonder," motioning to the place, was held admissible as *res gestæ*. Warren *v.* State, 9 Tex. App. 619; 35 Am. Rep. 745.

A quarter of a minute after K shot

man is shot, but not fatally injured,[1] or an assault is made with an intention to commit a rape,[2] it is essential to the admissibility

the deceased, K's wife made a remark to him to which he at once replied. The court had no doubt that this statement, made after so brief an interval, made, too, on the ground where the act was done, and before there was any change in the situation, was competent as part of the *res gestæ*. Keyes *v.* State, 122 Ind. 527.

The exclamation: "I am shot; William Kirby has shot me," made by the deceased to another when not more than two minutes had elapsed, was held admissible as evidence. Kirby *v.* Com., 77 Va. 681; 46 Am. Rep. 747.

A statement by the prisoner a few minutes after the homicide was committed, and near the place in presence and hearing of an eye-witness of the homicide, was held admissible. Little *v.* Com., 25 Gratt. (Va.) 921.

In O'Shields *v.* State, 55 Ga. 696, it was decided that *res gestæ* embraced the sayings of the parties within two or five minutes after the transaction which resulted in the homicide, and before preparation for defense could probably have been in the mind of the party speaking.

The question, "What did you shoot me for?" asked by the deceased within five minutes after the fatal shot and while he was being carried away, was held admissible as part of the *res gestæ*. Mitchell *v.* State, 71 Ga. 128.

An explanation of the circumstances for and reasons of the homicide made five or ten minutes after it took place were held admissible, under the circumstances, because tending to explain the acts of the parties at the time of the killing and therefore the main act or fact of the killing. Brunet *v.* State, 12 Tex. App. 521.

In Stagner *v.* State, 9 Tex. App. 440, a detailed conversation about twenty minutes after the firing of the shot which inflicted the wound between the witness and the deceased, who was still bleeding from the effects of the shot in his forearm, was held admissible as of the *res gestæ*.

Declarations by a dying woman that her husband had killed her with poison mixed in whisky were held admissible as part of the *res gestæ*, as a circumstance immediately and closely linked to the alleged homicide. Puryear *v.* Com., 83 Va. 51.

Where a man within five minutes from the time he was shot, asks one who is assisting him, what he shot him for, the question is of the *res gestæ* and admissible. Mitchell *v.* State, 71 Ga. 128.

On trial of J for assault with intent to murder F, F's exclamation: "Oh, Julia," uttered, though half consciously, as soon as she, F, was found on the day of the assault, at the moment of the restoration of sensibility—*held*, to be part of the *res gestæ*. Johnson *v.* State, 65 Ga. 94.

Where a party declared, after he had gone two hundred yards from the scene of the shooting, to a party who had not been a witness of it, and knew nothing of it, that the shooting was accidental on his part—*held*, that this declaration was not part of the *res gestæ*. State *v.* Seymour, 1 Houst. Cr. Cas. (Del.) 508.

In Com. *v.* M'Pike, 3 Cush. (Mass.) 181; 50 Am. Dec. 727, on a charge of manslaughter against the defendant for killing his wife, a witness was allowed to testify that the deceased, just before she died, told him that defendant had stabbed her; the statement was made after a sufficient interval of time to permit the deceased, after receiving the wound, to go upstairs and dispatch a messenger for the doctor, and then to allow the witness, after meeting this messenger on the stairs, to go after a watchman, return to the house, and go up to the room where the deceased lay.

Declarations made by one who had committed a homicide two hours afterwards, but when surrendering himself to a justice, relative to the circumstances of the killing, were held not admissible as part of the *res gestæ*. Rutherford *v.* Com., 13 Bush (Ky.) 608.

Upon an indictment for rape the answers by the girl, given two or three days after the alleged injury, are admissible. They were to a certain extent a part of the transaction, or *res gestæ*, which, in rape cases, according to most of the authorities, would include such accounts of the recent crime as are to be expected from the injured woman. People *v.* Brown, 53 Mich. 531.

1. Kirby *v.* Com., 77 Va. 681; 46 Am. Rep. 747.

2. Johnson *v.* State, 17 Ohio 593;

of the declarations of the injured party as part of the *res gestæ* that they be made recently after the injury and before sufficient time has elapsed for the fabrication of a story. If made after such time has elapsed and after the *lis mota* may be supposed to exist, they are not part of the *res gestæ*, but are merely a narrative of a past occurrence or hearsay and are not admissible as evidence.[1]

2. Homicide.—See HOMICIDE, vol. 9, p. 672.

3. Rape.—See RAPE, vol. 19, p. 959.

4. Abortion.—Declarations made during the performance of an abortion explanatory thereof, or so connected therewith as to constitute a part of the act, are admissible as part of the *res gestæ;*[2] but declarations made to others after the abortion has been accomplished are incompetent.[3]

5. Burglary.—On a trial for burglary, acts and exclamations of those wronged by the commission of the crime, when so intimately connected with the transaction as to characterize and explain it, are a part of the *res gestæ*.[4]

6. Larceny.—On a trial for larceny, declarations made by the accused while in possession of the property alleged to have been stolen, explanatory of his possession, are admissible for him as

Weldon *v.* State, 32 Ind. 81; Laughlin *v.* State, 18 Ohio 99; 51 Am. Dec. 444; McCombs *v.* State, 8 Ohio St. 643; State *v.* De Wolf, 8 Conn. 93; 20 Am. Dec. 90; State *v.* Kinney, 44 Conn. 153; 26 Am. Rep. 436; State *v.* Byrne, 47 Conn. 465; Reg. *v.* Wood, 14 Cox. C. C. 46.

1. Kirby *v.* Com., 77 Va. 681; 46 Am. Rep. 747. See *infra*, this title, *Letters as Part of the Res Gestæ.*

2. People *v.* Davis, 56 N. Y. 95. Exclamations indicating present pain made immediately after the operation was charged to have been performed were held admissible. Com. *v.* Fenno, 134 Mass. 217.

3. People *v.* Murphy, 101 N. Y. 126; 54 Am. Rep. 661; Montgomery *v.* State, 80 Ind. 338; 41 Am. Rep. 815; Hays *v.* State, 40 Md. 633.

Statements of the deceased that something dropped from her on her way to Hagerstown; that she had taken some stuff, and that she did not know what was the matter with her, were held a mere narrative of what had taken place before the physician visited her, and not admissible in evidence as a part of the *res gestæ*. Hays *v.* State, 40 Md. 635.

Declarations to a Physician.—On a prosecution for abortion, a physician, who, after the commission of the crime, was selected by the public prosecutor to attend and examine the woman, and did attend and examine her with her consent, was allowed to testify, as a witness for the prosecution, to his opinion, founded on his observation of the woman and her narration of the circumstances, that an abortion had been committed. The woman was alive at the time of the trial. *Held*, that it was incompetent, because a narration of past events and not part of the *res gestæ*. People *v.* Murphy, 101 N. Y. 126; 54 Am. Rep 661.

4. On trial of an indictment for entering a store with intent to steal, an exclamation of a child in charge of the premises while the owner was in the rear, "We are being robbed," followed immediately by his rushing in and seeing the accused run out, held admissible as part of the *res gestæ*. State *v.* Moore, 38 La. Ann. 66.

The defendant, having been arrested for burglary at night under the window of a room occupied by two young ladies, where one of the panes of glass had been broken out, the exclamation of one of them on running to her father in an adjoining room, that she saw someone at the window which caused the immediate arrest of the defendant, is admissible evidence as a part of the *res gestæ*. Dismukes *v.* State, 83 Ala. 287.

part of the *res gestæ*.[1] Declarations made before the stealing by the accused, explanatory of his right to the property, are also admissible.[2] If the facts show a lawful taking of possession, the statement of the accused as to his intention, made at the time of obtaining the property, is admissible as part of the *res gestæ*.[3] So statements made to a thief at the time of the larceny are admissible against his accessory before the fact as part of the *res gestæ*.[4]

7. Robbery.—Immediate complaints made of an alleged robbery are to be regarded as part of the *res gestæ*.[5] So also are the

1. Allen *v.* State, 73 Ala 23; Bennett *v.* People, 96 Ill. 607; Comfort *v.* People, 54 Ill. 404; State *v.* Kelly, 57 Iowa 647; State *v.* Jordan, 69 Iowa 506; People *v.* Dowling, 84 N. Y. 478; Leggett *v.* State, 15 Ohio 283; State *v.* Castor, 93 Mo. 243; Perry *v.* State, 41 Tex. 483; Ward *v.* State, 41 Tex. 611; Shackelford *v.* State, 43 Tex. 138; Darnell *v.* State, 43 Tex. 147; Hannah *v.* State, 1 Tex. App. 582; Shackleford *v.* State, 2 Tex. App. 385; Foster *v.* State, 4 Tex. App. 246; Shelton *v.* State, 11 Tex. App. 36; Sitterlee *v.* State, 13 Tex. App. 587; Miller *v.* State, 18 Tex. App. 34; State *v.* Gonsoulin, 38 La. Ann. 459. *Compare* Taylor *v.* State, 42 Ala. 529; Cooper *v.* State, 63 Ala. 80.

Upon the trial of a party under an indictment for the larceny of a watch, it was proven that the prisoner, being in possession of the watch a short time after it was stolen, met a pawnbroker away from the place of business of the latter and proposed to pledge the watch as security for a loan of money. Thereupon the parties went together to the pawnbroker's shop, when the prisoner received the money and placed the watch in pledge. *Held*, it was competent for the prisoner to prove all that was said by him when he first approached the pawnbroker in connection with the subject and as to the manner in which he obtained the watch. Comfort *v.* People, 54 Ill. 404.

Several armed men concealed themselves in the woods near where a horse was tied. Defendant came there on horseback and a gun was leveled at him and he was told to dismount and surrender himself. He did so and said if they would wait, he would tell everything. He did so and afterwards all parties dispersed and went home. *Held*, that the statement was voluntary and was admissible in evidence as part of the *res gestæ*. State *v.* Ware, 62 Mo. 597.

On trial of an indictment for larceny of cattle, declarations of the accused as to his ownership made four days after the alleged taking and sale, were held to be no part of the *res gestæ*. Harmon *v.* State, 3 Tex. App. 51.

Where the defendant was arrested under a charge of larceny and at first denied having any of the stolen money, but afterwards offered to tell the police officer, who professed to know "all about it," where the money was, and said that it was buried under the hearth in his house, and the officer having failed to find the money at the place indicated the defendant went to his house with the officer, raised a brick in the hearth and disclosed the money, and after pointing out the money defendant said it was given to him by a servant in the employment of the prosecutrix. *Held*, that this declaration was not admissible evidence for defendant, not being explanatory of possession nor part of the *res gestæ*. Cooper *v.* State, 63 Ala. 80.

2. State *v.* Thomas, 30 La. Ann. (Pt. 1) 600. See State *v.* Dellwood, 33 La. Ann. 1229.

3. Maddox *v.* State, 41 Tex. 205.

4. Parsons *v.* State, 43 Ga. 197.

5. Lambert *v.* People, 29 Mich. 71; Driscoll *v.* People, 47 Mich. 413; People *v.* Murphy, 56 Mich. 546; State *v.* Horan, 32 Minn. 394; 50 Am. Rep. 583; State *v.* Moore, 38 La. Ann. 66; State *v.* Driscoll, 72 Iowa 583; Rex *v.* Wink, 6 C. & P. 397; 25 E. C. L. 456.

A complaint of robbery made to a policeman immediately after its alleged occurrence is admissible on the prosecution as part of the *res gestæ*. Driscoll *v.* People, 47 Mich. 413.

Defendant was charged with robbery. The prosecution was permitted to introduce evidence of a statement made by the person alleged to have

statements made at the same time by the accused.[1] But such statements should be received with great caution and only when they are made so recently after the injury is received and under such circumstances as to place it beyond all doubt that they are not made or designed for the purpose of manufacturing evidence.[2]

8. Assault and Battery.—In an action for assault and battery what was said by the parties during the altercation is admissible in evidence as part of the *res gestæ*.[3] Declarations by bystanders at such altercation made during its progress, if they are necessary to a full understanding of the character of the act under investigation, are also a part of the *res gestæ* and are admissible in evidence.[4]

9. Riot.—The acts and declarations of persons engaged in the commission of a riot are admissible against them as part of the *res gestæ*.[5]

10. Conspiracy.—See CRIMINAL CONSPIRACY, vol. 4, p. 631.

VI. DECLARATIONS AS TO TITLE.—Declarations accompanying the act of possession, whether in disparagement of the claimant's title or otherwise qualifying his possession, if made in good faith, may be received as part of the *res gestæ*.[6]

been robbed, that he had been "knocked down and robbed." The statement did not show of what he had been robbed, or who had knocked him down and robbed him, and was made some time after the occurrence, and not in the presence of the defendant. The person alleged to have been robbed testified that he thought he had been knocked down, and that his watch had been taken from him, but was not certain. He did not state when, where, or by whom the alleged robbery was committed. *Held*, that the admission of the evidence as to the statement was erroneous. People *v.* Ehring, 65 Cal. 135.

1. Driscoll *v.* People, 47 Mich. 413.

2. State *v.* Ah Loi, 5 Nev. 82. See State *v.* Pomeroy, 25 Kan. 349.

3. Baker *v.* Gausin, 76 Ind. 317.

What the person said at the time of the assault, illustrative of its object, and the motive which prompted it, should have been admitted in evidence. People *v.* Roach, 17 Cal. 298.

Declarations of plaintiff during the affray relative to the character and extent of personal injuries inflicted upon him by defendant were held pertinent to the issue, as constituting part of the *res gestæ*. Green *v.* Bedell, 48 N. H. 546.

Defendant was tried for an assault. The person on whom the assault was made was not present at the trial. The prosecution was allowed to prove the declarations made by the one on whom the assault was made a few minutes after the difficulty to persons who were present, to the effect that defendant made the assault. *Held*, that the declarations were not admissible in evidence as part of the *res gestæ*. State *v.* Daugherty, 17 Nev. 376.

4. Baker *v.* Gausin, 76 Ind. 317; Castner *v.* Sliker, 33 N. J. L. 95; Brockett *v.* New Jersey Steamboat Co., 18 Fed. Rep. 156.

In Castner *v.* Sliker, 33 N. J. L. 95, 507, it appeared that the affray occurred in the room of a tavern, where both parties had been drinking, and where the witness as well as C, who came to the place in company with the defendant, were present, and where, of course, there was much confusion and tumult. The court held that under the circumstances in which all the witnesses of the combat were placed, what any of them said or did, while it was in progress, was a part of the *res gestæ* and was calculated to throw light on the facts of the case.

What one, who is present at a fight, says at the time as to the purpose of one of the parties to it, is inadmissible in evidence on his trial for assault. Carr *v.* State, 76 Ga. 592.

5. Gallaher *v.* State, 101 Ind. 411.

6. Howell *v.* Huyck, 2 Abb. App. Dec. (N. Y.) 423; Sweezey *v.* Collins,

See also DECLARATIONS, vol. 5, p. 367.

VII. DECLARATIONS AS TO CONTRACTS, DEEDS, ETC.—Declarations of the parties in relation to the terms of a contract made at the time of its execution are admissible as part of the *res gestæ*.[1] But

40 Iowa 540; Pearson *v.* Forsyth, 61 Ga. 537; Williamson *v.* Williams, 11 Lea (Tenn.) 355; McConnell *v.* Hannah, 96 Ind. 102; Lampe *v.* Kennedy, 60 Wis. 110; Stevens *v.* Miles, 142 Mass. 571.

Declarations made by a person in possession of land as to the extent of his possession are admissible as part of the *res gestæ*. State *v.* Gurnee, 14 Kan. 111; Harnage *v.* Berry, 43 Tex. 567.

The declarations of a party entering upon land for the purpose of making a survey thereof respecting his intentions in regard to the property and the purpose for which the survey was being made, are admissible as part of the *res gestæ* to show that the entry was with the intent to take possession of the land. Stephens *v.* McCloy, 36 Iowa 659.

In an action of ejectment, where the question involved is whether the premises in suit are included in the description in a certain deed, and the ambiguity does not appear on the face of the deed, but only by evidence, a conversation between the parties to the deed while the deed was being drawn and in the presence of the scrivener, and in accordance with which an alteration was made in the description, is admissible in evidence as part of the *res gestæ* tending to identify the boundaries in dispute. Purkiss *v.* Benson, 28 Mich. 537.

Declarations and statements of a defendant in an execution while in the actual possession of property exercising full control over it, directing the workman in repairing the same and offering to sell, claiming it as his own, are legitimate and proper evidence against one claiming the property as against the sheriff who has levied upon the same for the debt of the party whose declarations are sought to be shown, as they are a part of the *res gestæ*. Amick *v.* Young, 69 Ill. 542.

A declaration by a grantor to the scrivener, at the time of executing and delivering a deed that the portion has not been paid, is not to be deemed a part of the *res gestæ*. It has no legitimate connection with or tendency to qualify the transaction in hand. Trimmer *v.* Trimmer, 13 Hun (N. Y.) 182.

Declarations of Deceased Persons.—The application of the rule to declarations of deceased persons as to possession and ownership of land, is diverse in the various States. The rule in *Massachusetts* is stated in Long *v.* Colton, 116 Mass. 414, by Colt, J., as follows: "The declarations of deceased persons respecting boundaries are received as evidence as an exception to the rule which rejects hearsay testimony. In most of the decided cases, it is held that the declaration should appear to have been made in disparagement of title or against the interest of the party making it, but in Daggett *v.* Shaw, 5 Met. (Mass.) 223, it is said that the rule as practiced in this commonwealth is not so restricted, and that declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence when nothing appears to show that they are interested to misrepresent, and it need not appear affirmatively that the declaration was made in restriction of or against their own rights, and in Bartlett *v.* Emerson, 7 Gray (Mass.) 174, it is held that, to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and where nothing appears to show an interest to deceive or misrepresent. Ware *v.* Brookhouse, 7 Gray (Mass.) 454; Flagg *v.* Mason, 8 Gray (Mass.) 556.

1. Colt *v.* McConnel, 116 Ind. 249; Kenney *v.* Phillipy, 91 Ind. 511; Mobile, etc., R. Co. *v.* Worthington (Ala. 1892), 10 So. Rep. 839; Porter *v.* Waltz, 108 Ind. 40; Mitchell *v.* Colglazier, 106 Ind. 464; Johnson *v.* Elliot, 26 N. H. 67; Richardson *v.* Cato, 10 Humph. (Tenn.) 138; Curtice *v.* West, 50 Hun (N. Y.) 47; Sistare *v.* Hickscher (Supreme Ct.), 18 N. Y. Supp. 475.

The statements of the grantor in the deed, which is in evidence, made at the time of its execution, are always admissible in evidence as part of the *res gestæ*. Kenney *v.* Phillipy, 91 Ind. 511.

Where the consideration for a conveyance of lands is in issue and the contract is in parol and the grantor dead, the conversation of the parties relative

declarations made after the transaction has been concluded are inadmissible.[1]

to the consideration while conducting the negotiations resulting in the contract, is admissible as part of the *res gestæ*. Porter *v.* Waltz, 108 Ind. 40.

Declarations made by a mortgagor at the time of executing a chattel mortgage are of the *res gestæ*. Bushnell *v.* Wood, 85 Ill. 88.

Declarations in relation to the terms of settlement are also a part of the *res gestæ*. Kimball *v.* Huntington, 10 Wend. (N. Y.) 675; 25 Am. Dec. 590. And see McAdams *v.* Beard, 35 Ala. 478; Paul *v.* Berry, 78 Ill. 158; Ghormley *v.* Young, 71 Ind. 62; New England Marine Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) 56; Pierson *v.* Hoag, 47 Barb. (N. Y.) 243; Sanford *v.* Sanford, 61 Barb. (N. Y.) 293; Wetmore *v.* Mell, 1 Ohio St. 26; 59 Am. Dec. 607; Ganson *v.* Madigan, 15 Wis. 144; 82 Am. Dec. 659; Gray *v.* Harper, 1 Story (U. S.) 588.

Where, at the time parties enter into a parol contract, a memorandum is read containing the terms thereof, which are assented to by the parties except in two particulars, though not executed, such memorandum becomes a part of the transaction, and, in an action on the contract, is competent evidence as a part of the *res gestæ*, and may be considered by the jury for the purpose of assisting them to determine what the terms of the contract were. Humphrey *v.* Chilcat Canning Co., 20 Oregon 209. See MEMORANDUM, vol. 15, p. 269.

1. See Barber *v.* Bennett, 62 Vt. 50. The defendant offered a witness to prove that he was present at the office of the defendant when certain business was transacted between the plaintiff and defendant, and that a few minutes after the plaintiff had left the witness asked the defendant what they had been doing, and he thereupon stated to the witness what the business was. *Held*, that this statement was not admissible as part of the *res gestæ*. Rockwell *v.* Taylor, 41 Conn. 56.

When, immediately after the negotiation for a loan of money, the lender goes into the adjoining room, and the borrower not being present states to a third person the terms of the transaction, such declarations constitute no part of the *res gestæ*. Smith *v.* Webb, 1 Barb. (N. Y.) 230.

Where, for the purpose of invalidating the consideration of the promissory note, evidence has been introduced to show that it was one of the several notes given by a person, since deceased, in pursuance of a general design to settle his estate, declarations to the maker in relation to the consideration of such notes, made a few days after they were given, are incompetent. Hubbard *v.* Barker, 1 Allen (Mass.) 99.

In Clunie *v.* Sacramento Lumber Co., 67 Cal. 313, the evidence disclosed the fact that the declarations were made a year or two after the alleged parol agreement for the lease of five years was consummated, and that they stated the terms of such agreement as understood by the parties thereto at the time of its completion. The court held them inadmissible, being no part of the *res gestæ*. See also Osborne *v.* Osborne, 33 Kan. 257.

On issue whether making the deed was induced by undue influence, the fact that two days after the deed was executed a person conversed about it with an insurance agent and requested him to say nothing about it, is immaterial; the tenant could not be affected by these mere declarations. Cowels *v.* Merchants, 140 Mass. 377.

In Moore *v.* Meacham, 10 N. Y. 207, the object of the declarations offered was to show what the bargain was. The bargain and the performance of it were distinct transactions. By the bargain which was completed before the declarations offered were made, the rights of the parties had become fixed, so far as they could be affected by a parol agreement. It was clearly not competent to allow the party to prove his declarations while performing or endeavoring to perform his agreement, for the purpose of characterizing the agreement itself. It was at most an offer to prove the plaintiff's construction of the effect of the language used between him and the defendant in making the bargain after it was closed, but when the party to be affected by it was not present.

The declaration of one party in the absence of the other, after an agreement made, touching the terms of that agreement, was not held competent evidence for the party making the declaration. Wilson *v.* Hillyer, 1 N. J. Eq. 63.

In Stirling *v.* Buckingham, 46 Conn.

VIII. Declarations as to Sales.—Statements made by the parties to a sale relative to it during its negotiation may be admissible in evidence as part of the *res gestæ*.[1]

IX. Declarations Made in the Ordinary Course of Business.—Declarations made in the course of business are a part of the *res gestæ* if made while the business is in progress and before the transaction has ended.[2] A transaction cannot be considered as

461, the conversation sought to be introduced was after the whole transaction as to the note had been completely finished; though it does not appear how long after, but if it was immediately after it would be equally inadmissible under the circumstances.

Declarations of a party that he signed a bond with the understanding that another person was to be his co-security, made after the act of signing, were not admissible in evidence as part of the *res gestæ*. Miller *v.* State, 8 Gill (Md.) 141.

But in Wolffe *v.* Perryman (Ala. 1891), 9 So. Rep. 148, it was held that a witness who hears the terms of a contract discussed in the presence of the parties a few minutes after they are agreed upon, and before the persons present have dispersed, was competent to prove the contract, although he did not actually hear it made.

1. Atherton *v.* Tilton, 44 N. H. 452; Elliott *v.* Stoddard, 98 Mass. 145; Place *v.* Gould, 123 Mass. 347; Haight *v.* Hayt, 19 N. Y. 464; Black *v.* Thornton, 30 Ga. 361; Woodworth *v.* Hodgson, 59 Hun (N. Y.) 616; Cook *v.* Pinkerton, 81 Ga. 89; 12 Am. St. Rep. 297.

Though at the hour or during the day of the making of a representation as to the property offered for sale, the subsequent vendee, then negotiating for it, or the like of it, does not conclude a bargain for it if he afterward, as a continuation of the negotiation, becomes a purchaser, the representations are still a part of the *res gestæ* and bind the maker of them. Ahern *v.* Goodspeed, 72 N. Y. 108.

On the question whether there was a warranty of quality by the plaintiff of a boiler sold by him to the defendant at an interview between them in the evening, adjournment from a previous interview between them in the morning of the same day at which the defendant had examined the boiler and asked the plaintiff its price, the defendant, on cross-examination, testified that at the interview in the morning the plaintiff did not say that he would never warrant a boiler, held that the evidence afterwards offered by the plaintiff that he then and there did say so, was admissible both as tending to contradict the defendant's testimony on a material point, and also as tending to show affirmatively that the allegation of a warranty was unfounded. Cunningham *v.* Parks, 97 Mass. 172.

Where the sale had been completed, and one of the parties during the afternoon of the day of the sale at another place stated to other persons what had been done, such statements are not admissible in evidence. Haynes *v.* Rutter, 24 Pick. (Mass.) 242; Burnham *v.* Brennan, 74 N. Y. 597; Banfield *v.* Parker, 36 N. H. 353; Ohio Coal Co. *v.* Davenport, 37 Ohio St. 194; Wilson *v.* Sherlock, 36 Me. 295; Tilson *v.* Terwilliger, 56 N. Y. 273; St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491; 37 Am. & Eng. R. Cas. 94.

In an action for goods sold, when the issue made was whether the credit was given to the defendant who obtained the goods or to another person, the declarations of the vendor made to such other person, after the transaction had been completed and some time had elapsed, are not a part of the *res gestæ*. Whitney *v.* Durkin, 48 Cal. 462; Murray *v.* Cone, 26 Iowa 276.

2. Pool *v.* Bridges, 4 Pick. (Mass.) 377; Allen *v.* Duncan, 11 Pick. (Mass.) 308; Kilburn *v.* Bennett, 3 Met. (Mass.) 199. See Slevin *v.* Wallace (Supreme Ct.), 19 N. Y. Supp. 87.

The plaintiff, having delivered wool to one S to be manufactured, called on him in order to ascertain what progress had been made, and S showed him some wool, yarn, etc., which he said were the plaintiffs. In trover against the defendant who attached the wool, etc., as the property of S, it was held that this declaration of S, who afterwards absconded, was admissible in evidence as part of the *res gestæ* to prove that the wool, etc., was the property of the plaintiff. Pool *v.* Bridges, 4 Pick. (Mass.) 377.

In an action for the price of lumber to be used in defendant's house, alleged to have been furnished S on the

ended so long as the parties thereto remain together.[1] See also DECLARATIONS, vol. 5, p. 362.

X. **LETTERS AS PART OF THE RES GESTÆ.**—Letters are admissible on the same principle that a conversation between the parties would be when part of the *res gestæ*.[2] On the trial of a person charged with committing a crime letters written by him tending to show that he committed the crime are admissible in evidence against him.[3] So letters which pass between the parties to a contract, immediately before and after the transaction, may be so connected with and relate to it as to become part of the *res gestæ*, and therefore admissible in evidence.[4] See also LETTERS, vol. 13, p. 258.

credit of defendant, where it appeared that the order was entered on the book in the presence of S, and no objection made to filling the same on his credit, subsequent instructions to plaintiff's foreman not to deliver "any more lumber" on the order until plaintiff could see defendant and make arrangements with him for the pay, was no part of the *res gestæ* of the transaction, and incompetent as against defendant, and was properly excluded. Tolbert *v.* Burke, 89 Mich. 132.

1. Fifield *v.* Richardson, 34 Vt. 410.

2. Savage *v.* Russell, 84 Ala. 103. New England Marine Ins. *v.* De Wolf, 8 Pick. (Mass.) 56; McAllister *v.* Engle, 52 Mich. 56; Phœnix *v.* Gardner, 13 Minn. 430; Moore *v.* Hamilton, 44 N. Y. 666; Hannis *v.* Hazlett, 54 Pa. St. 133; Averill *v.* Hurd (Supreme Ct.), 2 N. Y. Supp. 166; Robinson *v.* Haas, 40 Cal. 474; Boyden *v.* Burke, 14 How. (U. S.) 575.

To be a part of the *res gestæ* they must be contemporaneous with and explanatory of the principal transaction. Chamberlain *v.* Chamberlain, 116 Ill. 480.

If they are declarations of third persons long prior to the controversy upon which the action is founded, they are not part of the *res gestæ* and cannot be admitted. Frank *v.* Brewer, 54 Hun (N. Y.) 635.

A statement made by the writer of a letter while writing it is not admissible as part of the *res gestæ* in proof of the sending of the letter. Home Ins. Co. *v.* Marple, 1 Ind. App. 411.

3. Com. *v.* Blood, 141 Mass. 571; Com. *v.* Choate, 105 Mass. 451; Hunter *v.* State, 40 N. J. L. 495; Gates *v.* People, 14 Ill. 433.

When bastardy is denied on the ground of fraud, letters tending to show the character of the intimacy between the parties are admissible as part of the *res gestæ*, when sufficiently near in point of time and sufficiently significant in character to afford an inference of the moral condition to be proved. Beers *v.* Jackman, 103 Mass. 192; Sullivan *v.* Hurley, 147 Mass. 387.

4. Merrill *v.* Douns, 41 N. H. 72. See New England Marine Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) 56; Gaskell *v.* Skene, 14 Q. B. 664; 68 E. C. L. 664; Hannis *v.* Hazlett, 54 Pa. St. 133; Griffin *v.* Turner, 75 Iowa 250.

A letter describing an agreement, written by one of the parties thereto, without the other's knowledge, several days after the transaction occurred, is inadmissible in evidence as part of the *res gestæ*. Emerson *v.* Mills (Tex. 1892), 18 S. W. Rep. 805.

Letters from a principal in a contract to the guarantors of its performance by him denying the making of the contract as claimed by plaintiffs, and stating that it was an optional agreement, that he had a certain time in which to determine whether he would carry it out, and he had elected not to do so, are inadmissible in an action on the contract against such principal and guarantors. Dewees *v.* Bluntzer, 70 Tex. 406.

Letters Written by Agents.—Letters written by an agent to a party between whom and his principal a contract exists with reference to the subject-matter thereof and within the scope of his authority, are competent against the principal. Wilson Sewing Mach. Co. *v.* Sloan, 50 Iowa 367.

Plaintiff's agent, in transmitting a duplicate copy of the contract to them, sent a letter detailing his acts and stating his understanding of the arrangement with defendants. He died before the trial. *Held*, that his letter was no part of the *res gestæ*, and was inadmissible. Henkel *v.* Trubee (Conn. 1887), 11 Atl. Rep. 722.

RESIDENT—RESIDENCE.[1]—A resident of a place is one whose place of abode is there, and who has no present intention of removing therefrom.[2]

1. Cross-references.—The term "residence" has no fixed meaning applicable to all cases. Its definition must depend entirely upon the connection in which it is used. For its meaning in these various connections, see ELECTIONS, vol. 6, p. 274; DIVORCE, vol. 5, p. 754; DOMICILE, vol. 5, pp. 863, 875; LIMITATIONS, vol. 13, p. 743; MARITIME LIENS, vol. 14, p. 417; SERVICE OF PROCESS. See also ACTUAL, vol. 1, p. 186; CEASE, vol. 3, p. 48; COME, vol. 3, p. 314; FRAUDULENT SALES, vol. 8, p. 871; LIFE INSURANCE, vol. 13, pp. 635–638; LIVE, vol. 10, p. 928; NON-RESIDENTS, vol. 16, p. 718; INHABITANT, vol. 10, p. 770; POOR AND POOR LAWS, vol. 18, p. 783; HOMESTEAD, vol. 9, p. 425; PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 198; SCHOOLS AND COLLEGES; TAXATION; SERVICE OF PROCESS.

2. And. L. Dict.; Bouv. L. Dict.; Abb. L. Dict.; *In re* Wrigley, 8 Wend. (N. Y.) 140. See also *In re* Hughes, 1 Tuck. (N. Y.) 38; Wolf's Appeal (Pa. 1888), 13 Atl. Rep. 760; *Ex parte* Blumer, 27 Tex. 734; Reeder *v.* Holcomb, 105 Mass. 93; Greenham *v.* Child, 24 Q. B. D. 29; Tazewell Co. *v.* Davenport, 40 Ill. 197; People *v.* Platt, 117 N. Y. 159; Venable *v.* Paulding, 19 Minn. 488; Penfield *v.* Chesapeake, etc., R. Co., 29 Fed. Rep. 494; 134 U. S. 351; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; Jefferson *v.* Washington, 19 Me. 300; Abbott's Trial Ev., pp. 91, 105; Mann *v.* Taylor, 78 Iowa 363; Reg *v.* Vice-Chancellor, L. R., 7 Q. B. 471; Stimson's Stat. Law, §§ 241, 243, 6030, 6031, 6222–84.

One may be a citizen of one State, within the meaning of the act of Congress of March 2, 1867, providing for the removal of a cause from a State court to a Federal court, and yet be a resident of another State. Darst *v.* Bates, 51 Ill. 439.

A transient visitor in a town or city is not a "resident" within the meaning of a statute subjecting telegraph companies to penalty for failure to deliver messages to residents. Moore *v.* Western Union Tel. Co. (Ga. 1891), 13 S. E. Rep. 639.

Resident Freeholder.—The term "resident freeholder," as used in the *Wisconsin* Highway Laws, is held to mean a person who resides in the town and owns a freehold interest in lands there. Damp *v.* Dane, 29 Wis. 419.

A statute of *Indiana* required that a contract to build a court-house be signed by at least two resident freeholders as sureties. After a discussion of the authorities in which analogous terms are construed, the court concludes that the term "resident freeholder," when not limited by other words, by the sense of the context, or by the subject-matter, must be construed to mean a resident freeholder of the State, and should not be restricted to the county. McCormick *v.* Johnson Co., 68 Ind. 214.

Resident Tax-payers and Voters.—An averment that plaintiffs in a case are "resident tax-payers and voters," means that they own taxable property in such district. Nevil *v.* Clifford, 55 Wis. 161.

Residence.—It is held in *New York* that, when used in the Code of Procedure, the term "residence" means legal residence; and legal residence means the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. Crawford *v.* Wilson, 4 Barb. (N. Y.) 505; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77; De Meli *v.* De Meli, 120 N. Y. 485 (divorce case).

When used in connection with substituted or constructive service of process, residence is generally synonymous with "dwelling house." Foot *v.* Harris, 2 Abb. Pr. (N. Y.) 454, while when used as a qualification for the enjoyment of a privilege or the exercise of a franchise, it is equivalent to "domicile." People *v.* Platt, 117 N. Y. 159.

Where the term "town next adjoining the residence of the plaintiff or defendant" is used in a statute, the word residence is considered to mean the town in which the party lives. Holmes *v.* Carley, 32 Barb. (N. Y.) 440.

A person's residence is not confined to his dwelling house; he is considered to reside on all parcels of land which are actually appurtenant to his house. Hedley *v.* Leonard, 35 Mich. 76 (settlement on public lands).

It may happen that one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion. In such case, the place at which he happens to be constitutes his "residence" so long as he is there, and ceases to be such as soon as he leaves it for the other place.[1] But one cannot, at the same time, have more than one "residence" within the legal meaning of the term.[2]

The term resident, occurring in a constitution or a statute ordinarily means an individual, a citizen, and does not include a corporation[3] or a State,[4] though for certain purposes—*e. g.*, those

Residence has often been judicially defined, and is used in many different senses. A good definition is that given in *In re* Collins, 64 How. Pr. (N. Y.) 63, where it is said: "Residence means the act or the state of being seated or settled in a place. It embraces not only personal presence in a place but an attachment to it by those acts or habits which express the closest connection between the person and the place, as by usually sitting or lying there."

Residence does not mean precisely the same thing as domicile when applied to succession of personal estate, but rather a fixed and permanent abode, a dwelling place for the time being as contradistinguished from a mere temporary locality of existence. *In re* Wrigley, 8 Wend. (N. Y.) 134; Roosvelt *v.* Kellogg, 20 Johns. (N. Y.) 208; Pells *v.* Snell, 130 Ill. 379; Drew *v.* Drew, 37 Me. 389.

Residence is defined as "the act of residing, abiding, or dwelling in a place for some continuance of time," also as the place where one resides" (Webster's Dict.), and as "the act or state of being seated or settled in a place; the act, state or habit of dwelling or abiding; the act or state of being a resident or inhabitant; the place where one resides; habitation." 2 Burr. Law Dict. "It usually imports the place of one's permanent domicile rather than a temporary abode." Reeder *v.* Holcomb, 105 Mass. 93.

See also for discussion of definitions, Hall *v.* Hall, 25 Wis. 607; *In re* Thompson, 1 Wend. (N. Y.) 43; *In re* Wrigley, 8 Wend. (N. Y.) 134; Chaine *v.* Wilson, 8 Abb. Pr. (N. Y.) 78; Foster *v.* Hall, 4 Humph. (Tenn.) 346.

Pol. Code *California*, § 52 provides: "In determining the place of residence, the following rules are to be observed: 1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. 2. There can only be one residence. 3. A residence cannot be lost until another is gained. . . . 7. The residence can be changed only by the union of act and intent." Hanson *v.* Graham, 82 Cal. 631.

In the case of *Ex parte* Blumer, 27 Tex. 734 it is said that the word "resident" is ordinarily used to designate persons in a particular locality, as of a city, town, or county, but that within the meaning of the conscript laws it designates a class within the whole limits of the government, being in this latter sense synonymous with domicile.

Residence Presumed to Continue.—The residence of a person, having been shown to be in a particular place, is presumed to continue there until the contrary is proved. Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; PRESUMPTIONS.

1. Stout *v.* Leonard, 37 N. J. L. 492. See also Walcott *v.* Botfield, 1 Kay 534; 18 Jur. 570. *Compare* Pol. Code *California*, § 52; Hanson *v.* Graham, 82 Cal. 631.

2. People *v.* Schoonmaker, 63 Barb. (N. Y.) 51; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 84; Chaine *v.* Wilson, 16 How. Pr. (N. Y.) 552; Kranshaar *v.* New Haven Steamboat Co., 7 Robt. (N. Y.) 356.

3. People *v.* Schoonmaker, 63 Barb. (N. Y.) 51; Westover *v.* Turner, 26 U. C. C. P. 510; Bank of U. S. *v.* Deveaux, 5 Cranch (U. S.) 90; Clarke *v.* Bank of Mississippi, 10 Ark. 516; 52 Am. Dec. 248. See also FOREIGN CORPORATIONS, vol. 8, p. 397–8.

4. Under the statute of *New Jersey* it was required that the assessor of taxes should deduct from the valuation of one's property any debt or debts *bona fide* due and owing from such individual to "creditors residing within the State." In State *v.* Trenton, 40 N. J. L. 89 a debt of $10,000 was due to the

of jurisdiction, or of determining the venue of suits—a corporation is considered as residing within a certain locality.[1]

Residence and domicile are to be distinguished—they are not convertible terms; residence is only one of the two essential elements of domicile.[2] One may have his domicile at a place from which he is absent most of the time, while residence imports continuous personal presence.[3]

State, and it was held that the act did not apply, the court saying that the word "reside" relates to individual abode, and though sometimes figuratively used, will not apply to the State in its representative and governmental relation to its citizens and people as individuals residing in the State, and that the political body called the State cannot be said, in the proper use of language, to reside anywhere.

1. Residence of Corporations.—Stevens *v.* Phœnix Ins. Co., 41 N. Y. 154; Merrick *v.* Van Santvoord, 34 N. Y. 218; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80; Conroe *v.* National Protection Ins. Co., 10 How. Pr. (N. Y.) 404; Crawford *v.* Wilson, 4 Barb. (N. Y.) 522; People *v.* Pierce, 31 Barb. (N. Y.) 138; Tatem *v.* Wright, 23 N. J. L. 429; State *v.* Haight, 35 N. J. L. 281; State *v.* Scudder, 32 N. J. L. 204; Clarke *v.* Bank of Mississippi, 10 Ark. 516; 52 Am. Dec. 248; 2 Morawetz on Priv. Corp., §§ 958–9.

A corporation of one State cannot become a resident of another State by establishing a place of business there. Webb on Record of Title, p. 425, n. 5.

The residence of a corporation is the place where its principal office is located and where its principal operations are carried on. A railroad corporation, however, is considered to be a resident of every county through which its road passes, and in which it transacts business; at least so far as regards its taxation, and suits instituted against it. See RAILROADS; Thorn *v.* Central R. Co., 26 N. J. L. 121; People *v.* Fredericks, 48 Barb. (N. Y.) 176; Baldwin *v.* Mississippi, etc., R. Co., 5 Iowa 519; CORPORATIONS, vol 4, p. 206.

The proper seat of residence of a foreign corporation is in the State which created it and which continues it in existence. But legislation may give it a residence elsewhere. And. L. Dict.; Stafford *v.* American Mills Co., 13 R. I. 311; FOREIGN CORPORATIONS, vol. 8, p. 330; Hume *v.* Pittsburgh, etc., R. Co., 8 Biss. (U. S.) 31; 2 Morawetz on Priv. Corp. (2nd ed.), § 958, 959.

2. Residence and Domicile.—And. L. Dict.; DOMICILE, vol. 5, p. 857; Garner *v.* Board of Education, 5 Dak. 259. See also People *v.* Platt, 50 Hun (N. Y.) 454, where the terms were considered synonymous. It is stated thus in Walker *v.* Walker, 1 Mo. App. 403: "The difference between a residence and a domicile may not be capable of easy definition; but every one can see at least this distinction: A person domiciled in one State, may, for temporary reasons, such as health, reside for one or more years in some other place deemed more favorable. He does not, by so doing, forfeit his domicile in the first State, or, in any proper sense, become a non-resident of it, unless some intention, manifested by some act, of abandoning his residence in the first State is shown."

And in Savage *v.* Scott, 45 Iowa 130, it is said: "The distinction which the law draws between the place of residence and that of domicile or citizenship is plain. A man may have more than one place of residence, but he can have but one domicile, and can hold citizenship in but one State."

As used in the divorce laws, residence means something more transient in its nature than a domicile, yet always some intent of permanent business or stay. It cannot be acquired by a visit to a State to bring a suit, while the party's domicile or business is in another State. Way *v.* Way, 64 Ill 407.

The word "residence," as used in the *Missouri* attachment law has technically a more restricted meaning than "domicile," but the words "not a resident" and "domicile" must be held to be used with reference to the same subject-matter, and to denote opposite conditions with reference to habitancy, but not differing in degree. One who has a domicile in *Missouri* cannot be a non-resident while temporarily absent. Charlton Co. *v.* Moberly, 59 Mo. 238.

3. And. L. Dict. Domicile and resi-

The terms "inhabitancy" and "residence" have meanings very similar; the former, however, is usually considered to import more fixity and permanency than the latter.[1] Residence and citizenship are by no means synonymous terms.[2]

In certain statutory connections a distinction obtains between "actual residence" and "legal residence."[3]

RESIDUARY—RESIDUE—(See also LEGACIES AND DEVISES, vol. 13, p. 45; WILLS).—Residue is that which remains of some-

dence are not convertible terms; domicile may be in one place and residence, for the time being, in another. Alston *v.* Newcomer, 42 Miss. 186; Briggs *v.* Rochester, 16 Gray (Mass.) 337.

1. Frost *v.* Brisbin, 19 Wend. (N. Y.) 11; 32 Am. Dec. 423; *In re* Hughes, 1 Tuck. (N. Y.) 38; *In re* Wrigley, 8 Wend. (N. Y.) 140; Brown *v.* Boulden, 18 Tex. 734; Zambrino *v.* Galveston, etc., R. Co., 38 Fed. Rep. 453.

In Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, where the plea alleged the defendant to be a resident while the statute in question (relating to insolvency) required that he be an inhabitant, the court deemed the terms convertible and the variance immaterial.

The liability of a person to taxation in a particular State or country is determined almost invariably by his inhabitancy rather than by residence. Thorndike *v.* Boston, 1 Met. (Mass.) 242; Borland *v.* Boston, 132 Mass. 89; 42 Am. Rep. 424; Church *v.* Rowell, 49 Me. 367. See also INHABITANTS, vol. 10, p. 775.

2. Everhart *v.* Huntsville Female College, 120 U. S. 223. See also Union Hotel Co. *v.* Hersee, 79 N. Y. 454; Morgan *v.* Nunes, 54 Miss. 308.

3. **Actual Residence.**—In statutes authorizing attachments, actual residence is contemplated. FOREIGN ATTACHMENT, vol. 8, p. 291, *et seq.*; 4 Minor's Insts. (2nd ed.) 336; Keller *v.* Carr, 40 Minn. 428; Stout *v.* Leonard, 37 N. J. L. 495; Brundred ads. Del Hoyo, 20 N. J. L. 328; Drake on Attachment, § 61–2; Hanson *v.* Graham, 82 Cal. 631; Long *v.* Ryan, 30 Gratt. (Va.) 720; Swaney *v.* Hutchins, 13 Neb. 266; Chariton Co. *v.* Moberly, 59 Mo. 238. See also NON-RESIDENT, vol. 16, p. 720; Koone *v.* Cooper, 43 Ark. 547; Nailor *v.* French, 4 Yeates (Pa.) 241; City Bank *v.* Merritt, 13 N. J. L. 134; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516.

A mere casual or temporary absence from a State on business or pleasure will not render one a non-resident even though he may not have a house of usual abode there at which a summons might be served during his absence. Keller *v.* Carr, 40 Minn. 428.

An actual resident is one upon whom process may be served. See SERVICE OF PROCESS; Niblack *v.* Goodman, 67 Ind. 174; Penley *v.* Waterhouse, 1 Iowa 498; Fitzgerald *v.* Arel, 63 Iowa 104; Blodgett *v.* Utley, 4 Neb. 25; Miller *v.* Tyler, 61 Mo. 401; Hackett *v.* Kendall, 23 Vt. 275; Vanlandingham *v.* Huston, 9 Ill. 125. See also 36 Am. Dec. 75, Note.

In cases where an attachment of property is authorized when the defendant is not a resident of the State, it is generally considered that residence and not domicil determines the operation of the statute; residence is defined in such cases as a permanent abode for the time being. *In re* Thompson, 1 Wend. (N. Y.) 43; Haggart *v.* Morgan, 5 N. Y. 422; 55 Am. Dec. 350. Hurlburt *v.* Seeley, 11 How. Pr. (N. Y.) 507; Mayor, etc., of N. Y. *v.* Genet, 63 N. Y. 646; Morgan *v.* Nunes, 54 Miss. 308; Mann *v.* Taylor, 78 Iowa 355; Colun *v.* Daniels, 25 Iowa 88; Story on Conflict of Laws, § 49, note.

Therefore, an attachment may issue against the estate of a debtor notoriously residing abroad, whether he is absent permanently or temporarily. *In re* Thompson, 1 Wend. (N. Y.) 43.

See also ACTUAL, vol. 1, p. 186.

Legal Residence.—In statutes relating to settlement, taxation, right of suffrage, divorce, limitation of actions, etc., the term "residence" is used in the sense of the legal residence. 4 Minor's Insts. (2nd ed.) 336; McShane *v.* McShane, 45 N. J. Eq. 342 (residence not proved by petitioner's evidence alone); Brundred *v.* Del Hoyo, 20 N. J. L. 328.

thing after taking away a part of it.[1] As used in wills, its ordinary meaning is, that portion of the estate which is left after the payment of charges, debts, and particular legacies. The presumption is that a testator uses it in this sense, unless a contrary intention clearly appears.[2]

Residuary means relating to the residue, as residuary legatee, devisee, etc.[3]

RESIDUUM.—Residue, *q. v.*

RESIGNATION—(See also ABDICATE, vol. 1, p. 21; OFFICERS, vol. 17, p. 169; PUBLIC OFFICERS).—The act by which an officer renounces the further exercise of his office. The surrender, relinquishment, etc., of an office.[4]

RESIST—(See also references under RESISTING AN OFFICER).—To resist is to oppose by direct action and *quasi* forcible means.[5]

RESISTING AN OFFICER.—See ARREST, vol 1, pp. 730, 755, *et seq.;* HOMICIDE, vol. 9, pp. 538, 552, 587; OBSTRUCTING JUSTICE, vol. 17, p. 13.

1. Bouv. L. Dict. *quoted* in Phelps *v.* Robbins, 40 Conn. 264.

Residue is what remains after some prior purpose is thereout satisfied. Cold *v.* Turner, 3 Russ. 376.

2. Phelps *v.* Robbins, 40 Conn. 264; Leahy *v.* Cardwell, 14 Oregon 172.

"Residue" means all of which no effectual disposition has been made by the will, other than the residuary clause. Sturges *v.* Work, 122 Ind. 134.

"Residue" means *ex vi termini* what may be left after satisfying the debts, legacies, etc. Choat *v.* Yeats, 1 J. & W. Ch. 105.

The "residue" of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed, and, in whatever part of the will it may happen to be found, it ought to have that meaning, unless the whole will, taken together, shows clearly that it is not so intended. A will bequeathing the residue of personalty passes everything not otherwise effectually disposed of. Willard's Appeal, 68 Pa. St. 332.

Applies to the Whole of an Estate.—When a doubt arises as to the extent of the application of the word "residue," as used in a will, whether it was intended to apply to the residue of the whole estate, or to be confined to a particular part of the estate, the courts generally incline to extend it to the whole estate where there are no other residuary clauses. Carr *v.* Dings, 58 Mo. 407.

May Include Real as Well as Personal Property.—That a gift in a will of the residue may include real as well as personal property, see Atkins *v.* Kron, 2 Ired. Eq. (N. Car.) 58; Seekright *v.* Carrington, 1 Wash. (Va.) 45; Smith *v.* Smith, 17 Gratt. (Va.) 268; Smyth *v.* Smyth, 8 Ch. Div. 561; Chapman *v.* Chick, 81 Me. 109.

3. Like legacy, "residuary legatee" has *prima facie* reference only to personalty. Windus *v.* Windus, 6 De G. M. & G. 549; Gethin *v.* Allen, 23 L. R. Ir. 236. It may, however, be extended by the context to realty. Hughes *v.* Pritchard, L. R., 6 Ch. Div. 24. In that case, however, there was a prior gift of the realty, and it has been said that where there is no such gift that case is not in point. *In re* Methuen, 16 Ch. Div. 696.

Residuary Clause.—The clause in a will disposing of the property remaining after all previous bequests and devises have been satisfied, *i. e.*, the clause disposing of the "residue." See also WILLS.

4. Resignation implies that the person resigning has been elected into the office which he resigns. A man cannot resign that which he is not entitled to, and which he has no right to occupy. Reg *v.* Blizzard, L. R., 2 Q. B. 57.

5. State *v.* Welch, 37 Wis. 201.

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I. DEFINITION AND GENERAL PRINCIPLES.—When a matter has once properly passed to final judgment, without fraud or collusion, in a court of competent or concurrent jurisdiction, it has become *res judicata*, and the same matter between the same parties cannot be reopened or subsequently considered. The general principle requires explanation and analysis; its scope needs to be carefully limited, as a multitude of cases occur which are so nearly upon the line that only the most careful scrutiny can determine whether the doctrine of *res judicata* applies or not.[1]

1. "The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter directly in question, in another court." Duchess of Kingston's Case, 11 State Trials 261; 2 Smith's Lead. Cas. (6th Am. ed.) 663.

"The authority of *res judicata* induces a presumption that everything contained in the judgment is true, and this presumption, being *juris et de jure*, excludes every proof to the contrary." Pothier on Obligations, pt. 4, ch. 3, § 3, art. 3.

"There must be a suit—and the judgment must be final; that is, it must settle the matter which it purports to conclude. Again, the thing demanded must be the same, the demand must be between the same parties and found by them against each other in the same quality." Durnford's Succession, 1 La. Ann. 93; Perry *v.* Dickerson, 85 N. Y. 345; 39 Am. Dec. 663.

"The maxim that there must be an end to litigation was dictated by wisdom and is sanctified by age." Warwick *v.* Underwood, 3 Head (Tenn.) 238; 75 Am. Dec. 767.

"The doctrine of estoppel by a former judgment between the same parties

It has become a fundamental principle regarding judgments that an issue properly determined is a bar not only to any dispute as to the facts, but also to any further consideration of the law bearing upon the case.[1] A judgment rests upon different grounds from estoppel, for while the latter results from the act of a party, the former rests upon the broader principles of peace, good order and public policy. The protection thus afforded in civil suits is somewhat analogous to the rule in criminal actions that one shall not be a second time put in jeopardy for the same crime, and is based upon equally broad and easily recognizable principles.[2] The judgment must be the result of an actual and fair trial of the issue; it is not sufficient that there is an inference of a decision upon the very point.[3]

While the general principle is the same, there is some variance in the consideration of the doctrine of *res judicata* in the English and American courts, and even among the decisions of the latter.[4]

The doctrine of *res judicata* has more particularly to do with judgments *in personam* than with judgments *in rem.* In the latter class of cases the judgments are generally conclusive so far as any property in question is concerned, or any held by attachment or otherwise, against any and everybody in the world; that is, if the property becomes liable, the question is of the thing and not of the person. Whereas in the case of actions *in personam*, a grave question arises as to the extent of the liability. It may extend

is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other." Aurora City *v.* West, 7 Wall. (U. S.) 82.

There must be some end to litigation, and much more injustice might be done in reviving forgotten issues than in limiting the right to prosecute. Gray *v.* Pingry, 17 Vt. 419; 44 Am. Dec. 345.

1. Case *v.* Beauregard, 101 U. S. 688; Imrie *v.* Castrique, 8 C. B. N. S. 405; 98 E. C. L. 403; South, etc., Ala. R. Co. *v.* Henlein, 56 Ala. 368.

The doctrine of *res judicata* is conducive to peace, repose, and morality, and that without working any injustice. Great Northern R. Co. *v.* Mossop, 17 C. B. 140; 84 E. C. L. 129; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 326; Martin *v.* Ives, 17 S. & R. (Pa.) 364.

2. Marsh *v.* Pier, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; Kilheffer *v.* Kerr, 17 S. & R. (Pa.) 319; 17 Am. Dec. 658.

3. *Ex parte* Roberts, 19 S. Car. 150; Burnham *v.* Webster, 1 Woodb. & M. (U. S.) 172; Greely *v.* Smith, 3 Woodb. & M. (U. S.) 236.

4. The Supreme Court of the *United States* has given this definition: "As we understand the rule in regard to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and, further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." Washington, etc., Steam Packet Co. *v.*

only to the parties to the action, or it may include all who are or may be privy to it, or it may extend even further and affect many who are entire strangers to the original action, at least so far as the record is concerned, and all these persons will be equally controlled in their future actions by the doctrine of *res judicata.* Actions *in rem* are said to bind not only *inter partes* but *inter omnes.* Actions *in personam* bind parties, privies, representatives and some others, either in a private or an official capacity.

This doctrine also deals with the issues, the nature of the action, the courts and the judgments therein, distinguishing the domestic from the foreign. A judgment may be an entire bar to an action upon any of several issues involved in the original case, or it may be a partial bar applying only to such facts or issues as were directly adjudicated in a previous action.

There are various classes of cases which it is difficult to place when drawing the distinction between actions *in rem* and *in personam,* noticeably those relating to prizes, revenue, probate and divorce.[1] In prize and revenue cases the question really is as to the forfeiture of the property.[2] There would be great difficulty in revising the decisions of the maritime courts of the world, and this furnishes one reason for considering the judgments of such courts as hear these causes as final.[3] Another class of cases includes those requiring an adjudication as to the domicile of paupers.[4] It is claimed that status may be determined by actions *in rem.*[5] The classes of cases last

Sickles, 5 Wall. (U. S.) 592. But consult authorities under *infra,* this title, *Issues.*

1. Croudson *v.* Leonard, 4 Cranch (U. S.) 434; DeMora *v.* Concha, 29 Ch. Div. 268; Castrique *v.* Imrie, L. R., 4 H. L. 414; Pittapur *v.* Garu, L. R., 12 Ind. App. 16.

2. Shaw, C. H., in Loring *v.* Steineman, 1 Met. (Mass.) 204, said: "In many cases courts of peculiar jurisdiction have jurisdiction of the subject-matter absolutely, and persons are concerned incidentally only, according to their respective rights and interests; as in a question of prize the jurisdiction of the court of admiralty extends to the question whether prize or not, and by adjudicating upon that question settles it definitely in regard to all persons interested in that question, whether they have notice or not. And we think the distribution of an intestate estate is analogous. The subject-matter, the property, is within the jurisdiction of the court, and the judgment, by determining who are entitled to distributive shares, and extending to the entire estate, determines that no other persons are entitled, and is necessarily conclusive because nothing further remains to be distributed." See also Brigham *v.* Fayerweather, 140 Mass. 411; Merriam *v.* Sewall, 8 Gray (Mass.) 316; Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23; Cecil *v.* Cecil, 19 Md. 72; 81 Am. Dec. 626; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190; Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176; Fry *v.* Taylor, 1 Head (Tenn.) 594; Bogardus *v.* Clark, 4 Paige (N. Y.) 623; DeMora *v.* Concha, 29 Ch. Div. 268; Hood *v.* Hood, 110 Mass. 463.

3. Castrigue *v.* Imrie, L. R., 4 H. L. 414; Concha *v.* Concha, L. R., 11 App. Cas. 541; Lothian *v.* Henderson, 3 B. & P. 499; Brigham *v.* Fayerweather, 140 Mass. 411; Robinson *v.* Jones, 8 Mass. 536; 5 Am. Dec. 114; Baxter *v.* New England Marine Ins. Co., 6 Mass. 277; 4 Am. Dec. 125. The Mary, 9 Cranch (U. S.) 126.

4. Renovo *v.* Half-Moon, 78 Pa. St. 301; Cabot *v.* Washington, 41 Vt. 168; Rex *v.* Bentley, Burr. Sett. Cas. 426; Rex *v.* Cirencester, Burr. Sett. Cas. 18. But see Bethlehem *v.* Watertown, 47 Conn. 237.

5. Hood *v.* Hood, 110 Mass. 463;

mentioned seemingly in their determination are as conclusive as any actions *in rem.*[1] Indeed, it may be said that the difference between actions *in rem* and *in personam* is merely one of degree.[2] Attachments have sometimes been considered as acting *in rem;* but it has been practically determined that where the action is *in personam,* the attachment has no effect upon the property seized unless it be between the immediate parties to the proceeding.[3] The attachment and sale of perishable property may be an exception to this.[4]

There must be a judgment before the doctrine of *res judicata* can be applied. Verdicts, decrees or interlocutory orders are insufficient.[5] The judgment must be valid; if void, the doctrine cannot apply;[6] if voidable, it must be reversed, appealed from, or otherwise dealt with before its force can be changed.[7] But

Markby Elements of Law, §§ 168–176, (3d. ed.).

1. Bouchier *v.* Taylor, 4 Bro. P. C. 708; Hart *v.* McNamara, 4 Price 154*n;* Concha *v.* Concha, L. R., 11 App. Cas. 541; Williams *v.* Williams, 63 Wis. 58; 53 Am. Rep. 253; Magoun *v.* New England Marine Ins. Co., 1 Story (U. S.) 157; Bunting *v.* Lepingwell, 4 Coke 29; Ennis *v.* Smith, 14 How. (U. S.) 400; but see Brigham *v.* Fayerweather, 140 Mass. 411; Salem *v.* Eastern R. Co., 98 Mass. 431; 96 Am. Dec. 650; The Mary, 9 Cranch (U. S.) 126; Radcliff *v.* United Ins. Co., 9 Johns. (N. Y.) 277; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64; 19 Am. Dec. 549.

2. Bigelow on Estoppel 48 (5th ed.); Pickett *v.* Pipkin, 64 Ala. 520; Brigham *v.* Fayerweather, 140 Mass. 411; Candee *v.* Lord, 2 N. Y. 269; 51 Am. Dec. 294; Schilsby *v.* Westezholn, L. R., 6 Q. B. 155; Rousillon *v.* Rousillon, 14 Ch. Div. 351.

3. Pennoyer *v.* Neff, 95 U. S. 714; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308; Easterly *v.* Goodwin, 35 Conn. 279; 95 Am. Dec. 237; Kieffer *v.* Ehler, 18 Pa. St. 388; Dow *v.* Sanborn, 3 Allen (Mass.) 181; Duchess of Kingston's Case, 2 Smith's Lead. Cas. 890 (5th Am. ed.); Ormond *v.* Moye, 11 Ired. (N. Car.) 564; Myers *v.* Beeman, 9 Ired. (N. Car.) 116; Barber *v.* Hartford Bank, 9 Conn. 407.

4. Megee *v.* Beirne, 39 Pa. St. 50.

5. Hawks *v.* Truesdell, 99 Mass. 557; Wadsworth *v.* Connell, 104 Ill. 369; *In re* Holbert, 57 Cal. 257; Lea *v.* Lea, 99 Mass. 493; 96 Am. Dec. 772; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733; Thurston *v.* Thurston, 99 Mass. 39; Moore *v.* Spiegel, 143 Mass. 413; Colt *v.* Partridge, 7 Met. (Mass.) 570; but see Co. Litt., 227*b;* Everest & Strode, 26.

6. Wixom *v.* Stephens, 17 Mich. 518; 97 Am. Dec. 205; Smith *v.* McNeal, 109 U. S. 426; Dodd *v.* Una, 40 N. J. Eq. 672; Meltzer *v.* Doll, 91 N. Y. 365; School Dist. No. 28 *v.* Stocker, 42 N. J. L. 116; Reg. *v.* Hutchings, 5 Q. B. Div. 353; Hood *v.* Hood, 110 Mass. 463; Walling *v.* Beers, 120 Mass. 548; Durant *v.* Abendroth, 97 N. Y. 132; White *v.* Crow, 110 U. S. 183; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308; Galpin *v.* Page, 18 Wall. (U. S.) 350; Dunlap *v.* Cody, 31 Iowa 260; 7 Am. Rep. 129; Pfiffner *v.* Krapfel, 28 Iowa 27; Luckenbach *v.* Anderson, 47 Pa. St. 123; Wanzer *v.* Bright, 52 Ill. 35.

7. Case *v.* Beauregard, 101 U. S. 688; Lawrence *v.* Milwaukee, 45 Wis. 306; Heroman *v.* Louisiana Institute, etc., 34 La. Ann. 805; Parker *v.* Wright, 62 Ind. 398; Jackson Co. *v.* Applewhite, 62 Ind. 464.

Hollister *v.* Abbott, 31 N. H. 448; 64 Am. Dec. 342. In this case the court by Eastman, J., said: "It is a well-established principle that the judgment of a court of record, having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet, as between the parties, the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction, it has a right to decide every question which arises in the cause; and whether its decisions be correct or otherwise its judgment until reversed is regarded as binding in every other

until this is done a voidable judgment is as binding as if it were valid.[1] A mere clerical error will not change the effect of a judgment which otherwise would prove a bar.[2] A judgment must be upon the merits, and not founded upon a mere technicality.[3] If an action has merely to do with the form of a remedy, or with some collateral issue, the real question may be *res integra*, and no adjudication prevents further action. Again a question may be raised in an improper form, and the result turning upon the form of action or the pleadings is no bar to another action.[4]

II. PARTIES AND PRIVIES—1. General Rule as Regards Parties.—Every person is liable to become or to be made a party to litigation, and to be bound by the result of it. If out of the jurisdic-

court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that cause, either by writ of error or by some other legal and direct mode. For, to the extent to which the judgment goes, their rights have been considered and decided, and they have submitted to that decision either from the force of law after a final hearing by a court of last resort, or from a disinclination to pursue the matter further when other courses of proceeding for rehearing were open before them and might have been had if they had so elected."

If a suit is discontinued, by agreement or otherwise, and even after judgment, it is no bar to a subsequent action. Hudson *v.* Nashua, 62 N. H. 591; Loeb *v.* Willis, 100 N. Y. 231.

A decree or judgment vacated by an appeal is no bar. Turley *v.* Turley, 85 Tenn. 251.

1. Voorhees *v.* Jackson, 10 Pet. (U. S.) 474. Here the court remarks: "The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or a decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in an action concerning the matters adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error." See Birckhead *v.* Brown, 5 Sandf. (N. Y.) 145; Parkhurst *v.* Sumner, 23 Vt. 541; 56 Am. Dec. 94.

2. Bourg *v.* Gerding, 33 La. Ann. 1369; Harris *v.* Billingsley, 18 Ala. 438; Gibson *v.* Wilson, 18 Ala. 63; Wolfley *v.* Lebanon Min. Co., 3 Colo. 296; Bank of U. S. *v.* Moss, 6 How. (U. S.) 31; *Ex parte* Jones, 61 Ala. 399; Miller *v.* Royce, 60 Ind. 189; Wright *v.* McCampbell, 75 Tex. 644; Alpers *v.* Schammel, 75 Cal. 590; Conway *v.* Day, 92 Ind. 422; Beers *v.* Shannon, 73 N. Y. 292; Spigner *v.* Farquhar, 82 Ala. 569; Wall *v.* Covington, 83 N. Car. 144; Smith *v.* Redus, 9 Ala. 99; 44 Am. Dec. 429; *In re* Mahon, 71 Cal. 586; Hood *v.* Spaeth, 51 N. J. L. 129; Grimes *v.* Grosjean, 24 Neb. 700; Chandler *v.* Frost, 88 Ill. 559; Carlton *v.* Patterson, 29 N. H. 580; Crispen *v.* Hannovan, 86 Mo. 160.

3. Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Verhein *v.* Schultz, 57 Mo. 326; Gray *v.* Dougherty, 25 Cal. 266; Houston *v.* Musgrove, 35 Tex. 594; Pepper *v.* Donnelly, 87 Ky. 259; Taylor *v.* Larkin, 12 Mo. 103; 49 Am. Dec. 119; Foster *v.* The Richard Busteed, 100 Mass. 412; 1 Am. Rep. 125; Detroit *v.* Houghton, 42 Mich. 459; Vaughan *v.* O'Brien, 39 How. Pr. (N. Y.) 515; Dixon *v.* Sinclear, 4 Vt. 354; 24 Am. Dec. 610; Hughes *v.* U. S., 4 Wall. (U. S.) 232; Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; Johnson *v.* White, 13 Smed. & M. (Miss.) 584; Carson *v.* Clark, 2 Ill. 113; 25 Am. Dec. 79.

4. Webb *v.* Buckelew, 82 N. Y. 555; Stevens *v.* Dunbar, 1 Blackf. (Ind.) 56; Johnson *v.* White, 13 Smed. & M. (Miss.) 587; Hughes *v.* U. S., 4 Wall. (U. S.) 232; Cannony *v.* Hoober, 5 Pa. St. 305; Morton *v.* Sweetser, 12 Allen (Mass.) 134; Garrett *v.* Greenwell, 92 Mo. 120; Doctor *v.* Furch, 76

tion of the court in which such litigation takes place, he may voluntarily permit himself to be a party plaintiff or defendant, and the judgment rendered becomes binding upon him. Judgments are a bar to the parties to them and their privies in actions *in personam*. "Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies,"[1] and the same may be said of those who assume to have the right to do these things.[2] And those appearing voluntarily as defendants without due service of process upon them are equally parties.[3] There may be nominal as well as real parties to an action. A single act of parties will not determine their status, such as the employment of an attorney.[4] By simply obtaining leave of court to become a party, a person does not become a party to the action, so as to be bound by the judgment therein.[5] The characteristics of parties may exist without making the persons to whom they apply actually parties to the record.[6]

Wis. 153; Atkins *v.* Anderson, 63 Iowa 739; Roberts *v.* Norris, 67 Ind. 386; Perkins *v.* Moore, 16 Ala. 9.

1. Greenleaf Ev., § 535; Duchess of Kingston's Case, 2 Smith's Lead. Cas. 890 (5th Am. ed.); Litchfield *v.* Goodnow, 120 U. S. 549.

Under the term *parties* the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers by its result, and for or against whom the record of the former proceedings might be adduced in evidence in another trial; those who have the right to be heard, and to offer testimony and examine the witnesses. *Privies* are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator, all others not included in either of these classes are, of course, *strangers*. Brown *v.* Chaney, 1 Ga. 412; Peterson *v.* Lathrop, 34 Pa. St. 223; Cecil *v.* Cecil, 19 Md. 72; 81 Am. Dec. 626.

In Allin *v.* Hall, 1 A. K. Marsh. (Ky.) 525, the court says: "To ascertain the extent of the effect of a judgment or decree, in relation either to the matters thereof or parties thereto, the record of the suit in which they have been rendered or pronounced should be explored. It affords the information *most*, if not *solely*, to be relied upon in the progress of such an inquiry. The law imputed to the record absolute verity, and will not permit the matter which it imports to be gainsaid or traversed. . . . And hence results (as we believe) the *rule* that none are to be considered as parties to a suit, and bound in that character by a judgment or decree therein, but those who are named as such in the record thereof." Barry *v.* Carothers, 6 Rich. (S. Car.) 331; Walters *v.* Wood, 61 Iowa 290; Sames's Appeal, 26 Pa. St. 184.

2. Winchester *v.* Heiskell, 119 U. S. 450; Stoddard *v.* Thompson, 31 Iowa 80; Landis *v.* Hamilton, 77 Mo. 554.

3. Burpee *v.* Sparkhawk, 108 Mass. 111; 11 Am. Rep. 320, King *v.* Penn., 43 Ohio St. 57; Denny *v.* Bennett, 128 U. S. 489. And in Hefner *v.* Northwestern Life Ins. Co., 123 U. S. 747, Gray, J., said: "To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is due and payable, he may, and, when the property is ordered sold free of all incumbrances, must be made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage." Any one interested may in equity be made a party against his will, so as to be bound by the decree rendered.

4. Schroeder *v.* Lahrman, 26 Minn. 87; Stokes *v.* Morrow, 54 Ga. 600.

5. Denny *v.* Bennett, 128 U. S. 489.

6. Greenleaf on Ev., § 535. Where,

Personal judgments cannot, however, affect the rights of strangers.[1] All the essential characteristics of parties must be present in those who are really parties to a suit.[2]

Considerable attention has been given to the question, whether, to create a bar, the parties to the judgment and the action must be exactly the same. While this is true to some extent it does not necessarily follow, and there are very many cases in which the parties are not the same, some parties not being included, or some added.[3] The doctrine of *res judicata* applies so long as the

in a second action, the record produced in behalf of the plaintiff did not show that his name was entered in the former suit as a record party, but he testified that he was, nevertheless, an active participant in the former trial respecting the same subject-matter, claiming the property in dispute as his own, appearing as a witness in the case, and, in the absence of the record plaintiff (who claimed to hold only as the bailee of the present plaintiff), assuming control and direction of the case, and employing and paying attorneys to attend to it, it was held that such facts brought him very clearly within the definition of a party to the first action, notwithstanding the omission of his name on the record as a formal litigant. Wood *v.* Ensel, 63 Mo. 194.

The principle is that a mere nominal party may represent a real party in interest so as to exclude the latter effectually from bringing a second action on the same matter. See *infra*, this title, *Representative parties.*

1. In Petrie *v.* Nuttall, 11 Exch. 569, Alderson, B., to show that an estoppel must be mutual, said: "The distinction is shown by the authority cited in Viner's Abr., Estoppel (F) 35, where it is said: 'If a man indicted for extortion or trespass puts himself into the grace of the king, and makes fine, and, after the party sues against him thereof by bill or writ, and he pleads not guilty, he shall have the plea, and the making of fine to the king shall not estop him.' That is precisely this case, and we ought to follow the same rule." Wright *v.* Phillips, 56 Ala. 69; Buttrick *v.* Holden, 8 Cush. (Mass.) 233; Corbley *v.* Wilson, 71 Ill. 209; 22 Am. Rep. 98; McBee *v.* Fulton, 47 Md. 403; 28 Am. Rep. 465.

2. In Cecil *v.* Cecil, 19 Md. 80; 81 Am. Dec. 626, the court said: "All these privileges—not any one of them—are essential to the assertion and protection of private rights and the investigation of the truth. Only, therefore, those who have enjoyed them collectively should be concluded by a decision, judgment, or decree." Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Dodge *v.* Zimmer, 110 N. Y. 43.

3. In Thompson *v.* Roberts, 24 How. (U. S.) 241, the court by Grier, J., says: "No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides. The question, as between the present parties, is *res adjudicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason, making a distinction where there is no difference. Such was the ruling of the court in the case of Lawrence *v.* Hunt, 10 Wend. (N. Y.) 82; 25 Am. Dec. 539, where it was objected that, in the former suit, there was another plaintiff joined. Where the former suit was at law this objection might have some weight, for it could not well be said that a contract of A and B with C and D was the same as that in another suit where A was sole plaintiff and D sole defendant. But this objection cannot apply where the first issue is in chancery, and parties collaterally interested are made parties to the litigation that it may be final, and not because they were legal parties to the original contract on which the litigation is founded. In such a case the pleadings may show the contract or subject-matter of the litigation to be the very same and directly in issue; in the other it could not well be so."

In Miller *v.* Manice, 6 Hill (N. Y.) 114, Walworth, Ch., declared expressly

that "it is no answer to the defense of a former recovery that the form of action in both suits is not the same, or that all the plaintiffs or defendants in both suits are not the same," subject, however, to the qualification that "where the form of the first action was such that the proof necessary to a recovery could only be brought forward in a different form of action, or where, from the number of plaintiffs or defendants in the first suit, the testimony relied on in the second is sufficient to authorize a recovery in such second action, but could not have produced a different result in the first, the failure of the one suit is no bar to recovery in the other, although it is for the same cause of action for which they attempted to recover in the first suit."

In Christy *v.* Tancred, 9 M. & W. 438, Parke, B., said: "There is no authority that a judgment against A and B jointly is evidence in an action against A alone, because it may have proceeded on an admission of B, which might or might not be evidence against A according to circumstances." McReynolds *v.* McReynolds, 74 Iowa 89; Berber *v.* Kersinger, 23 Ill. 346; Eikenberry *v.* Edwards, 71 Iowa 82; Brouner *v.* Davis, 15 Cal. 9; Wilson *v.* Buell, 117 Ind. 315; Davenport *v.* Barnett, 51 Ind. 329; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 80; 25 Am. Dec. 539; Russell *v.* Farquhar, 55 Tex. 355; Dows *v.* McMichael, 6 Paige (N. Y.) 139; Larum *v.* Wilmer, 35 Iowa 244.

In Cro. Jac. 74, Popham, C. J., said: "If one hath judgment to recover in trespass against *one*, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *contra*, if one hath cause of action against two and obtain judgment against one, he shall not have remedy against the other, and the difference betwixt this case and the case of debt and obligation against two is because there every one of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction."

In Rex *v.* Hoare, 13 M. & W. 494, Parke, B., renders an elaborate and exhaustive opinion, but in America a tort committed by one or more is considered as joint and several in its nature.

Elliott *v.* Hayden, 104 Mass. 180; Williams *v.* Sutton, 43 Cal. 65; Gilbreath *v.* Jones, 66 Ala. 129; Luce *v.* Dexter, 135 Mass. 23; United Soc. of Shakers *v.* Underwood, 11 Bush (Ky.) 265; Sessions *v.* Johnson, 95 U. S. 347; Brown *v.* Cambridge, 3 Allen (Mass.) 474; Buttrick *v.* Holden, 8 Cush. (Mass.) 236.

In Stone *v.* Dickinson, 5 Allen (Mass.) 29; 81 Am. Dec. 727, Bigelow, C. J., said: "It cannot be denied that the parties who were plaintiffs in the original actions, in suing out their writs against the present plaintiff, and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression it might seem that the legal inference from this fact is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. . . . The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful and unlawful act committed by a common agent acting for several and distinct principals. It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers by whom the tortious act was done were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of princi-

issue is between the same parties, and whether they continue, respectively, as plaintiffs and defendants, or reverse their positions, is not material.[1] They must, however, have been and continue to be adversary parties.[2] But when issues between various defendants are actually decided by the court they become *res judicata*, the same as if they arose between opposing parties.[3] It is just as important that the parties to both suits

pals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done so as to entitle the party injured to a compensation graduated, not according to the damages sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable. . . . He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. . . . But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others."

In Girardin *v.* Dean, 49 Tex. 243, it is said: "The fact that parties in the first suit are not identically the same as those in the second, when the first case was decided on the merits, and not upon an exception to joinder or non-joinder of parties, is certainly no answer to the plea (of former recovery) otherwise, no matter how often a case be decided, the parties might renew the litigation by simply joining with them a new party." Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608; Hawkins *v.* Lambert, 18 B. Mon. (Ky.) 99; Fell *v.* Bennett, 110 Pa. St. 181; Hawes *v.* Waltham, 18 Pick. (Mass.) 451; Freach *v.* Neal, 24 Pick. (Mass.) 55; Bergeron *v.* Dartmouth Sav. Bank, 62 N. H. 655.

In Ehle *v.* Bingham, 7 Barb. (N. Y.) 494, Edwards, J., said: "It will be remembered that the former suit was upon a promissory note which grew out of a transaction to which the plaintiff and defendant in this suit alone were parties, and that the plaintiff in this suit put in a separate plea and notice of a matter personal to himself; and the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment." Pollard *v.* New Jersey R., etc., Co., 101 U. S. 224; Miles *v.* Caldwell, 2 Wall. (U. S.) 35; Thompson *v.* Roberts, 24 How. (U. S.) 233; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Nemetty *v.* Naylor, 100 N. Y. 562; Whitford *v.* Crooks, 54 Mich. 261; Parnell *v.* Hahn, 61 Cal. 131; Davidson *v.* State, 63 Ala. 432; Follansbee *v.* Walker, 74 Pa. St. 306; Bigelow on Estoppel (5th ed.), note, 105; Lowry *v.* McMurtry, Sneed (Ky.) 251; Wiswall *v.* Sampson, 14 How. (U. S.) 52.

1. Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Barker *v.* Cleveland, 19 Mich. 235; Parkhurst *v.* Berdell, 110 N. Y. 386; Harmon *v.* Auditor, 123 Ill. 122.

2. Walters *v.* Wood, 61 Iowa 290; Dent *v.* King, 1 Ga. 200; 44 Am. Dec. 638; Montgomery *v.* Road, 34 Kan. 122; Buffington *v.* Cook, 35 Ala. 312; 73 Am. Dec. 491; McMahan *v.* Geiger, 73 Mo. 145; 39 Am. Rep. 489; Duncan *v.* Holcomb, 26 Ind. 378; Rice *v.* Cutler, 17 Wis. 351; 84 Am. Dec. 747; McCrory *v.* Parks, 18 Ohio St. 1; Torrey *v.* Pond, 102 Mass. 355; Graham *v.* La Crosse, etc., R. Co., 3 Wall. (U. S.) 704; Lloyd *v.* Barr, 11 Pa. St. 41; Jones *v.* Vert, 121 Ind. 140; Rogers *v.* Haines, 3 Me. 362.

3. Leavitt *v.* Wolcott, 95 N. Y. 212;

should be acting in the same capacity in each as that the parties should be the same.[1] Where a third party interpleads or intervenes in an action pending for the purpose of

Parkhurst *v.* Berdell, 110 N. Y. 386; Devin *v.* Ottumwa, 53 Iowa 461; Goldschmidt *v.* Nobles Co., 37 Minn. 49; Harmon *v.* Auditor, 123 Ill. 122; Harvey *v.* Osborn, 55 Ind. 535; Joyce *v.* Whitney, 57 Ind. 550; People *v.* Hall, 80 N. Y. 127; Brown *v.* Mayor, etc., of N. Y., 66 N. Y. 391; Demarest *v.* Darg, 32 N. Y. 281; Fairchild *v.* Lynch, 99 N. Y. 360.

1. Duchess of Kingston's Case, 2 Smith's Lead. Cas. (6th Am. ed.) 663; Leggott *v.* Great Northern R. Co., 1 Q. B. Div. 599. The latter is a recent and leading case. The widow of a passenger killed on a railroad sued as administratrix after she had recovered for herself and children, and it was held that there was no bar, as the plaintiff acted in different capacities in the two actions. In this connection, Mellor, J., remarked: "We have come to the conclusion that an estoppel does not arise. It seems that, though nominally, the machinery in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family in respect of the death of the deceased, occasioned by the negligence of other persons; and the recital of the act is that no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him. It is therefore enacted that 'whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof [it is limited entirely to this], then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action of damages, notwithstanding the death of the person injured.' Then, in the second section, it expressly enacts that 'every such action shall be for the benefit of the wife, husband, parent or child whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.' Then, the jury is to assess damages proportioned to the injury.

"By the later statute, 27 and 28 Vict,. ch. 95, the machinery is altered. There it is recited that persons may lose the benefit of that act, either from the expense of taking out probate, or because of the neglect of the executor; therefore, the action is given directly to the person injured, but is exactly, in respect of the same matter and the same cause, limited by Lord Campbell's act. This being the state of things, the executor being the mere machine, and this being the form of the machinery provided by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's act, can an admission on the record, made where the right of the executor to bring the action is expressly so limited, be set up in another action, brought by the executor generally, in respect of the assets and estates of the deceased, so that in that action the defendants who have submitted in the former action, are to be precluded from denying the facts alleged in the second action? I think that there is no estoppel under those circumstances; although the machinery is nominally the same, the entire object and effect of the action is different, and any admission made by the executor, if it were on his side or her side, would not be available in a subsequent action which was brought in respect of the general assets of the deceased. It is to be observed that the executrix, in a case under the act, does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the death of the deceased is to be made the subject of an action, just as if he had lived." Bradley *v.* Andrews, 51 Vt. 525; Bartlett *v.* Kochel, 88 Ind. 425; Salter *v.* Salter, 80 Ga. 178; Barrett *v.*

claiming certain property as his own, he is barred by the judgment, and cannot afterwards sue on the same claim. But if he can exercise his pleasure about it, no neglect or failure to do so on his part will bar him. To bind him he must be actually and really a party.[1] The position which a party to the record holds or the capacity in which he appears may be and often is determined by the court, so that in any subsequent proceeding by or against him, it can be easily seen whether he is acting in the same or a different capacity in the second action.[2] Exceptions to the

Choen, 119 Ind. 56; Coates *v.* Mackey, 56 Md. 416; Jenkins *v.* Nolan, 79 Ga. 295; Stockton Bld'g, etc., Assoc. *v.* Chalmers, 75 Cal. 332; Lorance *v.* Platt, 67 Miss. 183.

In Rathbone *v.* Honey, 58 N. Y. 463, the court says: "A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is, in contemplation of law, a distinct person and a stranger to the prior proceedings and judgment."

Erwin *v.* Garner, 108 Ind. 488; Lander *v.* Arno, 65 Me. 26; Stoops *v.* Woods, 45 Cal. 439; Davis *v.* Davis, 30 Ga. 296; Mansfield *v.* Hoagland, 46 Ill. 359; McNutt *v.* Trogden, 29 W. Va. 469; Landon *v.* Townshend, 112 N. Y. 93; McBurnie *v.* Seaton, 111 Ind. 56; Corcoran *v.* Chesapeake, etc, Canal Co., 94 U. S. 741; Coalton *v.* Onderdonk, 69 Cal. 155; 58 Am. Rep. 556; Hall *v.* Richardson, 22 Hun (N. Y.) 444; Moomey *v.* Maas, 22 Iowa 380; 92 Am. Dec. 395; Crenshaw *v.* Creek, 52 Mo. 101.

"A woman is not estopped after coverture by an admission on record of herself and her husband during coverture; and an heir claiming as heir of his mother is not estopped by an estoppel upon him as the heir of his father." 2 Phillips' Evid., 11, 12; Parker *v.* Moore, 59 N. H. 454; Lord *v.* Wilcox, 99 Ind. 491; Lantz *v.* Maffett, 102 Ind. 23.

It frequently occurs that one suit is brought in an individual capacity and another in an official or fiduciary capacity without the interference of the doctrine of *res judicata*. Flint *v.* Bodge, 10 Allen (Mass.) 128; Neilley *v.* Neilley, 89 N. Y. 352; Bradley *v.* Andrews, 51 Vt. 525; Karr *v.* Parks, 44 Cal. 46; Kronshage *v.* Chicago, etc., R. Co., 45 Wis. 500.

1. State *v.* Spikes, 33 Ark. 801; Gumbel *v.* Pitkin, 113 U. S. 545; Wilson *v.* Trowbridge, 71 Iowa 345; Markham *v.* O'Connor, 23 La. Ann. 688; Richardson *v.* Watson, 23 Mo. 34; Stoddard *v.* Thompson, 31 Iowa 80; Shelton *v.* Brown, 22 La. Ann. 162.

For cases where a third party was barred by interpleading, see Dorsey *v.* Smyth, 28 Cal. 24; Richardson *v.* Jones, 16 Mo. 177; Richardson *v.* Watson, 23 Mo. 34. In Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 448, the court, by Smith, J., said: "If there is anything in the principle that when a party is brought into court and given an opportunity to present his claims, he must do so at the peril of being cut off and foreclosed in respect to all such claims, the plaintiffs are clearly estopped from going back of this decree. They were subsequent incumbrancers upon the property in question. They were called upon to set up their claims and assert their rights, and omitted to do so, and suffered the plaintiffs in that suit to take the said decree and proceed to execute the same. . . . It is suggested that the said judgment and decree are not conclusive, because the plaintiffs were made parties as judgment creditors. I do not think this position at all tenable. The plaintiffs were made parties as subsequent incumbrancers; it matters not what their liens were; they had an opportunity to set them up and litigate the question in that suit. It is of no consequence that the plaintiff's made them thus parties as judgment creditors, and in ignorance of their chattel mortgage. The plaintiffs in this suit were not ignorant of the existence of their own mortgage, and they knew that the plaintiffs in that suit claimed a prior lien upon the property in question therein, and were seeking to enforce it against them and all subsequent incumbrancers, or to cut off all subsequent liens of whatever nature."

2. Sturtevant *v.* Randall, 53 Me. 149; Washington, etc., Steam Packet Co. *v.*

general principles laid down as to parties, capacity, relations to each other, the effect of judgments, and conclusiveness as to privies and strangers will be found under special topics in the treatment of the subject, and it will be found that there are a variety of instances where the general rule is to be modified.[1]

2. General Rule as Regards Privies.[2]—"Where one claims in privity with another, whether by blood, estate, or law, he is in the same situation with such person as to any judgment for or against him; for judgments bind privies as well as parties."[3] Privity is a "mutual or successive relationship to the same rights of property."[4] To become a privy one must have gained an interest in the property in question in some way.[5] All privies are really privies in estate. Judgments are just as conclusive upon privies to an action as upon the parties themselves.[6] One who is a tenant before the bringing of an ejectment suit cannot be dispossessed by the judgment unless made a party to the suit.[7] A person must claim through or under one of the parties in order to be affected by the judgment.[8]

Every person is privy to a judgment, who has succeeded to an estate or interest held by one who was a party to the judgment, this succession taking place after the bringing of the action.[9] Further than this, if there is no succession, there is no privity.[10] The law is that he who intermeddles with property

Sickles, 5 Wall. (U. S.) 580; Rogers *v.* Beauchamp, 102 Ind. 33; Foye *v.* Patch, 132 Mass. 105; Bryan *v.* Malloy, 90 N. Car. 508; Carter *v.* Shibles, 74 Me. 273; Wilson *v.* Deen, 121 U. S. 525; Read *v.* Sutton, 2 Cush. (Mass.) 115; Hood *v.* Hood, 110 Mass. 463; Dunlap *v.* Glidden, 34 Me. 517; Willard *v.* Whitney, 49 Me. 235; Parker *v.* Thompson, 3 Pick. (Mass.) 429.

1. Proctor *v.* Cole, 120 Ind. 102; Roberts *v.* Davidson, 83 Ky. 279; Roman Catholic Archbishop *v.* Shipman, 69 Cal. 586; Ryan *v.* Heenan, 75 Iowa 589; Franklin Sav. Bank *v.* Taylor, 131 Ill. 376.

2. See LIS PENDENS, vol. 13, p. 868.

3. Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560.

4. Bouv. L. Dict.; 2 Greenl. Evid., § 189. A privy is one holding under a party litigant and obtaining title after the commencement of suit. Hunt *v.* Haven, 52 N. H. 162.

5. Dooley *v.* Potter, 140 Mass. 49; Coles *v.* Allen, 64 Ala. 98; Bryan *v.* Malloy, 90 N. Car. 508; Chester *v.* Bakersfield Town Hall Assoc., 64 Cal. 42; Zoeller *v.* Riley, 100 N. Y. 102; 53 Am. Rep. 157; Scates *v.* King, 110 Ill. 456.

6. Webster *v.* Mann, 56 Tex. 119; 42 Am. Rep. 688; Cunningham *v.* Harris, 5 Cal. 81; Stoutimore *v.* Clark, 70 Mo. 471; Sobey *v.* Beiler, 28 Iowa 323; Beebe *v.* Elliott, 4 Barb. (N. Y.) 457; Cole *v.* Favorite, 69 Ill. 457; Finney *v.* Boyd, 26 Wis. 366; Cushing *v.* Edwards, 68 Iowa 145; Whitford *v.* Crooks, 54 Mich. 261.

7. Goerges *v.* Hufschmidt, 44 Mo. 179; Sampson *v.* Ohleyer, 22 Cal. 200; Garrison *v.* Savignac, 25 Mo. 47; 69 Am. Dec. 448; *Ex parte* Reynolds, 1 Cai. (N. Y.) 500; Satterlee *v.* Bliss, 36 Cal. 489; Smith *v.* Trabue, 1 McLean (U. S.) 87.

8. Thompson *v.* Clark, 4 Hun (N. Y.) 164; Calderwood *v.* Brooks, 28 Cal. 151; Hunt *v.* Haven, 52 N. H. 162; Scott *v.* Drennen, 9 Daly (N. Y.) 226; Lloyd *v.* Barr, 11 Pa. St. 41.

9. Winston *v.* Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Cushing *v.* Edwards, 68 Iowa 145; Webster *v.* Mann, 56 Tex. 119; 42 Am. Rep. 688; Whitford *v.* Crooks, 54 Mich. 261; Pray *v.* Hegeman, 98 N. Y. 351; Lipscomb *v.* Postell, 38 Miss. 476; 77 Am. Dec. 651; Stoutimore *v.* Clark, 70 Mo. 471; Shattuck *v.* Bascom, 105 N. Y. 39; Hair *v.* Wood, 58 Tex. 77; Adams Co. *v.* Graves, 75 Iowa 642.

10. Cook *v.* Parham, 63 Ala. 456;

in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it at the outset.[1] A purchaser of property *pendente lite*, becomes a privy to the party from whom he purchases, and is as much bound by the result of the suit, so far as the property is concerned, as if he had been a party of record.[2] We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased *bona fide* and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record.[3] It is not necessary that the purchaser of the property should be a party to the record in order to bind him.[4]

Jordan *v.* Ford, 7 Ark. 416; Sturges *v.* Beach, 1 Conn. 507; Crabb *v.* Larkin, 9 Bush (Ky.) 154; Leake, etc., Orphan House *v.* Laurence, 11 Paige (N. Y.) 80; Shattuck *v.* Bascom, 105 N. Y. 39; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Fenn *v.* Dugdale, 31 Mo. 580; Moore's Appeals, 34 Pa. St. 411; Wells *v.* Coyle, 20 La. Ann. 396; Parrett *v.* Birge, 50 Cal. 655; Mathes *v.* Cover, 43 Iowa 512; Hager *v.* Spect, 52 Cal. 579; Shay *v.* McNamara, 54 Cal. 169; Bickett *v.* Nash, 101 N. Car. 579.

1. Tilton *v.* Cofield, 93 U. S. 163; 1 Story Eq. Jur., § 406; Salisbury *v.* Morss, 7 Lans. (N. Y.) 359; Inloe *v.* Harvey, 11 Md. 524.

2. Orleans *v.* Platt, 99 U. S. 676; Wright *v.* Phillips, 56 Ala. 69; Daniels *v.* Henderson, 49 Cal. 243; Stout *v.* Lye, 103 U. S. 66; Moon *v.* Crowder, 72 Ala. 79; Haynes *v.* Calderwood, 23 Cal. 409; Snowman *v.* Harford, 62 Me. 434; Diamond *v.* Lawrence Co., 37 Pa. St. 353; 78 Am. Dec. 429; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566; American Exch. Bank *v.* Andrews, 12 Heisk. (Tenn.) 306; Eyster *v.* Gaff, 91 U. S. 521; Craig *v.* Ward, 1 Abb. App. Dec. (N. Y.) 454; Malone *v.* Marriott, 64 Ala. 486; Williams *v.* Terrell, 54 Ga. 463; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. (N. Y.) 70.

3. Brightman *v.* Brightman, 1 R. I. 112.

4. In Snowman *v.* Harford, 57 Me. 400, the court by Barrows, J., remarked: "Although the rule may sometimes operate to the prejudice of an innocent purchaser without notice, it is firmly adhered to; and it is based upon strong grounds of public policy and general equity; for, but for its adoption, the whole object of an expensive piece of litigation might be defeated by alienations while it was pending, and there would be no end of litigation." Bush *v.* Knox, 2 Hun (N. Y.) 578; Spencer *v.* Williams, L. R., 2 P. M. 230.

In another case between the same parties, Snowman *v.* Harford, 62 Me. 434, the question came up whether proceedings in equity would be considered in an action at law subsequently brought, and it was decided they would, the court saying: "In these two cases equity ascertained, determined, affirmed, and re-affirmed the plaintiff's right to the *locus in quo*. The deed required to be given to the defendant under the decree had been executed and delivered prior to commencement of the present suit. Equity had thus performed its office, exhausted its powers, and could do no more in respect to that controversy. With a title thus perfected, the plaintiff had a plain, adequate and complete remedy at law for any invasion of his property. The proceedings in equity are available at law to show that the deed given by the defendant to Saddler, prior to his deed to the plaintiff under the decree, is void and of no effect between the parties. There is neither reason nor law in invoking equity to enable a party to enforce his rights thus acquired under an executed decree of a court of equity as often as these rights should

Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record.[1] And generally when a suit is brought in the name of one for the benefit of another, the latter, being the real party, will be barred as conclusively as if he were a party of record.[2] An action where the real party in interest sues will be barred by the action in which the nominal party was the plaintiff of record.[3] No one can be bound, because of any transfer to him prior to the action, by a suit against the former owner.[4] If an interest and estate in land is directly affected by a judgment which fixes the status of the parties, the parties are as firmly bound as by any release or confirmatory instrument, and the judgment or bar forms part of the title to the land and extends to any and all who claim under either of the parties.[5] A purchaser under an execution is a voluntary purchaser, and acquires just such a title as there chances to be, subject to all risks and liens. He is bound by any litigation pending, and there is no occasion for making him a record party.[6] Whenever a title is in dispute in a suit, the judgment rendered is conclusive as to the parties against whom it is rendered.[7] Similarly a lessee is bound as a privy, even though he

be invaded. It is the office of equity in such cases to settle the rights of the parties, and of law to provide the appropriate remedies to secure their enjoyment. Happily, each is competent for its allotted task and performs its office without infringing upon the prerogatives of the other."

1. Claflin *v.* Fletcher, 7 Fed. Rep. 851. To the same effect are Burns *v.* Gavin, 118 Ind. 320; Conger *v.* Chilcote, 42 Iowa 18.

2. Cole *v.* Favorite, 69 Ill. 457; Gill *v.* U. S., 7 Ct. of Cl. 522.

3. In Follansbee *v.* Walker, 74 Pa. St. 306, the court said: "There was no error in the admission of the record of the former judgment. The parties in that suit and in the action tried below were substantially the same. In the former J F was the legal, in the latter he is the equitable plaintiff. The subject-matter of the two suits appeared by the record to be identical. The presumption would be, upon the issues, that the merits had been passed upon in the former proceeding. Such being the case, if no technical objection appeared to have been raised upon the record to the right of J F to maintain the action as legal plaintiff, the judgment in that action would be a bar to a subsequent action by him as equitable plaintiff. If it appeared that only the equitable, not the legal, right was in J F, it would be presumed that the defendant had waived that purely technical objection. It would be very unreasonable and contrary to the settled rules upon the subject to permit the plaintiff, having once been defeated on the merits, to try the same question over again in a different form."

4. Vose *v.* Morton, 4 Cush. (Mass.) 27; 50 Am. Dec. 750; Brush *v.* Fowler, 36 Ill. 58; 85 Am. Dec. 382; *In re* Smith, 4 Nev. 254; 97 Am. Dec. 531; Powers *v.* Heath, 20 Mo. 319; Brainard *v.* Cooper, 10 N. Y. 356; Coles *v.* Allen, 64 Ala. 98; Lyon *v.* Sanford, 5 Conn. 544; Hume *v.* Franzen, 73 Iowa 25; Windom *v.* Schuppel, 39 Minn. 36.

5. Adams *v.* Barnes, 17 Mass. 367; Kelly *v.* Donlin, 70 Ill. 386; Reg. *v.* Blakemore, 2 Den. C. C. 410; Pritchard *v.* Hitchcock, 6 M. & G. 151; 46 E. C. L. 149.

6. Hart *v.* Marshall, 4 Minn. 296; Cleveland *v.* Boerum, 24 N. Y. 613; Steele *v.* Taylor, 1 Minn. 278; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 290.

7. Shirley *v.* Fearne, 33 Miss. 666; 69 Am. Dec. 375.

have no notice of a suit or other lien upon the property.[1] The general rule of privity as to estate may be thus stated: ordinarily, the decree of the court binds only the parties to it, but he who purchases during the pendency of a suit is bound by the decree that may be made against the persons from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them, it is as if no such title existed; otherwise, suits would be interminable or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.[2]

1. Miller *v.* White, 80 Ill. 586; National Bank *v.* Sprague, 21 N. J. Eq. 535.

2. Com. *v.* Dieffenbach, 3 Grant Cas. (Pa.) 368; Bishop of Winchester *v.* Paine, 11 Ves. 197.

The same title must be in question in two actions of ejectment. Chase *v.* Irvin, 87 Pa. St. 286.

Where a judgment declared a title void, a third person taking the land and bringing, against a former claimant, a suit to test the title, was found not to be a privy in estate. Groesbeck *v.* Golden (Tex. 1887), 7 S. W. Rep. 362; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

One buying a judgment succeeds to the rights of the original plaintiff, and the relation of privy applies equally to the judgment itself and the subject of it. Kidder *v.* Blaisdell, 45 Me. 461; Bank of California *v.* Shaber, 55 Cal. 322.

Where the question of a fraudulent transfer of goods was not adjudicated in a former action, an execution creditor is not bound by the judgment in the prior case where the title to the goods as between the parties was determined. Raymond *v.* Richmond, 78 N. Y. 351; Blakemore *v.* Glamorganshire Canal Co., 2 C. M. & R. 133.

Administrators or Executors and Heirs.—There is no such privity between an administrator or executor and the heirs or devisees, as will render a judgment against the former binding upon the latter. Lehman *v.* Bradley, 62 Ala. 31; Boykin *v.* Cook, 61 Ala. 472; Teague *v.* Corbitt, 57 Ala. 529; Dorr *v.* Stockdale, 19 Iowa 269. In Steele *v.* Lineberger, 59 Pa. St. 313, the court said: "A judgment against the administrator is conclusive as to the personal estate, but only *prima facie* as to the realty. Heirs and devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item included in or constituting the judgment against the administrator if they can; so that, in fact, the only importance of the judgment against the administrator, so far as the realty is concerned, is that it is *prima facie* evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it." Lantz *v.* Maffett, 102 Ind. 23; Connolly *v.* Connolly, 26 Minn. 350; Osgood *v.* Manhattan Co., 3 Cow. 612; 15 Am. Dec. 304.

In Garnett *v.* Macon, 6 Call. (Va.) 308, the court by Marshall, C. J., said: "The defendants insist that the decree against the personal representative of George Brooks is conclusive evidence against the devisee of the existence of the debt. The cases cited by counsel in support of this proposition do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator as the legal owner of his personal property for the payment of his debts in the first instance, and is consequently the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit, cannot controvert the testimony, adduce evidence in opposition to the claim, or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investi-

gation of the claim. It would seem unreasonable that the heir who does not claim under the executor should be estopped by a judgment against him . . . In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir as devisee may, indeed, in a court of chancery be united with the executor in the same action; but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is in substance the foundation of the proceeding against the heir as devisee, the argument for considering it as *prima facie* evidence may be irresistible; but I cannot consider it as an estoppel. The judgment, not being against the person representing the land, ought, I think, on the general principle which applies to give records in evidence, to be re-examinable when brought to bear upon the proprietor of the land."

Allen *v.* Morgan, 61 Ga. 107; Sergeant *v.* Ewing, 36 Pa. St. 156; Speer *v.* James, 94 N. Car, 417; Starke *v.* Wilson, 65 Ala. 576; Hall's Appeal, 112 Pa. St. 42; Weeks *v.* Ostrander, 52 N. Y. Supr. Ct. 512; Speer *v.* James, 94 N. Car. 417; Bell *v.* Bell, S. Car. 149; Withers *v.* Sims, 80 Va. 651; Bradley *v.* Zehner, 82 Va. 685; Seabright *v.* Seabright, 33 W. Va. 152; Nichols *v.* Day, 32 N. H. 133; 64 Am. Dec. 358. But see Wilson *v.* Kelly, 19 S. Car. 160; Faran *v.* Robinson, 17 Ohio St. 242; 93 Am. Dec. 617; Ford *v.* Hennessy, 70 Mo. 580; Robertson *v.* Wright, 17 Gratt. (Va.) 534; Sharpe *v.* Freeman, 45 N. Y. 802; Birely *v.* Staley, 5 Gill & J. (Md.) 432; 25 Am. Dec. 303; Swiggart *v.* Harber, 5 Ill. 364; 39 Am. Dec. 418; Douglass *v.* McCarer, 80 Ind. 91; McCoy *v.* Nichols, 4 How. (Miss.) 31; Jones *v.* Commercial Bank, 78 Ky. 413; Hardaway *v.* Drummond, 27 Ga. 221; 73 Am. Dec. 730. A judgment against an administrator is binding upon the legatees and creditors of the estate. Castellaw *v.* Guilmartin, 54 Ga. 299; Bell *v.* Bell, 25 S. Car. 149; Mauldin *v.* Gossett, 15 S. Car. 565; Hooper *v.* Hooper, 32 W. Va. 526. But see Shipman *v.* Rollins, 98 N. Y. 311; Valsain *v.* Cloutier, 3 La. 170; 22 Am. Dec. 179.

There is no privity between an administrator or executor and an administrator *de bonis non.* Graves *v.* Flowers, 51 Ala. 402; 23 Am. Rep. 555; Ela *v.* Edwards, 13 Allen (Mass.) 48; 90 Am. Dec. 174; Grout *v.* Chamberlain, 4 Mass. 611; Merrill *v.* New England Mut. L. Ins. Co., 103 Mass. 245; 4 Am. Rep. 548; Alsop *v.* Mather, 8 Conn. 584; 21 Am. Dec. 703; Jones *v.* Jones, 15 Tex. 463; 65 Am. Dec. 174; Martin *v.* Ellerbe, 70 Ala. 326; Allen *v.* Irwin, 1 S. & R. (Pa.) 549; McLean *v.* Meek, 18 How. (U. S.) 16; Thomas *v.* Sterns, 33 Ala. 137.

In Garland *v.* Garland, 84 Va. 181, the court says: "Between executors of the same decedent in different jurisdictions there is a privity derived from or through the will of the testator, and a judgment or decree against either is evidence against the other, and may be enforced against each, and is sufficient to ground a suit or action against either executor. An administrator with the will annexed is, in legal contemplation, executor of the will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction." Again in Hill *v.* Tucker, 13 How. (U. S.) 458, the court says: "Notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor qualified in a different State from that in which the judgment was rendered. But such a judgment may be admissible in evidence against an executor in another jurisdiction for the purpose of showing that the demand had been carried into judgment in another jurisdiction against one of the testator's executors, and that the others were precluded from pleading prescription or the Statute of Limitations upon the original cause of action."

Certain defenses may be made by the heirs at law. Teague *v.* Corbitt, 57 Ala. 529; Scott *v.* Ware, 64 Ala. 174; Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387; Starke *v.* Wilson, 65 Ala. 576; Sharpe *v.* Freeman, 45 N. Y. 802; Daingerfield *v.* Smith, 83 Va. 81; Brewis *v.* Lawson, 76 Va. 36; Watts *v.* Taylor, 80 Va. 627; Robertson *v.* Wright, 17 Gratt. (Va.) 534; Hardaway *v.* Drummond, 27 Ga. 221; 73 Am. Dec. 730; Valsain *v.* Cloutier, 3 La. 170; 22 Am. Dec. 179; Barclay *v.* Kimsey, 72 Ga. 725; Stone *v.* Wood, 16 Ill. 177.

A contrary view was held in Cunningham *v.* Ashley, 45 Cal. 485; Wallace, C. J., saying: "If the judg-

ment be in favor of the administrator, it amounts to an adjudication that the title of the deceased, represented by the administrator, is superior to that upon which the defendant relies; and such a judgment would, upon that point, estop the defendant or his privies in a subsequent action brought for the recovery of the same premises in favor of the administrator, or the heirs, after distribution made, or in favor of any person who had subsequently succeeded to that title, or to the right to assert it in court. All these consequences necessarily flow from the statutory right of the administrator to sue for the recovery of the estate of the deceased, otherwise there is the anomaly of an action brought, and a judgment rendered upon the issue joined, by which judgment, however, nothing is in effect determined, and no one concluded. So if, upon an action brought by the administrator against a defendant in possession of real property, upon the allegation of seisin in the deceased at the time of his death, it be adjudged that the intestate was not seised, or that the defendant had the better title, the legal consequence follows, that the administrator, the heirs and creditors, and all persons subsequently asserting that title, as having vested in themselves, by reason of the death of the intestate, are alike estopped to deny the superiority of the title of the defendant adjudicated in the former action."

There is no privity between the personal and real representatives of the deceased. The authorities seem inclined to throw the burden of showing the injustice of a judgment against an administrator or executor upon the heir or devisee. Nichols *v.* Day, 32 N. H. 133; 64 Am. Dec. 358; Staples *v.* Staples, 85 Va. 76; Rosenthal *v.* Renick, 44 Ill. 202; Steele *v.* Lineberger, 59 Pa. St. 308. But see Brewis *v.* Lawson, 76 Va. 36; Daingerfield *v.* Smith, 83 Va. 81; Board *v.* Callihan, 33 W. Va. 209; McKay *v.* McKay, 33 W. Va. 724; Jones *v.* Commercial Bank, 78 Ky. 413; Hill *v.* Stevenson, 63 Me. 364; 18 Am. Rep. 231.

There is no privity between an administrator and the succeeding administrator *de bonis non.* Thomas *v.* Sterns, 33 Ala. 137; Graves *v.* Flowers, 51 Ala. 402; 23 Am. Rep. 555; Martin *v.* Ellerbe, 70 Ala, 326; Alsop *v.* Mather, 8 Conn. 584; 21 Am. Dec. 703.

There is no privity between an administrator and a purchaser under license from the probate court, Crandall *v.* Gallup, 12 Conn. 365; nor between principal and ancillary administrators. Merrill *v.* New England Mut. L. Ins. Co., 103 Mass. 245; 4 Am. Rep. 547; Low *v.* Bartlett, 8 Allen (Mass.) 259; Taylor *v.* Barron, 35 N. H. 484; Hill *v.* Tucker, 13 How. (U. S.) 466; Rosenthal *v.* Renick, 44 Ill. 202; Jones *v.* Jones, 15 Tex. 463; 65 Am. Dec. 174; Ela *v.* Edwards, 13 Allen (Mass.) 48; 90 Am. Dec. 174; Stacy *v.* Thrasher, 6 How. (U. S.) 44; Talmadge *v.* Chapel, 16 Mass. 71; Latine *v.* Clements, 3 Ga. 426; Dent *v.* Ashley, 1 Hempst. (U. S.) 54.

Agent and Principal.—Generally speaking there is no privity of estate between an agent and his principal. Pico *v.* Webster, 12 Cal. 140; McKinzie *v.* Baltimore, etc., R. Co., 28 Md. 161; Webster *v.* Diamond, 36 Ark. 532; Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Hayes *v.* Bickelhoupt, 24 Fed. Rep. 806; Warner *v.* Comstock, 55 Mich. 616.

But a suit against a subsequent discovered principal cannot be maintained after a judgment has been obtained against his agent. Morse *v.* Traynor, 26 Neb. 594; Priestley *v.* Fernie, 11 Jur. N. S. 813. Yet if the principal had notice of the action and an opportunity to defend he might be bound. Lawrence *v.* Ware, 37 Ala. 553.

Where, in a suit against the agent, a judgment is rendered for the defendant, the principal may plead it in bar. Thus in Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. Rep. 401, the court, by Choate, D.J. said: "The weight of authority is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits of the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon

the principle of public policy, which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both. Emery *v.* Fowler, 39 Me. 329; 63 Am. Dec. 627; Baynard *v.* Harrity, 1 Houst. (Del.) 200; Kingsley *v.* Davis, 104 Mass. 178; Beymer *v.* Bonsall, 79 Pa. St. 298.

Assignees.—The assignor is bound by an action in which the assignee is plaintiff. Lawrence *v.* Milwaukee, 45 Wis. 306; Hawkins *v.* Lambert, 18 B. Mon. (Ky.) 99; Adams *v.* Barnes, 17 Mass. 365.

The original payee of a note is bound, when retransferred to him, by the judgment obtained against his assignee. Leslie *v.* Bonte, 130 Ill. 498. But see Gerrish *v.* Bragg, 55 Vt. 329.

Bailors and Bailees.—An action by one is generally a bar to the other. Steamboat Farmer *v.* McCraw, 31 Ala. 659; Green *v.* Clark, 12 N. Y. 343; Hughes *v.* United Pipe Lines, 119 N. Y. 423; Burton *v.* Wilkinson, 18 Vt. 186; 46 Am. Dec. 145.

Garnishee or Trustee.—He is fully protected when judgment is rendered against him, if he has satisfied it in the proper way, and, so far as he has paid what was due the defendant from him, the payment is conclusive. Herman on Estoppel, § 119; Drake on Attachments, § 706; Cook *v.* Field, 3 Ala. 53; 36 Am. Dec. 436; Fuller *v.* Foote, 56 Conn. 341; Dole *v.* Boutwell, 1 Allen (Mass.) 286; Barton *v.* Allbright, 29 Ind. 489; Ladd *v.* Jacobs, 64 Me. 347; Morgan *v.* Neville, 64 Pa. St. 52; Wheeler *v.* Aldrich, 13 Gray 51; Adams *v.* Filer, 7 Wis. 306; 73 Am. Dec. 410; Warner *v.* Conant, 24 Vt. 351; 58 Am. Dec. 178; Strauss *v.* Ayres, 87 Mo. 348; Foster *v.* Jones, 15 Mass. 185; Allen *v.* Watt, 79 Ill. 284; Drew *v.* Towle, 27 N. H. 412; 59 Am. Dec. 380; Gunn *v.* Howell, 27 Ala. 663; 62 Am. Dec. 785; Canaday *v.* Detrick, 63 Ind. 485; Brown *v.* Dudley, 33 N. H. 511; Hammett *v.* Morris, 55 Ga. 644; McAllister *v.* Brooks, 22 Me. 80; 38 Am. Dec. 282; Holmes *v.* Remsen, 4 Johns. Ch. (N. Y.) 460; 8 Am. Dec. 581; Noble *v.* Thompson Oil Co., 69 Pa. St. 409; Rothschild *v.* Burton, 57 Mich. 540; Boyle *v.* Maroney, 73 Iowa 70; Hibernia Sav., etc., Soc. *v.* Inyo Co., 56 Cal. 265; Puffer *v.* Graves, 26 N. H. 256; King *v.* Vance, 46 Ind. 246; Ruff *v.* Ruff, 85 Pa. St. 333; Laughlin *v.* January, 59 Mo. 383; Moyer *v.* Lobengeir, 4 Watts (Pa.) 390; 28 Am. Dec. 723; McGill *v.* Wallace, 22 Mo. App. 675.

In Wadsworth *v.* Marsh, 9 Conn. 481, the court said: "The plaintiff has done nothing which was not induced by the disclosure of the defendant. If his disclosure was false, is the plaintiff to be estopped by it? Such a consequence cannot be admitted. On the contrary, if the defendant, by a false disclosure, has contradicted contradictory obligations, and subjected himself to superadded liabilities, the fault and the misfortune are both his own; but no person can be estopped by an act which is the result either of duress or the fraud or falsehood of another."

Lessor and Lessee.—There is a privity between lessor and lessee which is binding, with certain exceptions. McCreery *v.* Everding, 54 Cal. 168; Harvie *v.* Turner, 46 Mo. 444; Bennett *v.* Couchman, 48 Barb. (N. Y.) 73; Bartlett *v.* Boston Gas Light Co. 122 Mass. 209; Bennett *v.* Leach, 25 Hun (N. Y.) 178; Stout *v.* Taul, 71 Tex. 438; Kent *v.* Lasley, 48 Wis. 257; Read *v.* Allen, 58 Tex. 380; Tyrrell *v.* Baldwin, 67 Cal. 1; Sevey *v.* Chick, 13 Me. 141.

In Samuel *v.* Dinkins, 12 Rich. (S. Car.) 172; 75 Am. Dec. 729, the court said: "A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against the landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still if the landlord was no party to the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense which as a party he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded. His being a party might have caused change in the jury or in the admissibility of evidence, or in the conduct of parties or counsel, which would have altered the result."

Guardian and Ward.—A ward is not

in such privity with the guardian to be conclusively barred. Morris *v.* Garrison, 27 Pa. St. 226; Dunsford *v.* Brown, 23 S. Car. 328; Porche *v.* Ledoux, 12 La. Ann. 350; Lemunier *v.* McCearly, 37 La. Ann. 133.

Heirs and Devisees.—The heir is in privity with his ancestors, the latter with his testator. Boykin *v.* Cook, 61 Ala. 472; Sharkey *v.* Banksten, 30 La. Ann. 891.

Husband and Wife.—Between husband and wife there is no privity, as the word privity is here used, between them. Groth *v.* Washburn, 39 Hun (N. Y.) 324; Read *v.* Allen, 56 Tex. 182; Ballou *v.* Ballou, 110 N. Y. 394.

Master and Servant.—There may be such a privity between master and servant. Emery *v.* Fowler, 39 Me. 326; 63 Am. Dec. 627; Castle *v.* Noyes, 14 N. Y. 329; Alexander *v.* Taylor, 4 Den. (N. Y.) 302.

Mortgagor and mortagee may or may not be privies. Schnepp's Appeal, 47 Pa. St. 37; Gamble *v.* Voll, 15 Cal. 507; Cook *v.* Parham, 63 Ala. 456; Shattuck *v.* Bascom, 105 N. Y. 39.

Remaindermen are barred by judgment, even though not real parties to the action. Gobel *v.* Iffla, 111 N. Y. 170; Johnson *v.* Jacob, 11 Bush (Ky.) 659; Mead *v.* Mitchell, 17 N. Y. 210; 72 Am. Dec. 455. In Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152, the court said: "It is well settled that it is not necessary that remaindermen, after the first estate of inheritance, should be made parties, and where real estate is in controversy which is subject to an entail, it is sufficient to make the first tenant in tail *esse* in whom an estate of inheritance is vested a party with those claiming prior interests, without making those parties who may claim in remainder or reversion after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder, although, by the failures of all the previous estates, the estates in remainder or reversion might afterwards become vacated." Pyke *v.* Crouch, 1 Ld. Raym. 730; Doe *v.* Tyler, 6 Bing. 390; 19 E. C. L. 111. But see Hubbell *v.* Hubbell, 22 Ohio St. 208; Adams *v.* Butts, 9 Conn. 79; Bartlett *v.* Boston Gas Light Co., 122 Mass. 209; Mayer *v.* Hover, 81 Ga. 308; White *v.* Haynes, 33 Ind. 540; Collins *v.* Lofftus, 10 Leigh (Va.) 5; 34 Am. Dec. 719; Reed *v.* Reed, 16 N. J. Eq. 248; Sprague *v.* Tyson, 44 Ala. 338.

Trustee and Cestui Que Trust.—The general rule is that trustee and *cestui que trust* are independent of each other so far as this question of privity is concerned; but there are many cases in which this general rule must be modified. Caldwell *v.* Taggart, 4 Pet. (U. S.) 190; Harris *v.* Mebane, 66 N. Car. 334; Dunn *v.* Seymour, 11 N. J. Eq. 220; Prewitt *v.* Land, 36 Miss. 495; Sprague *v.* Tyson, 44 Ala. 338; Clemons *v.* Elder, 9 Iowa 273; Blake *v.* Allman, 5 Jones Eq. (N. Car.) 407. See, however, Field *v.* Flanders, 40 Ill. 470; Shaw *v.* Norfolk Co. R. Co., 5 Gray (Mass.) 170; Johnson *v.* Robertson, 31 Md. 476; New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Richter *v.* Jerome, 123 U. S. 233; Barfield *v.* Jefferson, 84 Ga. 609; Van Vechten *v.* Terry, 2 Johns. Ch. (N. Y.) 197; Kerr *v.* Blodgett, 48 N. Y. 62; Glide *v.* Dwyer, 83 Cal. 477; Thompson *v.* Jones, 77 Tex. 626; Bannon *v.* Thayer, 124 Ill. 451; Franklin Sav. Bank *v.* Taylor, 131 Ill. 376; Loeb *v.* Chicago, etc., R. Co., 60 Miss. 933.

Principal and Surety.—Formerly the surety was considered as conclusively bound as the principal, but the tendency now is rather in the other direction. Floyd *v.* Ritter, 56 Ala. 356; Curry *v.* Mack, 90 Ill. 606; Parker *v.* Lewis, 21 W. R. 928; Haddock *v.* Perham, 70 Ga. 572; Respublica *v.* Davis, 3 Yeates (Pa.) 128; 2 Am. Dec. 366; Moss *v.* McCullough, 5 Hill (N. Y.) 131; Douglass *v.* Howland. 24 Wend. (N. Y.) 35; Stoops *v.* Wittler, 1 Mo. App. 420; Drummond *v.* Prestman, 12 Wheat. (U. S.) 515. Generally the surety is bound only where the principal has acted as agent for the surety. Way *v.* Lewis, 115 Mass. 26; Stoval *v.* Banks, 10 Wall. (U. S.) 583; Parkhurst *v.* Sumner, 23 Vt. 538; 56 Am. Dec. 94; Towle *v.* Towle, 46 N. H. 432. Sureties on a bond of an administrator are bound by a judgment for removal. Casoni *v.* Jerome, 58 N. Y. 316; Harrison *v.* Clark, 87 N. Y. 572; but they can set up an extension of time. Kane *v.* Cortesy, 100 N. Y. 133. The principle varies according to the nature of the suretyship.

Other Instances.—Where a judgment debtor transferred property and bought it back, he was held by an intervening judgment in action where the transfer was in issue as to creditors. Jones *v.* Dipert, 123 Ind. 594; Torrey *v.* Schneider, 74 Tex. 116.

3. Joint Parties.—*a.* JOINT AND SEVERAL CONTRACTS. — In many instances contracts are joint and several. A suit may be a joint one against all of the parties, or it may be against one or more. It does not follow that an unsatisfied judgment against one such party is any bar to an action against other parties; rather the contrary, as in another action the parties being different, it would be hard to claim a bar by virtue of the previous action.[1]

For cases as to vendees, see Proctor *v.* Cole, 120 Ind. 102; Hill *v.* Bain, 15 R. I. 75; Goodwin *v.* Snyder, 75 Wis. 450; Shores *v.* Doherty, 75 Wis. 616; Sawyer *v.* McAdie, 70 Mich. 386.

As between grantor and grantee, see Peterson *v.* Weissbein, 80 Cal. 38; Chase *v.* Kaynor, 78 Iowa 449; Bell *v.* Wilson, 52 Ark. 171; Strayer *v.* Johnson, 110 Pa. St. 21; Irish *v.* Foulks, 42 Kan. 370; Bryan *v.* Bowser, 77 Tex. 324; Masterson *v.* Little, 75 Tex. 682.

A judgment as to homestead is binding. Barfield *v.* Jefferson, 84 Ga. 609.

As between indorser and indorsee a judgment may be a bar. Drennan *v.* Bunn, 124 Ill. 175; Leslie *v.* Bonte, 130 Ill. 498.

An heir born after a partition of an estate is not bound by it. L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 435; Mayo *v.* Tudor, 74 Tex. 471; Hotaling *v.* Marsh, 55 Hun (N. Y.) 325.

Validity of public bonds cannot be questioned a second time. Lehman *v.* Glenn, 87 Ala. 618; Harmon *v.* Auditor, 123 Ill. 122; but see Calhoun *v.* Millard, 121 N. Y. 69.

Proceedings in insolvency and bankruptcy may be a bar. *In re* Baird, 84 Cal. 95; Gooch *v.* Hollan, 30 Mo. App. 450; Moller *v.* Tuska, 87 N. Y. 167.

Regarding corporations, ferries, streets, shipmasters and warehousemen, see Rex *v.* York, 5 T. R. 66; Carnarvon *v.* Villebois, 13 M. & W. 313; Pim *v.* Currell, 6 M. & W. 234; *Ex parte* Tomline, 28 L. T. N. S. 12; Berry *v.* Banner, Peake 152; Bermondsey Vestry *v.* Ramsey, 40 L. J. C. P. 206; Priestly *v.* Fernie, 3 H. & C. 977; Hughes *v.* United Pipe Lines, 119 N. Y. 423.

It is not proof that a person had such notice of a suit as to bind him by a judgment that he was a witness in the case. Lebanon *v.* Mead, 64 N. H. 8.

1. In the leading English case on the subject, Rex *v.* Hoare, 13 M. & W. 494, the court by Parke, B., said: "It is remarkable that this question should never have been actually decided in the courts of this country. There have been apparently conflicting data upon it. Lord Tenterden, in the case of Waters *v.* Smith, 2 B. & Ad. 892, 22 E. C. L. 205, is reported to have said that a mere judgment against one would not be a defense for another. My brother Maule stated, in that of Bell *v.* Banks, 3 M. & G. 267; 42 E. C. L. 141, that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher, 1 C. & M. 634, Bayley, B., strongly intimates the opinion of the court of exchequer that the judgment against one was a bar for both of two joint debtors, though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*, the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action being single, cannot afterwards be divided into two. Thus it has been held

Certain conclusions may be drawn from the decisions in regard to the effect of joint and several actions in contracts of this kind, the same being subject, of course, to various modifications. Any subsequent action, either joint or several, is barred by a joint action. In case of a joint and several contract, the plaintiff may sue, successively, at his election, each of the contractors singly, but can have satisfaction for only enough to cover his claim. The plain-

that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause. . . . We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other; but for the purpose of this decision they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.

"The distinction between a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee. . . . If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he would be deprived of the right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule that an action on a joint debt barred against one is barred altogether; the only exception now being when one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement both must be joined, and that, if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one or two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that when judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

In an action against two on a joint note a judgment against one was a bar. Ward *v.* Johnson, 13 Mass. 148. The conclusions reached in Sheehy *v.* Mandeville, 6 Cranch (U. S.) 253, although the opinion was given by Marshall, C. J., are recognized as law to-day. See U. S. *v.* Ames, 99 U. S. 35; Sessions *v.* Johnson, 95 U. S. 347; Trafton *v.* U. S., 3 Story (U. S.) 649; U. S. *v.* Cushman, 2 Sumn. (U. S.) 434; Robertson *v.* Smith, 18 Johns. (N. Y.) 459; 9 Am. Dec. 227.

In Lauer *v.* Bandow, 48 Wis. 638, the court said: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment therein against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and being indivisible it cannot be merged or canceled as to one and existing and operative as to another joint debtor."

tiff must elect to sue either jointly or severally—that is, he cannot sue some of them together and the others singly. A several action against one, or a number of several actions, will bar a subsequent joint action. If a suit is brought against one of the parties only, another suit cannot be brought because the judgment in the former case is not satisfied.[1] If a joint action is brought, the recovery must be against all or none; there cannot be a judgment in favor of certain defendants and not against others.[2] It is immaterial whether the parties are individuals, acting as such; whether they are officials acting in their official capacity, or whether they are corporations, private, municipal or otherwise. Neither does it make any difference whether the joint liability

Morgan *v.* Chester, 4 Conn. 387; Day *v.* Hill, 2 Speers (S. Car.) 628; 42 Am. Dec. 390; Brooklyn City, etc., R. Co. *v.* National Bank, 102 U. S. 14.

1. U. S. *v.* Ames, 99 U. S. 35; Sessions *v.* Johnson, 95 U. S. 347; Mason *v.* Eldred, 6 Wall. (U. S.) 231; Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308; Robertson *v.* Smith, 18 Johns. (N. Y.) 459; 9 Am. Dec. 227; Benson *v.* Paine, 2 Hilt. (N. Y.) 556; Peters *v.* Sanford, 1 Den. (N. Y.) 525; Brinsmead *v.* Harrison, L. R., 7 C. P. 553; Union Bank *v.* Hodges, 11 Rich. (S. Car.) 480; Collins *v.* Lemasters, 1 Bailey (S. Car.) 348; 21 Am. Dec. 469; Ferrall *v.* Bradfords, 2 Fla. 508; 50 Am. Dec. 293; Elliot *v.* Porter, 5 Dana (Ky.) 299; 30 Am. Dec. 689; Robinson *v.* Snyder, 74 Ind. 110; Bonesteel *v.* Todd, 9 Mich. 371; 80 Am. Dec. 90; Willings *v.* Consequa, Pet. (C. C.) 301; Moale *v.* Hollins, 11 Gill & J. (Md.) 11; 33 Am. Dec. 684; Robertson *v.* Smith, 18 Johns. (N. Y.) 459; 9 Am. Dec. 227; Suydam *v.* Barber, 18 N. Y. 254; 75 Am. Dec. 264; People *v.* Harrison, 82 Ill. 84; Robinson *v.* Snyder, 74 Ind. 210; Gibbs *v* Bryant, 1 Pick. (Mass.) 118; Ward *v.* Johnson, 13 Mass. 148; Clinton Bank *v.* Hart, 5 Ohio St. 34; Wann *v.* McNulty, 7 Ill. 355; 43 Am. Dec. 58; Smith *v.* Black, 9 S. & R. (Pa.) 142; 11 Am. Dec. 686; Brown *v.* Johnson, 13 Gratt. (Va.) 644; Streatfield *v.* Halliday, 3 T. R. 782; Lilly *v.* Hodges, 8 Mod. 166; Kendall *v.* Hamilton, L. R., 4 App. Cas. 504; Phillips *v.* Ward, 2 H. & C. 717; *Ex parte* Higgins, 3 De G. & J. 33; Cabel *v.* Vaughn, 1 Wm. Saund. 291; Ascue *v.* Hollingsworth, Cro. Eliz. 594.

2. Parke *v.* Edge, 42 Ala. 631; Helm *v.* Van Vleet, 1 Blackf. (Ind.) 342; 12 Am. Dec. 248; Platner *v.* Johnson, 3 Hill (N. Y.) 476; Flake *v.* Carson, 33 Ill. 518; People *v.* Organ, 27 Ill. 27; 79 Am. Dec. 391; Goodale *v.* Cooper, 6 Ill. App. 81.

There are exceptions to the general rule, especially where a defendant is able to plead infancy, insolvency, or some defense not applicable to the other defendants. In Hathaway *v.* Crocker, 7 Met. (Mass.) 262, the court said: "That rule was always adopted with this exception — that when one defendant pleaded in his discharge some matter personal to himself, as a discharge under a bankrupt act or insolvent law, and upon such plea had a verdict, the other defendants were still liable. The reason of the distinction is obvious, and it is this: that such a special personal defense does not falsify the averment of an original joint promise, but admitting it, avoids it by the averment of matter subsequent." Gray *v.* White, 5 Ala. 490; Henry *v.* Gibson, 55 Mo. 570; Rohr *v.* Davis, 9 Leigh (Va.) 30; Mitchell *v.* Brewster, 28 Ill. 163; Wootters *v.* Kauffman, 67 Tex. 488; Woodward *v.* Newhall, 1 Pick. (Mass.) 500; Barbour *v.* White, 37 Ill. 164; Barker *v.* Ayers, 5 Md. 202; Peyton *v.* Scott, 2 How. (Miss.) 870; Jameson *v.* Barber, 56 Wis. 630.

In U. S. *v.* Price, 9 How. (U. S.) 83, the court said: "It is essential to the idea of election that a man cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged and extinguished in the judgment, which is a security of a higher nature." Williams *v.* McFall, 2 S. & R. (Pa.) 280; *Ex parte* Rowlandson, 3 P. Wms. 405; Hix *v.* Davis, 68 N. Car. 233; McReady *v.* Rogers, 1 Neb. 124; 93 Am. Dec. 333.

arises from the acts of the parties, or from a decree of court determining the relative status.[1]

b. SUBSEQUENT INDIVIDUAL OBLIGATION.—Various cases have arisen where there has been suit brought against one joint defendant on his individual agreement to be responsible for the whole claim. In *England* it is held that a judgment under such a suit will bar a subsequent action against all the parties jointly, while the tendency of the American decisions is the other way.[2] In some of the States joint debtors' acts have been passed regulating such cases.

c. WHERE PERSONAL DEFENSE EXISTS.—Where one joint defendant has, and pleads, a personal defense, such as bankruptcy, infancy or an analogous defense, the plaintiff may discontinue or enter a *nolle prosequi* as to him, and proceed against the others and have judgment against them. Such defenses must be set up by the defendant, they being personal privileges of his, and the plaintiff cannot take notice of them in the first instance, as it might work an injury or throw a burden upon the other defendants which the one under disability did not intend or desire.[3]

1. Faust *v.* Baumgartner, 113 Ind. 139; Pittsburgh, etc., R. Co. *v.* Reno, 123 Ill. 273.

2. In Drake *v.* Mitchell, 3 East 251, one party gave a note in payment of his liability under the joint obligation. When suit was brought against all the obligors jointly, the previous action was held no bar. It being held that no satisfaction having been received, it was collateral security only, and the principle *transit in rem judicatum* applied only to actions in which judgment was had. Stingley *v.* Kirkpatrick, 8 Blackf. (Ind.) 186; Martin *v.* Kennedy, 2 B. & P. 71; Hitchin *v.* Campbell, 2 W. Bl. 827; Mason *v.* Eldred, 6 Wall. (U. S.) 239; Tibbetts *v.* Shapleigh, 60 N. H. 487; Stimson *v.* Van Pelt, 66 Barb. (N. Y.) 151; Richardson *v.* Jones, 58 Ind. 240; Ells *v.* Bone, 71 Ga. 466; Crews *v.* Lackland, 67 Mo. 619; Lamar *v.* Williams, 39 Miss. 342; Rufty *v.* Claywell, 93 N. Car. 306; Dill *v.* White, 52 Wis. 456; Stoddart *v.* Van Dyke, 12 Cal. 437; Longstreet *v.* Rea, 52 Ala. 195; Barker *v.* Cocks, 50 N. Y. 689; Lampkin *v.* Chisom, 10 Ohio St. 450; Fielden *v.* Lahens, 2 Abb. App. Dec. (N. Y.) 111; Eyre *v.* Cook, 9 Iowa 185. In Benson *v.* Paine, 2 Hilt. (N. Y.) 557, the court by Daly, J., said: "It cannot be, as Lord Ellenborough and the other judges, in Drake *v.* Mitchell, supposed, that actual satisfaction is the test, and that because the plaintiff has taken an individual obligation from one of the joint debtors, he can have two judgments in his favor for the same debt—one upon the joint and the other upon the individual obligation. If satisfaction were the test, and could alone constitute a bar, it would be a complete answer to the objection of the previous recovery of a judgment against one in an action against joint debtors that it had not, in the language of the court, in Drake *v.* Mitchell, produced the fruit of a judgment—actual satisfaction. . . . One of two joint contractors cannot be twice troubled for the same cause. . . . Nor do I think that the distinction taken by Lord Ellenborough that the covenant and the note constituted different causes of action, was a substantial one. The judgment upon the note was for the same debt, and to render another judgment against the same party upon the covenant was contravening the principle referred to. The fact is that the law upon this subject was not well understood and had not been very distinctly defined when Drake *v.* Mitchell was decided."

Oakley *v.* Aspinwall, 4 N. Y. 515; Wooters *v.* Smith, 56 Tex. 198; Yoho *v.* McGovern, 42 Ohio St. 11; Moss *v.* Jerome, 10 Bosw. (N. Y.) 220; Nevill *v.* Hancock, 15 Ark. 511; Brown *v.* Johnson, 13 Gratt. (Va.) 644; Bilsland *v.* McManomy, 82 Ind. 139; Porter *v.* Ingraham, 10 Mass. 88; Farwell *v.* Hilliard, 3 N. H. 318.

3. Hartness *v.* Thompson, 5 Johns.

d. DEATH OF JOINT DEBTOR.—In case of the death of one joint debtor, the action survives against the others and they alone can be sued, the case being similar to that of the survivor of a partnership. As to the effect of a judgment rendered against joint debtors after the death of one of them the decisions have not been harmonious.[1]

e. ABSENCE OF JOINT DEBTOR.—In many of the States there are statute provisions covering all or many of the cases bearing upon joint defendants, and the effect of absence, death or lack of service upon any one or more of them. It has been held that an action may be brought against such of the defendants as are to be found within the jurisdiction, with a right remaining over to proceed against the others whenever they can be found and served upon. The decisions are, however, somewhat contradictory.[2]

f. JUDGMENT AS BETWEEN JOINT DEFENDANTS.—Where there is an action against two or more joint defendants, it may be that a judgment against them will be binding as determining

(N. Y.) 161; Robertson *v.* Smith, 18 Johns. (N. Y.) 478; 9 Am. Dec. 227; Robinson *v.* Brown, 82 Ill. 279; Snyder *v.* Snyder, 9 W. Va. 415; Griffith *v.* Furry, 30 Ill. 251; 83 Am. Dec. 186; Davidson *v.* Bond, 12 Ill. 84; Platner *v.* Johnson, 3 Hill (N. Y.) 476; Coe *v.* Hamilton, 1 Morris (Iowa) 319.

1. It has been held that where in a joint action one defendant dies before judgment and his death is not suggested on the record, the judgment is voidable only and not void. King *v.* Burdett, 28 W. Va. 601; 57 Am. Rep. 687; Burke *v.* Stokely, 65 N. Car. 569.

In McCloskey *v.* Wingfield, 29 La. Ann. 141, such a judgment was held void. To the same effect see Lewis *v.* Ash, 2 Miles (Pa.) 110.

In Loring *v.* Folger, 7 Gray (Mass.) 505, it was held that a judgment against a trustee in a process of foreign attachment commenced after the death of the principal defendant and payment of the amount of such judgment by the trustee under an execution were no bar to an action against the trustee by the administrator of the deceased.

In Reid *v.* Holmes, 127 Mass. 326, it was held that a judgment rendered after the death of a defendant upon a default by him during his lifetime was not invalid.

In Moody *v.* Harper, 38 Miss. 599, it was held that a judgment which passed by operation of law upon the return of a forfeited forthcoming bond, was not vitiated by the fact that one of the obligors was dead and incapable of suffering a judgment, but was valid as to the surviving obligors.

In Collins *v.* Knight, 3 Tenn. Ch. 183, it was held in effect that a judgment rendered after the death of one of the joint debtors, though void as to him, was *prima facie* good as to the others. See Colson *v.* Wade, 1 Murph. (N. Car.) 43; Milam *v.* Robertson, 47 Tex. 222; McClelland *v.* Moore, 48 Tex. 361; Case *v.* Robelin, 1 J. J. Marsh. (Ky.) 29; Spaulding *v.* Wather, 7 Bush (Ky.) 633; Coleman *v.* McAnalty, 16 Mo. 175; Levasey *v.* Antram, 24 Ohio St. 96; Yaple *v.* Titus, 41 Pa. St. 195; Carr *v.* Townsend, 63 Pa. St. 202; Stotzell *v.* Fullerton, 44 Ill. 108; Lawson *v.* Lawson, 52 Vt. 595; Hays *v.* Shaw, 2 Minn. 407; Jennings *v.* Simpson, 12 Neb. 558; Evans *v.* Spurgin, 6 Gratt. (Va.) 107; Neal *v.* Utz, 75 Va. 480; Tarleton *v.* Cox, 43 Miss. 430; Parker *v.* Home, 38 Miss. 215; McCreery *v.* Everding, 44 Cal. 288; Carter *v.* Calliger, 3 Yerg. (Tenn.) 411; Morrison *v.* Deaderick, 10 Humph. (Tenn.) 342; Wert *v.* Jordon, 68 Me. 484; Boor *v.* Lowry, 103 Ind. 468.

2. Tappan *v.* Bruen, 5 Mass. 196; Dennett *v.* Chick, 2 Me. 192; 11 Am. Dec. 59; Olcott *v.* Little, 9 N. H. 261; 32 Am. Dec. 357; Clinton Bank *v.* Hart, 5 Ohio St. 35; Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608; Hawes *v.* Waltham, 18 Pick. (Mass.) 451; French *v.* Neal, 24 Pick. (Mass.) 55; Judd Linseed, etc., Oil Co. *v.* Hubbell, 76 N. Y. 543; Starry *v.* Johnson, 32 Ind. 438; Croasdell *v.* Tallant, 83 Pa. St. 193;

the liability between them,[1] but it is the general rule that a judgment against several defendants decides nothing as between the defendants themselves.[2]

g. HUSBAND AND WIFE.—If an action is brought by one only, when the other should be joined, if there is a waiver of the non-joinder it will prove a bar to any further action by the same plaintiff joining the other and suing the same party for the same cause of action, for no one can take any advantage of his neglect or wrongful prosecution of an action.[3] Whether the husband or wife not made a party is barred from a subsequent action is not so clearly established and his or her remedy may still be open.[4]

h. CONTRIBUTION.—In suits for contribution the question turns upon the fact of notice. If the party seeking contribution had due and seasonable notice of the former action and opportunity to join in a defense, the former judgment is a bar, but one not having notice of such action can proceed in obtaining contribution.[5]

i. INDIVIDUAL SET-OFF.—In case of a joint action, if a set-off is pleaded as to one plaintiff the plea is inadmissible, as there is a lack of mutuality, and if it be by one defendant it is not allowable for the same reason, it being otherwise, of course, as to proper joint set-offs.[6] Nor will the former

Holmes *v.* Gay, 6 Bush (Ky.) 47; Sears *v.* McGrew, 10 Oregon 48; Howell *v.* Barrett, 8 Ill. 433.

1. Kent *v.* Kent, 82 Va. 205; Devin *v.* Ottumwa, 53 Iowa 461.

2. Buffington *v.* Cook, 35 Ala. 312; 73 Am. Dec. 491; Gardner *v.* Raisbeck, 28 N. J. Eq. 71; McMahan *v.* Geiger, 73 Mo. 145; 39 Am. Rep. 489; Gilman *v.* Healy, 46 Hun (N. Y.) 310; Montgomery *v.* Road, 34 Kan. 122; Dent *v.* King, 1 Ga. 200; 44 Am. Dec. 638; Leavitt *v.* Wolcott, 95 N. Y. 212; Goldschmidt *v.* Nobles Co., 37 Minn. 49.

In Harvey *v.* Osborn, 55 Ind. 535, the court said: "Where two parties are sued in the same action, and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his co-defendant, such co-defendant cannot, under one code of practice, demur or reply to or join issue in any manner upon such separate answer. And in such a case the finding and judgment of the court, on an issue joined in such separate answer by the plaintiff, will not, necessarily conclude and determine any of the merely relative rights of the defendants as between themselves." Jones *v.* Reynolds, 7 C. & P. 335; Christy *v.* Tancred, 9 M. & W. 438.

3. Franklin Sav. Bank *v.* Taylor, 131 Ill. 376; Groth *v.* Washburn, 39 Hun (N. Y.) 324; Read *v.* Allen, 56 Tex. 182; Hawkins *v.* Lambert, 18 B. Mon. (Ky.) 106; Neeson *v.* Troy, 29 Hun (N. Y.) 173; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643; Durst *v.* Amyx (Ky.), 13 S. W. Rep. 1087; Jacobs *v.* Chase (Ky. 1886), 1 S. W. Rep. 6.

4. Smith *v.* Warden, 86 Mo. 382; Schnell *v.* Blohm, 40 Hun (N. Y.) 378; Ballou *v.* Ballou, 110 N. Y. 394.

5. Preslar *v.* Stallworth, 37 Ala. 402; Love *v.* Gibson, 2 Fla. 598; Kramph *v.* Hatz, 52 Pa. St. 529; Fletcher *v.* Jackson, 23 Vt. 581; 56 Am. Dec. 98.

6. Eastmure *v.* Laws, 5 Bing. N. Cas. 444; 35 E. C. L. 170; Jones *v.* Richardson, 5 Met. (Mass.) 247.

In Moody *v.* Willis, 41 Miss. 357, the court by Harris, J., said: "To allow one defendant, when jointly sued with another, to bring into litigation in the same suit his individual private transactions with the plaintiff would be to multiply issues; and when the suit is determined between the plaintiff and defendants, to leave for another settlement or lawsuit the adjustment of accounts between the defendants growing out of the preceding suit; and so when there are several plaintiffs and one defendant, the indebtedness of one of the plaintiffs to the defendant is not mutual, so far as the other plaintiffs are concerned."

judgment be affected by the fact that another matter has been added.[1]

j. JOINT TRESPASSERS.—It is the *English* rule that joint trespassers are not jointly and severally liable so that actions can multiply against them. An action against any one of them may be pleaded in bar by the others.[2] In the *United States* any tort or trespass committed by more than one is regarded as both joint and several in character, and there is a remedy against all jointly, or against each one separately.[3] The plaintiff has a right of elec-

1. Finney *v.* Finney, L. R., 1 P. & M. 483; Wilson *v.* Deen, 121 U. S. 525.

2. Brown *v.* Wotton, Cro. Jac. 73; King *v.* Hoare, 3 Mees. & W. 494; Warden *v.* Bailey, 4 Taunt. 88; Buckland *v.* Johnson, 15 C. B. 145; 80 E. C. L. 145; Day *v.* Porter, 2 M. & R. 151; Brinsmead *v.* Harrison, L. R., 7 C. P. 547.

3. In Livingston *v.* Bishop, 1 Johns. (N. Y.) 290; 3 Am. Dec. 330, Kent, C. J., considered the English and American rules as follows: This case of Brown *v.* Wotton, Cro. Jac. 73, was clearly introductory of a new rule. It is laid down in Brooke's Judgment, pl. 98, that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot plead that the plaintiff hath recovered against the other for the same trespass and taken him in execution. And in Morton's case, Cro. Eliz. 30, it was even made a question by one of the judges whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser; but the court held it reasonable that it should be a bar. And many cases subsequent to that of Brown *v.* Wotton, Cro. Jac. 73, seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in Cocke *v.* Jenner, Hob. 66, the court held that if trespassers be sued in several actions, the plaintiff may make choice of the best damages, but that when he has taken one satisfaction, he can take no more, and if he attempt it, an *audita querrea* will lie. Again, in the case of Corbet *v.* Barnes, Wm. Jones, 377, the court said that for one assault the plaintiff can have several actions and recover, but when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of Bird *v.* Randall, 3 Burr. 1345, Lord Mansfield advanced the same doctrine, and observed, that in case of a joint trespass, the defendants were all liable to the plaintiff and he might proceed against any or all of them as he pleased, yet he shall have but one satisfaction from them all. I am, therefore, inclined to question the extent of the decision in Brown *v.* Wotton, Cro. Jac. 73, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon, to bring a case within the facts on which that decision was founded, and that, perhaps, may be deemed an election by the plaintiff, *de melioribus damnis*, and sufficient to conclude him."

See also Luce *v.* Dexter, 135 Mass. 23; Elliott *v.* Hayden, 104 Mass. 180; Knight *v.* Nelson, 117 Mass. 458; Elliot *v.* Porter, 5 Dana (Ky.) 299; 30 Am. Dec. 689; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Bloss *v.* Plymale, 3 W. Va. 403; 100 Am. Dec. 752; Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Blann *v.* Crocheron, 19 Ala. 647; 54 Am. Dec. 203; Turner *v.* Hitchcock, 20 Iowa 310; Maple *v.* Railroad Co., 40 Ohio St. 313; 48 Am. Rep. 685; State *v.* Boyce, 72 Md. 140; Stone *v.* Dickinson, 5 Allen (Mass.) 29; 81 Am. Dec. 727; Guille *v.* Swan, 19 Johns. (N. Y.) 381; 10 Am. Dec. 234; Matthews *v.* Menedger, 2 McLean (U. S.) 145; Morgan *v.* Chester, 4 Conn. 387.

In Lovejoy *v.* Murray, 3 Wall. (U. S.) 10, Miller, J., reviewed the English and American authorities, and deduced from them the following propositions: First. Persons engaged in committing the same trespasses are joint and several trespassers, not joint trespassers exclusively. Like persons liable on a joint and several contract, they may

tion. A separate judgment may protect all the defendants if the plaintiff does not prevail.[1] But one satisfaction can be obtained whether it be joint or several, and that will bar all other actions or executions. It may be that where there are several actions the plaintiff may be required to elect upon which judgment he will proceed. A partial satisfaction is not a release, but, if a suit is settled it may discharge all the defendants, even though it was not so intended.[2]

k. LIMIT OF SEPARATE JUDGMENTS IN JOINT TORTS.—The plaintiff has considerable latitude of election in his right of action. It may be either joint or several; if several, he may choose the defendant against whom he will enforce his claim; he may accept satisfaction or make settlement, but where he has made an election he is bound by it. If he elects to his injury, and does not recover the full amount of the judgment he is nevertheless estopped.[3]

4. Representative Parties—*a.* ADMINISTRATORS AND HEIRS.—An administrator has not such representative character relatively to the heirs as to bind them to the settlement of the estate made

all be sued in one action, or one may be sued alone, and cannot plead the non-joinder of the others in abatement; and so far is the doctrine of several liability carried that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages. Second. No matter how many judgments may be obtained for the same trespass, or what the varying amounts of these judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, and is a bar to any other action for the same cause.

Atlantic Dock Co. *v.* Mayor, etc., of N. Y., 53 N. Y. 64; Williams *v.* Sutton, 43 Cal. 65; Knott *v.* Cunningham, 2 Sneed (Tenn.) 204; Jones *v.* Lowell, 35 Me. 541; Chamberlin *v.* Murphy, 41 Vt. 110; Fleming *v.* McDonald, 50 Ind. 278; 19 Am. Rep. 711; United Soc. of Shakers *v.* Underwood, 11 Bush (Ky.) 265; 21 Am. Rep. 214; Du Bose *v.* Marx, 52 Ala. 506; Allen *v.* Craig, 13 N. J. L. 294; Savage *v.* Stevens, 128 Mass. 254; Smith *v.* Rines, 2 Sumn. (U. S.) 338.

In Sessions *v.* Johnson, 95 U. S. 347, the court said: "Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly and has judgment, he cannot afterwards sue any one of them separately; or if he sues any one of them separately and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy." See Davis *v.* Caswell, 50 Me. 294.

1. Williams *v.* McGrade, 13 Minn 46.

2. Luce *v.* Dexter, 135 Mass. 23; Savage *v.* Stevens, 128 Mass. 254; Smith *v.* Singleton, 2 McMull. (S. Car.) 184; 39 Am. Dec. 122; White *v.* Philbrick, 5 Me. 147; 17 Am. Dec. 214; Putney *v.* O'Brien, 53 Iowa 117; Fleming *v.* McDonald, 50 Ind. 278; 19 Am. Rep. 711; Page *v.* Freeman, 19 Mo. 421; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Blann *v.* Cocheron, 20 Ala. 320; Karr *v.* Barstow, 24 Ill. 580; United Soc. of Shakers *v.* Underwood, 111 Bush. (Ky.) 265; Fell *v.* Bennett, 110 Pa. St. 181.

3. McVey *v.* Manatt, 80 Iowa 132; First Nat. Bank *v.* Indianapolis Piano Mfg. Co., 45 Ind. 5; Sanderson *v.* Caldwell, 2 Aik. (Vt.) 195; Osterhaut *v.* Roberts, 8 Cow. (N. Y.) 43; Jones *v.* McNeil, 2 Bailey (S. Car.) 466; White *v.* Philbrick, 5 Me. 147; 17 Am. Dec. 214; Sharp *v.* Gray, 5 B. Mon. (Ky.) 4; Sheldon *v.* Kibbe, 3 Conn. 214; 8 Am. Dec. 176; Floyd *v.* Browne, 1 Rawle (Pa.) 125; 18 Am. Dec. 602;

by him, especially where they are not made parties to the proceedings, which, as against them, are not *prima facie* evidence even. Likewise against him or an executor, a judgment is merely *res inter alios acta*, and no evidence against the heirs of the justice or amount of the claim of any creditor. Any acquiescence or acceptance of settlement on the part of any of the heirs is in no way binding upon any of the others. Each one can act only for himself, and it has even been said that any agreement by a single heir is not even binding upon him.[1] The administrator has an interest directly adverse to the heirs in reality, instead of being privy to them. If the administrator brings a suit directly for the heirs and to their benefit they may be estopped by it. If the heirs ignore the claims of creditors and of the administrator in his official capacity, and a judgment is consequently entered against them, the administrator is not prevented by such action from further proceedings. A judgment against the heirs can be set up as a defense where the administrator subsequently brings an action for their benefit.[2] A judgment is *prima facie* evidence of debt,

Allen *v.* Wheatley, 3 Blackf. (Ind.) 332; Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267; Hawkins *v.* Hatton, 1 Nott & M. (S. Car.) 318; 9 Am. Dec. 700.

1. Steele *v.* Lineberger, 59 Pa. St. 313; Roberston *v.* Wright, 17 Gratt. (Va.) 540. In Street *v.* Street, 11 Leigh (Va.) 508, the court said: "The account in this case was no evidence before the commissioner of the chancery court, except so far as the acknowledgment of the brothers made it so. But, in that acknowledgment the sisters did not join, and it did not, therefore, bind them. Hence it could not avail the administrator, for he could have no decree for a sale of the realty without establishing his demand in such a mode as would bind all the heirs. It is like the case of a confession of judgment by one of two joint obligors, and a successful defense of the action by the other, in which case the confession avails nothing and judgment is entered for both defendants; the demand is entire, and if disproved as to one is disproved as to all, the confession to the contrary, notwithstanding." Garnett *v.* Macon, 6 Call (Va.) 308; Chant *v.* Reynolds, 49 Cal. 213; Nichols *v.* Day, 32 N. H. 133; 64 Am. Dec. 358; Gaither *v.* Welch, 3 Gill & J. (Md.) 259.

In Cecil *v.* Cecil, 19 Md. 81; 81 Am. Dec. 626, the court, by Bowie, C. J., speaking of the relation of the administrator to the heirs as to an advancement to one of them, said: "No one in this State can claim a share or interest in the personal estate of an intestate except through an administrator. It is the administrator's duty to get in the personal estate of the deceased for distribution. Advancements, however, do not go into the inventory, and constitute no part of the assets for the payment of debts, nor increase the fund on which the administrator's commission is allowed. It is optional with the party advanced whether he will come into hotchpot. The administrator has no interest in establishing the fact of advancement, and cannot be said to be a party in interest. It is wholly immaterial to him whether money or other property given by the intestate be brought into the settlement or not. The aggregate of the estate, so far as he is concerned, is neither increased nor diminished. In the absence of all motive to protect the rights of the distributees, it would be hazardous to extend the privity of interest in law where there is no common interest in fact, and conclude a party in interest by constructive representation."

2. In Dorr *v.* Stockdale, 19 Iowa 269, the court by Lowe, J., said: "It would be carrying the doctrine far if the rights of creditors are to be concluded by the heirs acting independently of them, and in their own right, in any proceeding which they might institute in behalf of themselves, and to the exclusion of the administrator and the creditors of the estate." See Manly *v.* Kidd, 33 Miss. 148; Hardaway *v.*

where it has been obtained by a creditor of an estate against the personal representatives of the deceased intestate, and the heirs can sometimes by statute be brought in under a *scire facias* and the real estate charged with the same. It is to be borne in mind that all this is merely *prima facie*, and not conclusive, and the parties to be bound can make the same defense which would have been available to them if they had been made parties to the original suit.[1] If the administrator obtains a license from the probate court to sell real estate to pay debts, then all this does not apply to the case.

b. SUCCESSIVE ADMINISTRATORS.—There is nothing binding upon successive administrators as the result of the acts of their predecessors.[2] The administrator *de bonis non* has simply to complete the settlement of the estate, not to undo or change anything done by his predecessor in office.[3] Again there is no privity between the principal and ancillary administrators for similar reasons,[4] nor between the executor and an ancillary administrator,

Drummond, 27 Ga. 221; 73 Am. Dec. 730; Randle *v.* Carter, 62 Ala. 95; Faran *v.* Robinson, 17 Ohio St. 242; 93 Am. Dec. 617; Wilson *v.* Kelly, 19 S. Car. 160; Marigault *v.* Holmes, Bailey Eq. (S. Car.) 283; Castellaw *v.* Guilmartin, 54 Ga. 299; Shepman *v.* Rollins, 98 N. Y. 311; Redmond *v.* Coffin, 2 Dev. Eq. (N. Car.) 437; Valsain *v.* Cloutier, 3 La. 170; 22 Am. Dec. 179; Barclay *v.* Kimsey, 72 Ga. 725; Stone *v.* Wood, 16 Ill. 177.

1. Such a statute exists in *Pennsylvania*. In Sergeant *v.* Ewing, 36 Pa. St. 160, the court, by Thompson, J., said: "To have determined the point in any other way would certainly have been a great surprise upon the profession in *Pennsylvania*, if not something worse. Ordinarily one personal action is conclusive between the parties to it, and nothing but a just sense of the danger to parties interested as heirs or devisees in the real estate of a decedent ever superinduced the relaxation of the rule in any degree. But to hold that a creditor who has, after a severe and prolonged contest, established his right to satisfaction out of the personal assets, but finds in the end that they are insufficient for the purpose, and that he must enter *de novo* into the same contest with the heirs—must anew produce his proofs and witnesses perhaps scattered and lost sight of under the expectation that they would never be needed again—is something in practice which has not been thought necessary for the last twenty years at least."

Steele *v.* Lineberger, 59 Pa. St. 313; Chant *v.* Reynolds, 49 Cal. 216; Cohen *v.* Broughton, 54 Ga. 298; Shannon *v.* Taylor, 16 Tex. 415.

2. Graves *v.* Flowers, 51 Ala. 402; 23 Am. Rep. 555; Thomas *v.* Sterns, 33 Ala. 137; Bigelow on Estoppel 100; Alsop *v.* Mather, 8 Conn. 584; 21 Am. Dec. 703; Martin *v.* Ellerbe, 70 Ala. 326; Stacy *v.* Thrasher, 6 How. (U. S.) 44.

3. Boykin *v.* Cook, 61 Ala. 472; Dykes *v.* Woodhouse, 3 Rand. (Va.) 287.

In a case on a promissory note any admission as to the genuineness of the signature or the consideration which may have been made by the administrator is of no binding force upon his successor. Rogers *v.* Grannis, 20 Ala. 247.

A recovery of lands, however, has been held to inure to the benefit of the successor, even against heirs of the estate, the rights of both in the premises being the same. Hunt *v.* Payne, 29 Vt. 175.

4. In McLean *v.* Meek, 18 How. (U. S.) 16, the court said: "These administrations were independent of each other; the respective administrators represented M, the deceased intestate, by an authority co-extensive only with the State where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees according to the laws of the State granting the authority. No connection existed, or could exist, between them, and therefore a recovery against the

the latter in each case being presumed to have been appointed by the court of another State.[1]

c. DECEDENT AND PERSONAL REPRESENTATIVE.—A judgment is binding upon the administrator or executor which was rendered against and was binding upon the intestate or testator during his lifetime.[2] The administrator is in privity with his intestate as to personalty.[3] The executor is in privity with the testator only in so far as he steps into the place of the testator.[4]

d. EXECUTOR AND RESIDUARY LEGATEES.—This relation is very similar to that of the administrator and heir. Where the amount of advancement and of distributive shares are fixed by the court, the decree or decision is conclusive in case of any subsequent action for distribution or partition.[5]

e. PRINCIPAL AND AGENT.—In very many instances a judgment for or against the principal is binding upon the agent, and conversely; this in fact is so frequently true, that the rule that there is no privity between principal and agent, is subjected to many exceptions. It is never the case that a judgment is binding on the principal, when obtained against an agent acting beyond or without authority from his principal.[6] The same relation

one in *Tennessee* was not evidence against the other in *Mississippi*." Merrill *v.* New England Mut. L. Ins. Co., 103 Mass. 245; 4 Am. Rep. 548; Pond *v.* Makepeace, 2 Met. (Mass.) 114; Jones *v.* Jones, 15 Tex. 463; 65 Am. Dec. 174; Brodie *v.* Bickley, 2 Rawle (Pa.) 431.

1. In Low *v.* Bartlett, 8 Allen (Mass.) 259, the court said: "It is said that they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in *Massachusetts* and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in *Vermont*, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independently." The case may be different as between two executors. Hill *v.* Tucker, 13 How. (U. S.) 458; Hall *v.* Armor, 68 Ga. 449; Hatchett *v.* Berney, 65 Ala. 39.

2. Wilson's Succession, 12 La. Ann. 592.

3. Steele *v.* Lineberger, 59 Pa. St. 313.

4. McCreery *v.* Everding, 44 Cal. 284; Ladd *v.* Durkin, 54 Cal. 395; Marigault *v.* Holmes, Bailey Eq. (S. Car.) 283.

5. Torrey *v.* Pond, 102 Mass. 357; Redmond *v.* Coffin, 2 Dev. Eq. (N. Car.) 437; Castellaw *v.* Guilmartin, 54 Ga. 299; Starke *v.* Wilson, 65 Ala. 576; Ford *v.* Hennessy, 70 Mo. 580; Beckett *v.* Selover, 7 Cal. 215; Hudgin *v.* Hudgin, 6 Gratt. (Va.) 320; 52 Am. Dec. 124; Swiggart *v.* Harber, 5 Ill. 364; 39 Am. Dec. 418; Birely *v.* Staley, 5 Gill & J. (Md.) 432; 25 Am. Dec. 303.

In Garland *v.* Garland, 84 Va. 181, the court said: "Between executors of the same decedent in different jurisdictions there is a privity derived from or through the will of the testator, and a judgment or decree against either is evidence against the other, and may be enforced against each, and is sufficient to ground a suit or action against either executor. An administrator with the will annexed is, in legal contemplation, executor of the will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction."

6. In Emery *v.* Fowler, 39 Me. 331; 63 Am. Dec. 627, the court said: "This case requires that a single point only should be considered; whether one who acts as a servant of another, in doing an act alleged to be a trespass, is to be considered as so connected with his

exists between master and servant as between any other principal and agent.

f. OWNER AND FORWARDER OF GOODS.—The forwarder is acting for the owner to such an extent, that if, in case of a loss of goods by the carrier, the owner sues the carrier for them, the for-

principal who commanded the act to be done, that what will operate as a bar to the further prosecution of the principal will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another who commanded the act, and was justified in the commission of it; or who, if the act were unlawful had made compensation for it either before or after judgment, and his defense would be complete. It is not perceived why he may not upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them; and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest and would be known by the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts alleged to be trespass to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases, the technical rule that a judgment can only be admitted between the parties to the record, or their privies, expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."

Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Peterson *v.* Lothrop, 34 Pa. St. 222; Castle *v.* Noyes, 14 N. Y. 329; Green *v.* Clark, 5 Den. (N. Y.) 497; Baynard *v.* Harrity, 1 Houst. (Del.) 200; Webster *v.* Diamond, 36 Ark. 532; McKinzie *v.* Baltimore, etc., R. Co., 28 Md. 161; Lawrence *v.* Ware, 37 Ala. 553; Campbell *v.* Phelps, 1 Pick. (Mass.) 62; 11 Am. Dec. 139. But see Atkinson *v.* White, 60 Me. 396; Hill *v.* Bain, 15 R. I. 75; Maple *v.* Railroad Co., 40 Ohio St. 313; 48 Am. Rep. 685.

In Lawrence *v.* Ware, 37 Ala. 553, where a suit having been brought on a promissory note, by an authorized attorney, who by mistake sued in the name of the agent against whom the defendant had a legal claim in set-off, was held no bar to an action by the real principal on the same note, he having had no notice of the previous suit, the court said: "The general principle is that judgments and verdicts are only binding on parties and privies. The plaintiff in this suit was neither a party nor privy to the former suit which is pleaded in bar. With the person in whose name the former suit was brought the plaintiff occupied no relationship, in reference to the property in the note, which would constitute privity. The only relationship which existed between them was that of a temporary agency on the part of the plaintiff in the former suit to demand payment of the note, and in default of payment to deliver it to an attorney for collection." King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675; Alexander *v.* Taylor, 4 Den. (N. Y.) 302; Kingsley *v.* Davis, 104 Mass. 178; Jones *v.* Aetna Ins. Co., 14 Conn. 501; Raymond *v.* Crown, etc., Mills, 2 Met. (Mass.) 319; Beymer *v.* Bonsall, 79 Pa. St. 298; Clark *v.* Wolf, 29 Iowa 197; Lyman *v.* Faris, 53 Iowa 498; Calkins *v.* Allerton, 3 Barb. (N. Y.) 171; Landis *v.* Hamilton, 77 Mo. 554; Nemetty *v.* Naylor, 100 N. Y. 562. In Middleton *v.* Kansas City, etc., R. Co., 62 Mo. 581, a suit against the agent of the company by a party for services in digging a well, was decided in favor of the defendant, but this did not interfere with a suit by the same plaintiff directly against the company.

Shipowner and Master.—In the leading English case of Priestley *v.* Fernie, 3 H. & C. 983, it was adjudged that, where the master of a ship signs a bill of lading in his own name, and suit is brought thereon and judgment is rendered against him, a second action against the owner will not lie, although the judgment rendered against the master is not satisfied. In this case the court referred to Story on Agency,

warder will be bound by the result of that action and can do nothing further.[1]

g. BAILOR AND BAILEE, AND OWNER.—The relation is quite similar to that of landlord and tenant. A suit and recovery by either bailor or bailee is a bar to an action by the other. In a suit between bailor and bailee in which the question of title is involved, the bailee, while not answerable to a bailor who has obtained the goods by fraud, or who, for any other reason, has no title to them, may in a subsequent action by the real owner against him, be found liable to him, and obliged either to pay for the goods or deliver them up to the owner. The bailee is estopped to deny the bailor's title unless it has been conclusively determined that it is in another.[2]

§ 296, which was cited as authority for the contrary doctrine, criticized it adversely, and cited Livermore on Agency and Rich *v*. Coe, Cowp. 636, in opposition to the authority of Story, and said: "Then, really, there is no authority for this contention, while there is much the other way in the silence of all other writers on the subject. It is not suggested in Abbott on Shipping, p. 91; nor in Kent's Com. (see 3 Kent's Com. 161); nor in Maude & Pollock on Shipping, p. 102; nor in Maclachlan on Merchant Shipping, p. 128; nor in Parsons on Maritime Law, vol. 1, p. 378.

"There is one powerful consideration the other way—namely, if the master contracts under seal, no action lies on the contract against the owner. Why? If the master makes two contracts, one for himself and one for his owners, why should his contract, being under seal, prevent the owners being sued on that which the master has made for them? But if he makes one contract only, as in ordinary cases where the agent contracts in his own name, which the merchant may say binds him because made in his name or binds his owners because made for them, then the decisions are intelligible and the expression is correct; the owners are not liable because of a technical rule that a contract under seal cannot bind a person not executing and not giving authority under seal for its making."

1. Green *v*. Clark, 12 N. Y. 343; Kent *v*. Hudson River R. Co., 22 Barb. (N. Y.) 278; Stoddard *v*. Thompson, 31 Iowa 80.

2. Burton *v*. Wilkinson, 18 Vt. 186; 46 Am. Dec. 145; Steamboat Farmer *v*. McCraw, 26 Ala. 189; 62 Am. Dec. 718; Bates *v*. Stanton, 1 Duer (N. Y.) 79; Green *v*. Clark, 12 N. Y. 343.

In Cheesman *v*. Exall, 6 Exch. 341, the court by Pollock, C. B., said: "My impression is that if a person pledges with another property to which he has no title and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law it constantly occurs that where stolen property has been pledged, the pawnbroker is called upon to deliver it up to the rightful owner. If the servant illegally pledges his master's plate, the servant cannot recover it by an action, since the pawnbroker may inquire who is really the true owner and deliver it to him."

If a party accepts property from a bailor knowing the latter acts without right, the bailee cannot afterwards plead the bailor's title. *Ex parte* Davis, 19 Ch. Div. 86; Kingsman *v*. Kingsman, 6 Q. B. Div. 122.

In Biddle *v*. Bond, 34 L. J. Q. B. 137, the plaintiff had seized goods of one Robbins and delivered them to the defendant to sell. Robbins notified the defendant not to sell, or if he did to retain the proceeds. The court sustained the defendant in retaining the money, saying by Blackburn, J.: "We do not question the general rule that one who has received property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it. . . . But the bailee has no better title than the bailor, and consequently if a person entitled as against the bailor to the property claims it, the bailee has no defense against him. Wilson *v*. Anderton, 1 B. & Ad. 450; 20 E. C. L. 426. Such was the position of the defendant in the present case. If Robbins had

h. ASSIGNEE IN BANKRUPTCY OR INSOLVENCY.—The assignee stands in the same position as the debtor and can bind him by his action, and the opposing party is likewise bound. In fine, the force of a judgment for or against is the same as if the debtor were acting for himself.[1]

i. LANDLORD AND TENANT.—The privity which would seemingly exist between these parties is not so strong as in most cases which appear to be analogous. Whatever the action of the tenant, the landlord, unless an actual and record party to the action, is in no way prejudiced in his rights and remedies. The title of the landlord is paramount and the tenant cannot deny it, neither can he jeopardize or injure the title or interests of the one under whom he holds.[2]

chosen to sue him in trover, or waiving the tort had sued for money had and received, the defendant would have had no defense. He was therefore compelled to yield to Robbins' claim; and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defense against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited . . . and Hawes *v.* Watson, 2 B. & C. 540; 9 E. C. L. 170, in which a bailee who, by attorning to a purchaser of the goods, has in effect represented to him that the property has passed to him, though such was not the fact, and has thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all these cases the estoppel proceeded upon the representation which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and so far as any weight is to be given to the representation, it makes against the estoppel. . . . In Sheridan *v.* New Quay Co., 4 C. B. N. S. 618; 93 E. C. L. 617, a bailee was permitted, under circumstances similar to the present, to set up the *jus tertii*. . . . The position of the baillee is precisely the same whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in Shelbury *v.* Scotsford, 1 Yelv. 22; viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person." Hardman *v.* Willcock, 9 Bing. 382; 23 E. C. L. 312; Betteley *v.* Reed, 4 Q. B. 511; 45 E. C. L. 509; Thorne *v.* Tilbury, 3 H. & N. 534.

1. *In re* Leland, 6 Ben. (U. S.) 165; Wiley *v.* Pavey, 61 Ind. 457; 28 Am. Rep. 677; Chapman *v.* Brewer, 114 U. S. 158; Brown *v.* Covenant Mut. L. Ins. Co., 86 Mo. 51; Sheets *v.* Hawk, 14 S. & R. (Pa.) 173; 16 Am. Dec. 486; Baker *v.* Kunkel, 70 Md. 392; Lewis *v.* Sloan, 68 N. Car. 557; Thornton *v.* Hogan, 63 Mo. 143; Mount *v.* Manhattan Co., 41 N. J. Eq. 211; Harris *v.* Cornell, 80 Ill. 64; Sargent *v.* Fitzpatrick, 4 Gray (Mass.) 513.

2. In Valentine *v.* Mahoney, 37 Cal. 394, the court by Rhodes, J., said: "A possible future controversy between the landlord and tenant was not the only or the principal purpose in view in securing to the landlord the right to defend the action in the tenant's name; but it was that the issue between the plaintiff's and the landlord's title might be litigated and determined. If judgment when for the plaintiff would not bind the landlord, he could not avail himself of its benefits when it was for the tenant. It is impossible to conceive that the courts should concede to a person the right to participate in an action without his being bound or

j. NOMINAL PARTY.—A nominal party may be just as surely barred by a previous action as a real one, his interest and standing having something to do with it; but, being a party to the record, he is barred unless conclusively shown to have had no interest in the result of the prior suit.[1]

5. Parties Answerable Over; or Respondeat Superior—*a.* IN GENERAL.—The rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not.[2]

benefited by its results." See also Chant *v.* Reynolds, 49 Cal. 216; Masten *v.* Olcott, 101 N. Y. 154; Powers *v.* Scholtens, 79 Mich. 299; Arnold *v.* Woodward, 14 Colo. 164.

In Samuel *v.* Dinkins, 12 Rich. (S. Car.) 172; 75 Am. Dec. 729, the court said: "A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against the landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense which as a party he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded. His being a party might have caused change in the jury, or in the admissibility of evidence, or in the conduct of parties or counsel, which would have altered the result." Smith *v.* Gayle, 58 Ala. 600; Douglas *v.* Fulda, 45 Cal. 592; Wheelock *v.* Warschauer, 34 Cal. 265; Stridde *v.* Saroni, 21 Wis. 175; Bradt *v.* Church, 110 N. Y. 537.

In a case where tenant, as the result of an explosion, sued for an injury to his person, and the landlord for injury to the building, there was no privity, and neither was a bar, the court saying in Bartlett *v.* Boston Gas Light Co., 122 Mass. 209, that "The plaintiff's right to recover for the destruction of his building is entirely independent of the tenant's claim for the personal injury. The landlord does not claim by, through or under his tenant. The former judgment, therefore, was not between the same parties or their privies, nor was the cause of action the same; no right or title to the demised premises was involved."

In *California* the law is somewhat peculiar. If the landlord comes in and defends, he alone can conduct the case and is bound by the result. To make judgment binding it must appear that he had notice and request to defend, but a default may be removed. Dutton *v.* Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Dimick *v.* Deringer, 32 Cal. 491; Calderwood *v.* Brooks, 28 Cal. 156.

1. Wright *v.* Tatham, 1 A. & E. 3; 28 E. C. L. 11; Faust *v.* Baumgartner, 113 Ind. 139; French *v.* Neal, 24 Pick. (Mass.) 61; Case *v.* Reeve, 14 Johns. (N. Y.) 81; Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Dodge *v.* Zimmer, 110 N. Y. 43; Verplanck *v.* Van Buren, 76 N. Y. 247; Eshelman *v.* Shuman, 13 Pa. St. 564; Follansbee *v.* Walker, 74 Pa. St. 306; Rogers *v.* Haines, 3 Me. 362; Wiswall *v.* Sampson, 14 How. (U. S.) 52; Manly *v.* Kidd, 33 Miss. 141; Lowry *v.* McMurtry, 1 Sneed (Ky.) 251.

2. Davis *v.* Smith, 79 Me. 351; Prichard *v.* Farrar, 116 Mass. 213; Boston *v.* Worthington, 10 Gray (Mass.)

b. SHERIFFS AND DEPUTIES.—Some decisions seem to indicate that a judgment in favor of or against a deputy sheriff is conclusive for or against the sheriff, but it does not always follow. It makes quite a difference whether the sheriff has notice of the action and comes in to help defend it. If he does he may be barred, if not he may still sue or be sued. A judgment against a deputy which has not been satisfied will prove no bar to protect the sheriff, and satisfaction can be had only on payment of the execution.[1]

c. MUNICIPAL CORPORATIONS AND INDIVIDUALS.—Where a municipal corporation has been held liable in damages for injuries or nuisances caused by individuals, it can recover in an action against the individual the amount which it has been compelled to pay. And as its liabilities are broader in cases where a person may be liable, the doctrine of *respondeat superior* applies more frequently than in most other cases.[2] It is a matter of consid-

498; Hamilton *v.* Cutts, 4 Mass. 353; 3 Am. Dec. 222; Hardy *v.* Nelson, 27 Me. 530; Veazie *v.* Penobscot R. Co., 49 Me. 124; Littleton *v.* Richardson, 34 N. H. 187; 66 Am. Dec. 759; Walker *v.* Ferrin, 4 Vt. 523; Spencer *v.* Dearth, 43 Vt. 106; Kip *v.* Brigham, 6 Johns. (N. Y.) 158; Clark *v.* Carrington, 7 Cranch (U. S.) 322.

In Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217, where a carrier was sued for the loss of goods, and notified a second carrier to whom they were delivered to come in and defend, the first judgment is not conclusive, the court by Walker, J., saying: "Whether such a relation exists as to make the notice an estoppel, to that extent, is an open question that may always be contested; but when it is shown that the relation does exist, and that a recovery over may be had against the person on whom the notice was served, then he is estopped to deny that the judgment was recovered against his privy, that the wrong was perpetrated, or [to allege] that the recovery was too large. In that case, the judgment may be read in evidence to show that there had been a recovery against the person first sued, and the amount he has been compelled to pay, as fixing the measure of damages, but the judgment is evidence for no other purpose." Hagerthy *v.* Bradford, 9 Ala. 567; Tyree *v.* Magness, 1 Sneed (Tenn.) 276; Brown *v.* Chaney, 1 Ga. 410; Bone *v.* Torry, 16 Ark. 83; Morgan *v.* Simmons, 3 J. J. Marsh. (Ky.) 611.

1. Morgan *v.* Chester, 4 Conn. 387; Geekie *v.* Kirby Carpenter Co., 106 U. S. 379; Campbell *v.* Phelps, 1 Pick. (Mass.) 62; 11 Am. Dec. 139; Alexander *v.* Taylor, 4 Den. (N. Y.) 302; Emery *v.* Fowler, 39 Me. 326; 63 Am. Dec. 627; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Snell *v.* Campbell, 24 Fed. Rep. 880.

Where in a suit for seizing personal property, a deputy was not held liable, the plaintiff not proving his title therein, it was held that no suit in regard to the same issues could be brought against the sheriff. King *v.* Chase, 15 N. H. 19; 41 Am. Dec. 675; Sheldon *v.* Kibbe, 3 Conn. 214; 8 Am. Dec. 176; Sheehey *v.* Mandeville, 6 Cranch (U. S.) 265; Drake *v.* Mitchell, 3 East 258; Bloomfield's Case, 5 Coke 87; Macdonald *v.* Bovington, 4 T. R. 825.

A deputy is liable if the tort was committed by him, and as his act binds the sheriff, there is a joint liability. Elliott *v.* Hayden, 104 Mass. 180; Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18; 80 Am. Dec. 49.

If a sheriff is sued upon his official bond for wrongdoing of his deputy, he may sue the deputy in turn and recover whatever damage had been recovered in the previous action. Hand *v.* Taylor, 4 Ind. 416; Lyon *v.* Stanford, 42 N. J. Eq. 411; Thames *v.* Jones, 97 N. Car. 121; Verplanck *v.* Van Buren, 76 N. Y. 247; Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Atkinson *v.* White, 60 Me. 396; Hill *v.* Bain, 15 R. I. 75; Rex *v.* Grimes, Bull N. P. 231; Bounker *v.* Atkyns, Skin. 15; see SHERIFFS.

In Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 139, it was held that the court would take notice of the real parties to a suit. Brown Co. *v.* Butt, 2 Ohio 348.

2. In Lowell *v.* Short, 4 Cush. (Mass.) 275, it was held that though

the injured party recovered double damages from the city, yet the latter could only recover single from the one causing the nuisance or obstruction which led to the injury, as the ground for double damage was the neglect of the city, for which, of course, the third party was not liable. Heiser *v.* Hatch, 86 N. Y. 614; Coates *v.* Roberts, 4 Rawle (Pa.) 100.

In Lowell *v.* Spaulding, 4 Cush. (Mass.) 277; 50 Am. Dec. 775, where the question arose as to the liability as between landlord and tenant, the court, by Shaw, C. J., said: "By the common law, the occupier and not the landlord is bound, as between himself and the public, so far to keep buildings in repair, that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant, that the former shall keep the premises in repair, so that in case of a recovery against the tenant, he would have his remedy over, then to avoid circuity of action, the party injured by the defect and want of repair, may have his action in the first instance against the landlord."

To determine what the plaintiff must establish in the second suit, see Littleton *v.* Richardson, 34 N. H. 187; 66 Am. Dec. 759.

In Chicago *v.* Robbins, 2 Black (U. S.) 424, the court, by Davis, J., said: "It is well settled that a municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons or property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer. If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it. An express notice to him was not necessary in order to charge his liability." And see Robbins *v.* Chicago, 4 Wall. (U. S.) 670; Lovejoy *v.* Murray, 3 Wall. (U. S.) 18; Storrs *v.* Utica, 17 N. Y. 104; Lowell *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 24; 34 Am. Dec. 33; in which latter case the court by Wilde, J., said: "In this negligence of the defendant's agent, the plaintiffs had no participation. Their subsequent negligence was rather contractive than real. If the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot, therefore, be controverted, that the plaintiff's claim is founded on manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability; and the policy of the law does not in the present instance interfere with the claim of justice. . . . They (the plaintiffs) are not entitled to a full indemnity, but only to the extent of single damages. To this extent only were the defendants liable to the parties injured; and so far as the plaintiffs have been held liable beyond that extent, they have suffered from their own neglect; and whether it was actual or constructive is immaterial. The damages were doubled by reason of the neglect of the town; and although there was, in fact, no actual negligence, yet constructive negligence was sufficient to maintain the action against them; and they must be responsible for the increased amount of damages, and cannot throw the burden on the defendants."

In Churchill *v.* Holt, 127 Mass. 165; 34 Am. Rep. 355, where a hatchway in the street leading to a basement was left open and a person falling into it in passing was injured and obtained judgment against the occupant, which was no bar to a suit against the one whose servant had left the place in a dangerous condition, the court by Morton, J., said: "Under the pleadings in that suit the judgment may have been rendered on the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *particeps criminis* with the defendants, and is not inconsistent with their right to maintain this action."

In a *New York* case the court said: "If a public officer authorize the doing of an act not within the scope of his

erable importance whether the third party, whom it is sought to make responsible for damage, has had notice of the previous suit, thus giving him every opportunity to come in and defend the action and, indirectly, himself. It is immaterial, if there has been notice, whether it is express or implied. The rule, seemingly, is that notice is not necessary to allow of a right of action, but is essential to the conclusiveness of the judgment.[1]

6. Sureties—*a.* GENERAL RULE OF LIABILITY.—The decisions vary in the different States, and distinctions of importance are made between the different classes of sureties. It may be said generally that a judgment against the principal is not conclusive evidence against the sureties, but merely *prima facie*. The judgment proves only its own existence, unless the principal acted with the knowledge of the sureties and as an agent, as it were, in their behalf. The right of action against either, after a judgment against the other, will depend largely upon whether the obligation was joint or several. It is also material whether a judgment is obtained with or without fraud and collusion.[2] The question of notice is impor-

authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible, but not for the misconduct or malfeasance of such persons as he is obliged to employ." Bailey *v.* Mayor, etc., of N. Y., 3 Hill (N. Y.) 538; 38 Am. Dec. 669; City of Cohoes *v.* Morrison, 42 Hun (N. Y.) 216; Milford *v.* Holbrook, 9 Allen (Mass.) 17; 85 Am. Dec. 735; Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571; Portland *v.* Richardson, 54 Me. 46; 89 Am. Dec. 720.

In Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774, the court said: "A judgment obtained against a municipal corporation for injuries received on account of the defects in a street caused by third persons would, in a suit by such corporation, brought to recover back what it had been compelled to pay, be conclusive as to the right of the injured party to recover, and as to the amount which the municipal corporation would be entitled to recover. But the party against whom the municipal corporation might seek to recover would be entitled to show that it was under no obligation to keep the street in safe condition, or that it was not in fault, or that the accident was caused by the negligent conduct of both parties, in which event no recovery could be had, for the reason that one of two joint wrongdoers cannot have contribution from the other."

1. The decisions are variable as to the necessity of notice to the third party. In Port Jervis *v.* First Nat. Bank, 96 N. Y. 550, the court by Ruger, C. J., said: "The liability of the author of the act which occasions the injury does not depend upon the fact of his receiving notice of the action brought by the injured party against the municipality. . . . The only object of notice in such a case is to enable the corporation to avail itself of its right to impose the burden of defense upon the party ultimately liable, and to estop the author of the injury by the judgment recovered, from again contesting the facts upon which judgment depends. The omission to give notice in such case does not go to the right of action, but simply changes the burden of proof, and imposes upon the party against whom the judgment was recovered the necessity of again litigating and establishing all of the actionable facts. But if the party who is ultimately responsible has notice of the pendency of an action against his indemnitee, and is given an opportunity to defend, and neglects it, he is still bound by the result of the action and estopped from controverting in an action subsequently brought against him by such indemnitee, the facts which were litigated in the original action."

2. Watts *v.* Sayl, 20 Ala. 817; Means *v.* Hicks, 65 Ala. 241; Martin *v.* Tally, 72 Ala. 23; Riddle *v.* Baker,

13 Cal. 295; Harvey *v.* Head, 68 Ga. 247; Haddock *v.* Perham, 70 Ga. 512; Craig *v.* Herring, 80 Ga. 709; Curry *v.* Mack, 90 Ill. 606; Boyd *v.* Huffaker, 40 Kan. 634; Tracy *v.* Goodwin, 5 Allen (Mass.) 409; Tapley *v.* Goodsell, 122 Mass. 176; Fall River *v.* Riley, 140 Mass. 488; Cutter *v.* Evans, 115 Mass. 27; Way *v.* Lewis, 115 Mass. 26; Destrehan *v.* Scudder, 11 Mo. 484; State *v.* Coste, 36 Mo. 437; 88 Am. Dec. 148; Stoops *v.* Wittler, 1 Mo. App. 420; Wingate *v.* Haywood, 40 N. H. 437; Towle *v.* Towle, 46 N. H. 432; De Greiff *v.* Wilson, 30 N. J. Eq. 435; Ehle *v.* Bingham, 7 Barb. (N. Y.) 494; Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Stedman *v.* Patchin, 34 Barb. (N. Y.) 218; Rapelye *v.* Prince, 4 Hill (N. Y.) 121; 40 Am. Dec. 267; Raymond *v.* Richmond, 78 N. Y. 351; Swihart *v.* Shaum, 24 Ohio St. 432; Respublica *v.* Davis, 3 Yeates (Pa.) 128; 2 Am. Dec. 366; Parkhurst *v.* Sumner, 23 Vt. 538; 56 Am. Dec. 94; Stoval *v.* Banks, 10 Wall. (U. S.) 583; Drummond *v.* Prestman, 12 Wheat. (U. S.) 615. See generally MASTER AND SERVANT, vol. 14, p. 740.

Administrators and Executors. — In Irwin *v.* Backus, 25 Cal. 214; 85 Am. Dec. 225, the court by Sanderson, C. J., said: "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense, but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are, that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the probate court. The account must be rendered to and settled by the court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the court, and the undertaking of the sureties is that their principal will do all this." Jones *v.* Ritter, 56 Ala. 270.

In Stoval *v.* Banks, 10 Wall. (U. S.) 583, it is held that "when judgment has been recovered in a court of competent jurisdiction against an administrator, showing that he has received funds belonging to an estate, and has failed to pay over the same, a breach of his administration bond is established."

In Slagle *v.* Entrekin, 44 Ohio St. 637, it was said that "the amount found due from an administrator or executor to the estate, on the settlement of his accounts in the probate court, is, in the absence of fraud or collusion, binding, not only upon him, but also upon his sureties in an action upon the administration bond, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error."

In Boyd *v.* Caldwell, 4 Rich. (S. Car.) 117, the court said: "If a judgment has been recovered against an administrator and an action thereon be commenced against the surety on his bond to the ordinary, such judgment is conclusive, unless the surety can show that it was obtained through fraud or collusion between the creditor and the administrator."

Willey *v.* Paulk, 6 Conn. 74; Housh *v.* People, 66 Ill. 178; Ralston *v.* Wood, 15 Ill. 159; 58 Am. Dec. 604; Thurlough *v.* Kendall, 62 Me. 166; State *v.* Holt, 27 Mo. 340; 72 Am. Dec. 273; Heard *v.* Lodge, 20 Pick. (Mass.) 53; 32 Am. Dec. 197; Ferguson *v.* Glaze, 12 La. Ann. 667; State *v.* Donegan, 12 Mo. App. 190; Casoni *v.* Jerome, 38 N. Y. 315; Lipscomb *v.* Postell, 58 Miss. 476; 77 Am. Dec. 651; McWilliams *v.* Kalbach, 55 Iowa 110; McCleary *v.* Menke, 109 Ill. 294; Shepard *v.* Pebbles, 38 Wis. 373; Brodrib *v.* Brodrib, 56 Cal. 563.

A judgment against an administrator is conclusive on his sureties as to the amount of his indebtedness. On this point it was said, in Heard *v.* Lodge, 20 Pick. (Mass.) 58; 32 Am. Dec. 197, "To most purposes it seems to us that the sureties on an administrator's bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are in many respects like the sureties in a bail-bond, and equally bound by the proceedings against their principal. The duty they have assumed is that their

principal will pay on demand all debts ascertained by judgment of a court of law against him, in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach off the administration bond. The sureties are not to be concluded by a judgment suffered collusively by the administrator, and they have also the right to insist that the action against the administrator shall be commenced within the limitation period." Train *v.* Gold, 5 Pick. (Mass.) 380; Lowell *v.* Parker, 10 Met. (Mass.) 315; 43 Am. Dec. 436; Clark *v.* Carrington, 7 Cranch (U. S.) 322; Walmesley *v.* Mendelsohn, 31 La. Ann. 152.

If an administrator does not plead the Statute of Limitations, the sureties may do so in a subsequent suit on the bond. In Dawes *v.* Shed, 15 Mass. 9; 8 Am. Dec. 80, the court by Parker, C. J., said: "He was obliged to make that defense for the protection of the heirs, devisees, legatees, and purchasers of the estate which he represents, for the statutes were made for the benefit of all interested in the estate, as well as for the convenience and safety of executors and administrators. . . . We are clearly of opinion that under these circumstances '(of failure so to plead) the executors of the surety have a right in the present action to plead the same matter in their defense, not being barred by a judgment suffered collusively or negligently by the administrator from a protection which the law intended for their benefit."

Some decisions of the Supreme Court of the United States maintain that a judgment against an administrator is binding upon the surety unless fraud or collusion is proven. McLaughlin *v.* Bank of Potomac, 7 How. (U. S.) 230; Drummond *v.* Prestman, 12 Wheat. (U. S.) 520.

The amount of the judgment against the administrator is *prima facie* but not conclusive evidence against the sureties on the bond. Ferguson *v.* Glaze, 12 La. Ann. 668. Yet in the same State a surety on a bond was not concluded by judgment against his principal. Walmesley *v.* Mendelsohn, 31 La. Ann. 152. In case the administrator fails to file a suggestion of insolvency when he should have done so, the sureties are not precluded from doing it in a suit against them. Hayes *v.* Seaver, 7 Me. 239.

Where an administrator should pay up a mortgage and fails so to do the sureties may become liable, though they cannot reopen the issues on the mortgage which led to the liability. McCalla *v.* Patterson, 18 B. Mon. (Ky.) 210. It may be that a surety will be *prima facie* liable even though collusion is shown between the surety and creditors by the principal, and there may have been no notice. Bone *v.* Torry, 16 Ark. 86; Chipman *v.* Fambro, 16 Ark. 291.

Where an administrator of an insolvent estate neglects to settle an estate, an action lies by the creditor on his bond as well as against his estate. Coney *v.* Williams, 9 Mass. 114; Braxton *v.* Winslow, 1 Wash. (Va.) 31.

Where the defense of sureties was performance, and it was shown that the administrator had received assets with which he could, but failed, to satisfy a judgment against him, the judgment was admissible in an action against sureties both to show liability and amount of damages. The amount of the damages is conclusive. All this is only after a suit against the personal representative to fix the debt. Willey *v.* Paulk, 6 Conn. 75; Garber *v.* Com., 7 Pa. St. 265.

Sheriffs and Constables.—In Evans *v.* Com., 8 Watts (Pa.) 399; 34 Am. Dec. 77, the court said, in explanation of the principle involved: "Seeing, then, that it has become a settled rule of the law in regard to the sureties on a constable's (or other's) bond, that a judgment obtained in a suit brought against the constable alone for official misconduct or neglect of duty will bind and be conclusive on them, though not notified of the suit, they must be presumed to have known that such was the law when they entered into the bond, and it must, therefore, be taken as a part of their obligation or agreement that they were willing to be so bound and concluded, as often as judgment should be so obtained against their principal, and hence those who have become sureties for constables (or others) since the establishment of the rule in this respect can have no reason to complain of it. Under this view, then, it would seem that the objection originally made to the establishment and application of such rule to the sureties has lost its force, and the tendency of the rule, in its operation, being to prevent creditors from being vexatiously and unreasonably delayed in having or obtaining execution of their judgments—which,

it is said, is the life of the law—strongly recommends it on the ground of expediency and public policy." Dennie *v.* Smith, 129 Mass. 143; Dane *v.* Gilmore, 51 Me. 544; People *v.* Mersereau, 74 Mich. 687; McMicken *v.* Com., 58 Pa. St. 213.

In Tracy *v.* Goodwin, 5 Allen (Mass.) 409, the court by Chapman, J., said: "Judicial reasonings and decisions having thus far left the question involved in much doubt, we have to decide it by a reference to the general principles which appear to be applicable to it. We must regard it as settled in this case that the judgment is competent evidence against the sureties; and it appears that the bond in suit is joint and not several. As to the constable, who is one of the defendants, the judgment proves conclusively the wrongful taking of the plaintiff's property and the amount of damages sustained by him. The execution of the bond and the taking of the property by color of his office being proved by other evidence, it follows that this joint bond was given for the purpose, among others, of securing the plaintiff against this tortious act of the officer. If no part of the judgment has been paid, the amount of it is the amount due from him on the bond. And the sureties have so made their bond that a joint judgment must be rendered in this suit against all the defendants. If they were permitted to open the matter and show that the plaintiff ought not to have recovered his judgment, in whole or in part, their defense must inure to the benefit of their principal as well as to theirs. We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guaranty to the plaintiff for such amount as he has legally established to be due to himself from the constable, and that, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages. If the bond had been several as well as joint, there would have been less embarrassment in treating the evidence as *prima facie*, and permitting the sureties to offer rebutting evidence. We do not understand the presiding judge to have decided that the judgment was conclusive beyond these points." Thomas *v.* Hubbell, 15 N. Y. 405; 69 Am. Dec. 619; Brown *v.* Bradford, 30 Ga. 927; Chamberlain *v.* Godfrey, 36 Vt. 380; 84 Am. Dec. 690; Fletcher *v.* Jackson, 23 Vt. 581; 56 Am. Dec. 98; Pitts *v.* Fugate, 41 Mo. 405; State *v.* Colerick, 3 Ohio 487; Spencer *v.* Dearth, 43 Vt. 98; Macready *v.* Schenck, 41 La. Ann. 456.

In State *v.* Cason, 11 S. Car. 392, the court said: "The contract of the surety on an official bond has reference to the general conduct in cases and transactions that should arise in the discharge of his official duties, and therefore they have no concern or interest to protect in an action brought against such public officer by one aggrieved by his misconduct. The law presumes that a judgment recovered against the principal rests on sufficient grounds of proof, but allows that presumption to be rebutted by proper evidence. It does not appear that any evidence rebutting such presumption was submitted to the jury in the present case, and therefore it was competent to rest the verdict on such judgment as proof of official misconduct." Dennie *v.* Smith, 129 Mass. 143; Masser *v.* Strickland, 17 S. & R. (Pa.) 354; 17 Am. Dec. 668; Lucas *v.* Governor, 6 Ala. 826; Graves *v.* Bulkley, 25 Kan. 249; 37 Am. Rep. 249; Lowell *v.* Parker, 10 Met. (Mass.) 309; 43 Am. Dec. 436; Taylor *v.* Johnson, 17 Ga. 521.

Guardians.—The sureties on the bond of a guardian are generally conclusively holden by the decree of court respecting the guardian's account, although this statement is subject to modification. McWilliams *v.* Kalbach, 55 Iowa 110; McCleary *v.* Menke, 109 Ill. 294; Braiden *v.* Mercer, 44 Ohio St. 339; Gravett *v.* Malone, 54 Ala. 19; Hailey *v.* Boyd, 64 Ala. 399; Weaver *v.* Thornton, 63 Ga. 655; State *v.* Hull, 53 Miss. 526. As between co-sureties, see Preslar *v.* Stallworth, 37 Ala. 402; Love *v.* Gibson, 2 Fla. 598; Fletcher *v.* Jackson, 23 Vt. 581; 56 Am. Dec. 98.

Distinction Between Responsibility for Acts and for Legal Consequences.—In Spencer *v.* Dearth, 43 Vt. 104, the court by Wilson, J., said: "Some of the cases that profess to follow the common-law rule make it depend upon what is the true meaning of the engagement which gives rise to the question. They say if the engagement be merely that a particular thing shall be done or omitted by the principal, a judicial decision in a proceeding against

him will avail nothing towards establishing the existence of the default on which it is founded, in a subsequent suit against the surety or guarantor. But the same cases maintain the doctrine that when the engagement is virtually, or in terms, to be answerable, not merely or directly for acts *in pais*, but for their legal consequences, as ascertained in the course of subsequent legal proceedings, then the result of one action will be conclusive in the other. Ordinarily, where a party has a right of recovery over secured to him, either by operation of law or by express contract, and he has given the person so responsible due notice of the suit, the judgment, if obtained without fraud or collusion, will be conclusive evidence for him against such person upon every fact established by it. The latter then cannot be viewed in the light of a mere stranger, but has the same means of controverting the adverse claim as though he were the nominal and real party on the record. It is decided in Douglass *v.* Howland, 24 Wend. (N. Y.) 35, and in Jackson *v.* Griswold, 4 Hill (N. Y.) 522, that the relation which subsists between a principal and surety, or principal and guarantor, does not render either of them privy to a suit brought against the other. It has, notwithstanding, been held in a number of the more recent decisions that an engagement by one man to be responsible for another creates such a privity between them as to render a recovery against the latter *prima facie* evidence in a suit brought on the guaranty given by the former. Lowell *v.* Parker, 10 Met. (Mass.) 309; 43 Am. Dec. 436; McLaughlin *v.* Bank of Potomac, 7 How. (U. S.) 220; Drummond *v.* Prestman, 12 Wheat. (U. S.) 515; Berger *v.* Williams, 4 McLean (U. S.) 577; Jacobs *v.* Hill, 2 Leigh (Va.) 393; Bryant *v.* Owen, 1 Ga. 355; Bradwell *v.* Spencer, 16 Ga. 578. It would seem that the doctrine of the more recent cases above referred to, is, that the relation between joint and several contractors, whether they stand in the relation of principal and surety, or are both principals, creates such privity between them that a judgment for or against one of them, founded on the merits and not on technical grounds, and obtained without fraud or collusion, is evidence for or against the other in a subsequent suit involving the matters adjudicated in the former action. And where the defendant in the second action had notice of the former suit and an opportunity to make defense, or where the defendant in the second action voluntarily appeared and assisted in the former proceedings, or in case of payment made by a co-contractor, who is a party of record in the second, but was not in the first action, or a release to him of the whole cause of action, or accord and satisfaction, where either of such matters is presented in the former action by the party therein, and urged for himself and through his agency for and on behalf of another party not on the record but having a direct interest arising from express contract or by operation of law to prosecute or defend the suit, and the same is prosecuted or defended with his express or implied countenance, such judgment is conclusive evidence in the second suit of the matters so adjudicated in the former action; and some of these cases decide that such judgment may be *prima facie* evidence of the facts on which it is based, even though the party so interested had no notice of, and took no part in the trial of the former action in which such judgment was rendered."

A sheriff having been sued for the escape of a prisoner, the sureties, upon notice to them, came in and assisted in the defense of the suit. When suit was brought upon the indemnity bond which the sheriff had taken, the sureties could not come in and question the fact of the escape. The sureties might prosecute an appeal in the first action, even though they could not compel the sheriff to do it. People *v.* Irving, 1 Wend. (N. Y.) 20; Kip *v.* Brigham, 6 Johns. (N. Y.) 159.

Where it was agreed that a mortgage should provide for enough in the foreclosure, above the amount and expenses, to cover certain contingencies, the proceedings under the mortgage were admissible to show what the deficiency was. Rapelye *v.* Prince, 4 Hill (N. Y.) 119; 40 Am. Dec. 267.

It has been decided that an action against principal or surety does not bar the party joined, and the result as to him is immaterial. Deck *v.* Johnson, 30 Barb. (N. Y.) 289; Curry *v.* Mack, 90 Ill. 606; Pitts *v.* Fugate, 41 Mo. 405; Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Chamberlain *v.* Godfrey, 36 Vt. 380; 84 Am. Dec. 690.

tant in considering the liability of sureties. The notice may be either express or implied, direct or indirect, actual or inferential, and if it can in any way be brought home to them they are regarded as charged with notice. It is enough if the sureties have notice of the suing out of a writ, even though they are ignorant of all subsequent action taken; for when proceedings are begun, they knowing it, are warned or put upon their guard to watch and protect themselves from any results that may accrue therefrom. Notice is not necessary always to lay the foundation of an action, but its force is to make any judgment arising from it conclusive. If the parties have notice they can come in and defend, and if they either fail in the defense, or neglect to make any, the damages are fixed, and they are estopped to question the justice or propriety of the judgment and are firmly held under the obligations of the bond.[1] If, in the absence of any fraud or

If an indemnity bond is given it is *prima facie* evidence, not to say conclusive, against the principal and sureties, and that, too, without notice. Lee *v.* Clark, 1 Hill (N. Y.) 58.

1. Love *v.* Gibson, 2 Fla. 616; Blasdale *v.* Babcock, 1 Johns. (N. Y.) 517; Barney *v.* Dewey, 13 Johns. (N. Y.) 226; 7 Am. Dec. 372.

In Fay *v.* Ames, 44 Barb. (N. Y.) 327, the court said: "The defendants being jointly bound to indemnify the plaintiff, they were in privity of contract with each other, and are to be regarded and treated, *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person. In such a case, notice to one is notice to all, on the same principle as where two or more persons are shown to be jointly bound by a contract, the acts and admissions of either are binding upon all the others to the same extent as upon the one doing the acts or making the admissions. It was no part of the plaintiff's agreement with the sureties on the bond that they should have notice of suits brought against him for the misconduct of his deputy, and their liability as indemnitors was not made to depend on such notice. The law, indeed, required the notice to the deputy in order that he might defend and discharge himself from the misconduct imputed to him, and for the purpose of rendering the judgment against the sheriff conclusive, if one should be obtained. The notice was properly given to the deputy, whose conduct only was called in question, and who is presumed to know the facts and circumstances far better than the sureties or the sheriff. If, in addition to giving notice to the deputy, notice had been given to the sureties also, it would have been little more than an idle or useless ceremony, as it is to be presumed that all they would or could have done would have been to refer the matter to their principal, the deputy, and cast upon him the burden of the defense, as the sheriff has done. By a fair and reasonable interpretation of the conditions of the bond, the parties contemplated that actions might be brought against the sheriff for the acts or omission of his deputy, and the covenant of indemnity in the condition was inserted to provide for such contingencies."

But see Thomas *v.* Hubbell, 15 N. Y. 405; 69 Am. Dec. 619, where a sheriff offered a judgment in evidence in an action by him against his deputies, the court said: "The terms of the condition of this bond do not bring it within the class of cases in which an indemnitor is concluded by the result of a suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the terms of the contract. This condition is only that he will do his duty as a deputy sheriff. In the class of cases alluded to, the contract of indemnity is held to stipulate for the result of a litigation to which the indemnitor is not a party, and to make his liability to depend merely upon the result. There is therefore no reason why this case, in which the language of the condition admits of no similar construction, should be taken out of the general rule which declares the

collusion, a judgment is obtained, the principal and sureties having notice, the same may be conclusive as against surety or principal in a process where either may be seeking for contribution.[1]

effect of judgments as to strangers, that they may conclusively prove *rem ipsam*, and nothing else." Westevelt *v.* Smith, 2 Duer (N. Y.) 449; Konitzky *v.* Meyer, 49 N. Y. 571. "It is a well-settled rule that where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and an opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner." Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430; Beers *v.* Pinney, 12 Wend. (N. Y.) 309; Kip *v.* Brigham, 6 Johns. (N. Y.) 158; Mayor, etc., of Troy *v.* Troy, etc., R. Co., 3 Lans. (N. Y.) 270.

Want of notice does not bar cause of action in an ordinary indemnity bond, the judgment is only *prima facie*, and so the sureties can show that in the former action there was a valid defense which should have been, but was not, put in. But the bond may be drawn with such covenants as to render the judgment conclusive against the sureties. But however the bond may be drawn there is always an opportunity to be allowed for showing any such fraud or collusion as would vitiate the whole proceedings. Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 280; Beall *v.* Beck, 3 Har. & M. (Md.) 242; Morris *v.* Lucas, 8 Blackf. (Ind.) 9; Lartigue *v.* Baldwin, 5 Martin (La.) 193.

It may be shown by the sureties in an action against them that the misconduct of the principal was not official for which they would be liable, but merely individual wrong doing which their bond did not provide against. Dane *v.* Gilmore, 51 Me. 551.

Where any party may easily obtain notice upon inquiry, the burden of making it may be put upon him. The liability of sureties may be the same as principals both as to amount, and absolute obligation, regardless of notice or any other modification. Douglass *v.* Howland, 24 Wend. (N. Y.) 48. *Prima facie* evidence is equally strong if not rebutted, except fraud and collusion be shown. Lipscomb *v.* Postell, 38 Miss. 476; 77 Am. Dec. 651; State *v.* Jennings, 14 Ohio St. 76; Bryant *v.* Owen, 1 Ga. 355.

Where a statute requires a suit against an officer before there can be any suit in which his sureties are joined, it is generally understood that the sureties are concluded so far as anything which might have been pleaded in the prior case is concerned. No defenses which were open in the former action can be used in the subsequent action unless judgment was obtained by default. Bradley *v.* Chamberlin, 35 Vt. 277.

Sureties in Legal Proceedings.—A judgment against a defendant is conclusive as regards his bail, so that it cannot be questioned in any respect, unless there is negligence or fraud of the principal. Cutter *v.* Evans, 115 Mass. 27; Tracy *v.* Maloney, 105 Mass. 90; Way *v.* Lewis, 115 Mass. 26; Riddle *v.* Baker, 13 Cal. 295; Parkhurst *v.* Sumner, 23 Vt. 538; 56 Am. Dec. 94; Giltinan *v.* Strong, 64 Pa. St. 242; Respublica *v.* Davis, 3 Yeates (Pa.) 128; 2 Am. Dec. 366. It is not open for sureties to go back of the judgment in the prior action, whether it be on a poor debtor recognizance, a replevin bond, a bond to dissolve an attachment, or whatever it may be. See last cited cases and Warner *v.* Mathews, 18 Ill. 86; Towle *v.* Towle, 46 N. H. 434; McBroom *v.* Sommerville, 2 Stew. (Ala.) 515; Allen *v.* McKibbin, 5 Mich. 449.

Sureties may inquire into clerical errors, payment, collusion or fraud. Berger *v.* Williams, 4 McLean (U. S.) 577; Great Falls Mfg. Co. *v.* Worster, 45 N. H. 112; State *v.* Colerick, 3 Ohio 487.

Suit of Surety Against Principal.—Where there has been a judgment against principal and surety and the latter sues his principal to recover, the defendant cannot show that the judgment was usurious. Wade *v.* Green, 3 Humph. (Tenn.) 547; neither can the incompetent and inadequate defense of the first suit be made a ground for defense in the second. Rice *v.* Rice, 14 B. Mon. (Ky.) 335; nor is it open to show that a replevin suit was malicious and groundless when surety had signed a bond therein. Smith *v.* Rines, 32 Me. 177.

1. Duffield *v.* Scott, 3 T. R. 374, in

b. JUDGMENTS IN FAVOR OF PRINCIPAL.—Judgments in favor of the principal will be of material assistance to sureties upon any official bond, including not only bonds of officers but of executors, administrators or others acting in a fiduciary capacity.[1]

7. Warrantors of Title.—Where a superior or previous title is set up against the warrantee, the latter must vouch the warrantor in order to hold him liable in case the decision in the suit is adverse to him. If the warrantee or grantee is involved in an action to try title, the warrantor or grantor should be immediately notified that the suit is pending, and then he will be estopped by a judgment for the plaintiff in that case from any further litigation to test title or breach of warranty. There must, in order to admit of the prosecution of an action on a warranty, either be an actual eviction of the warrantee, or such action as will be tantamount to it. A virtual eviction may be insufficient, and if an actual eviction is necessary, not only is judgment necessary, but possession must in reality have been obtained under it, unless the warrantee has voluntarily recognized and admitted it. If there has been eviction under a judgment, the warrantor, in a suit upon his covenant, may set up this lack of eviction and thereby protect himself.[2]

which Buller, J., said: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first is not bound to pay the money. If the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defenses he might otherwise have to the introduction of the instrument to be introduced in evidence; and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed *res judicata*." McNamee *v.* Moreland, 26 Iowa 96; Love *v.* Gibson, 2 Fla. 598; Thomas *v.* Hubbell, 35 N. Y. 120; Clark *v.* Carrington, 7 Cranch (U. S.) 308; Huzzard *v.* Nagle, 40 Pa. St. 178; Dane *v.* Gilmore, 51 Me. 544; Milford *v.* Holbrook, 9 Allen (Mass.) 17; 85 Am. Dec. 735; Knapp *v.* Marlboro, 34 Vt. 235; Brown *v.* Bradford, 30 Ga. 927; Means *v.* Hicks, 65 Ala. 241; Fall River *v.* Riley, 140 Mass. 488; Martin *v.* Tally, 72 Ala. 23; Larkin *v.* Mason, 71 Ala. 227; Wright *v.* Lang, 66 Ala. 389; Stoval *v.* Banks, 10 Wall. (U. S.) 583.

In Huzzard *v.* Nagle, 40 Pa. St. 178, even notice is not required to conclude the surety in contribution, though he may not be liable in the same amount.

In case the bond is joint only, the previous judgment is easily a bar to all subsequent action. Way *v.* Goodwin, 5 Allen (Mass.) 412. For further cases in contribution, see Pitts *v.* Fugate, 41 Mo. 405; Fletcher *v.* Jackson, 23 Vt. 581; 56 Am. Dec. 98; Preslar *v.* Stallworth, 37 Ala. 402; Love *v.* Gibson, 2 Fla. 598.

1. Dickason *v.* Bell, 13 La. Ann. 249; Brown *v.* Bradford, 30 Ga. 928; State *v.* Coste, 36 Mo. 437; 88 Am. Dec. 148; Pitts *v.* Fugate, 41 Mo. 405; State *v.* Cason, 11 S. Car. 392; Hailey *v.* Boyd, 64 Ala. 399; Charles *v.* Haskins, 14 Iowa 471; 83 Am. Dec. 378; Moore *v.* Alexander, 96 N. Car. 34; Braiden *v.* Mercer, 44 Ohio St. 339; Shepard *v.* Prebbles, 38 Wis. 373. See *supra*, this title, *Suretyship*.

2. Mitchell *v.* Warner, 5 Conn. 521; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 4; 3 Am. Dec. 379; Kent *v.* Welch, 7 Johns. (N. Y.) 258; 5 Am. Dec. 266; Kerr *v.* Shaw, 13 Johns. (N. Y.) 236; Osborne *v.* Atkins, 6 Gray (Mass.) 423; Carpenter *v.* Pier, 30 Vt. 87; 73 Am. Dec. 288.

If notice has been given to the warrantor, and he has an opportunity to appear and defend the title, his representatives will, in case of his death, be

equally liable on the covenant and no further notice to them is required, unless there was some neglect or misconduct of the plaintiff in the first action. Brown *v.* Taylor, 13 Vt. 638; 37 Am. Dec. 618; Blasdale *v.* Babcock, 1 Johns. (N. Y.) 518; Smith *v.* Compton, 3 B. & Ad. 407; 23 E. C. L. 106.

In Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 221, the court said: "A person holding a covenant running with the land, being sued for the land, or on his covenant, may give notice to a prior grantor in the chain of title to sustain the title, and on failure to do so, the judgment may be read in evidence against him to show that the last covenantor had been sued, a judgment recovered against him, and that his covenant had not been performed, and the amount he had been compelled to pay; and in such a suit the plaintiff would not be required to prove the title under which the eviction was had, except that it was not a title derived from himself." Williamson *v.* Williamson, 71 Me. 442; Bever *v.* North, 107 Ind. 544; Lord *v.* Cannon, 75 Ga. 300; Terry *v.* Drabenstadt, 68 Pa. St. 400; Knapp *v.* Marlboro, 34 Vt. 235; King *v.* Kerr, 5 Ohio 158; 22 Am. Dec. 777; Cummings *v.* Harrison, 57 Miss. 275; Dalton *v.* Bowker, 8 Nev. 190; Davenport *v.* Muir, 3 J. J. Marsh. (Ky.) 310; 20 Am. Dec. 143; Andrews *v.* Davison, 17 N. H. 413; 43 Am. Dec. 666; Adams *v.* Conover, 22 Hun (N. Y.) 424; Hamilton *v.* Cutts, 4 Mass. 349; 3 Am. Dec. 222; Chamberlain *v.* Preble, 11 Allen (Mass.) 370; Harbin *v.* Roberts, 33 Ga. 45; Saveland *v.* Green, 36 Wis. 612; Ferrea *v.* Chabot, 63 Cal. 564; Axford *v.* Graham, 57 Mich. 422; Hersey *v.* Long. 30 Minn. 114; Davis *v.* Wilbourne, 1 Hill (S. Car.) 27; 26 Am. Dec. 154; Lebanon *v.* Mead, 64 N. H. 8; Sampson *v.* Ohleyer, 22 Cal. 200; Heiser *v.* Hatch, 86 N. Y. 614; Todd *v.* Chicago, 18 Ill. App. 565.

Notice.—The notice must be certain, explicit and unequivocal, though it must be such as requires a defense of title. No particular words are necessary; it need not appear of record, and it is very doubtful if it even need be in writing. Paul *v.* Witman, 3 W. & S. (Pa.) 407; Lebanon *v.* Mead, 64 N. H. 8; Harding *v.* Larkin, 41 Ill. 413; Miner *v.* Clark, 15 Wend. (N. Y.) 427; Mason *v.* Kellogg, 38 Mich. 132; Somers *v.* Schmidt, 24 Wis. 417; 1 Am. Rep. 191; Boyd *v.* Whitfield, 19 Ark. 447; Collins *v.* Baker, 6 Mo. App. 588. In Hersey *v.* Long, 30 Minn. 114, the court said: "This notice must be clear and explicit, and convey precise information that unless the person to whom it is addressed establishes the validity of the title in the first action, he will be estopped by the judgment. But no case has decided that the notice should be in any particular form. In some it is suggested that it would be better if notice in writing were required, but most of the cases assume that if sufficient in substance it need not be in writing; and except for facility in proving it, and certainty as to its character, we see no reason why it should be written or formal. If it clearly apprise the person to whom it is given that an action involving the title has been commenced, and that the defendant giving it looks to him to establish the title in that action, the object of the notice is accomplished."

If no notice has been received the warrantor may set up defenses not open to him after notice, as the prior judgment is only *prima facie* evidence against him. Collingwood *v.* Irwin, 3 Watts (Pa.) 310.

If notice is given and judgment had, if it be by default it may not be conclusive. Cadwallader *v.* Harris, 76 Ill. 370.

Vanderkarr *v.* Vanderkarr, 11 Johns. (N. Y.) 122; Kortz *v.* Carpenter, 5 Johns. (N. Y.) 120; Kelly *v.* Dutch Church, 2 Hill (N. Y.) 110. See generally EJECTMENT, vol. 6, p. 195. Eaton *v.* Lyman, 26 Wis. 61.

The authorities vary as to cases where no notice has been given. Ryerson *v.* Chapman, 66 Me. 557; Walton *v.* Cox, 67 Ind. 164; Everling *v.* Holcomb, 74 Iowa 722; Clements *v.* Collins, 59 Ga. 124; Stephens *v.* Jack, 3 Yerg. (Tenn.) 403; 24 Am. Dec. 583; Rhode *v.* Green, 26 Ind. 83.

In Andrews *v.* Denison, 16 N. H. 469; 43 Am. Dec. 565, the court said: "The right of a plaintiff to give notice may be limited to cases where, in some form, a defense involving the title warranted has been set up. If he might give the notice upon the institution of his suit, without any knowledge whether the defense would involve the validity of the title warranted and the covenant of warranty, it would in effect, be a notice to come in and prosecute the suit, which would not be a good notice." Marsh *v.* Smith, 73

Iowa 295; Daskam *v.* Ullman, 74 Wis. 474; Littleton *v.* Richardson, 34 N. H. 187; 66 Am. Dec. 759.

Warrantor of Personal Property.—In Mondell *v.* Steel, 8 M. & W. 858, the court, by Parke, B., said: "The defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the case, and the work, in consequence of the non-performance of the contract, in the other, were diminished in value. . . . In all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant in all of those not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more." Davis *v.* Hedges, L. R., 6 Q. B. 687; Houston *v.* Sligo, 29 Ch. Div. 448; King *v.* Boston, 7 East 481, n.; Hamlet *v.* Richardson, 9 Bing. 644; 23 E. C. L. 407; Marriott *v.* Hampton, 7 T. R. 269; Brown *v.* McKinally, 2 Esp. 278; Caird *v.* Moss, 33 Ch. Div. 22.

In Thurston *v.* Spratt, 52 Me. 204, the court said: "The vendor in possession impliedly warrants the title to the thing sold. He is, therefore, bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. . . . It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the individuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice." Marlatt *v.* Clary, 20 Ark. 251; Buchanan *v.* Kauffman, 65 Tex. 235; Fallon *v.* Murray, 16 Mo. 168; Walker *v.* Ferrin, 4 Vt. 523; Barney *v.* Dewey, 13 Johns. (N. Y.) 224; 7 Am. Dec. 372; Smith *v.* Moore, 7 S. Car. 209; 24 Am. Rep. 479; Smith *v.* Palmer, 6 Cush. (Mass.) 513; Hunt *v.* Brown, 146 Mass. 253; Burnett *v.* Smith, 4 Gray (Mass.) 50; Haynes *v.* Ordway, 58 N. H. 167; Howell *v.* Goodrich, 69 Ill. 556; Kraus *v.* Thompson, 30 Minn. 64; 44 Am. Rep. 182.

In Barker *v.* Cleveland, 19 Mich. 230, the court by Cooley, C. J., said: "When a party declares upon a contract of warranty contained in a sale of chattels, he necessarily affirms the validity of the contract. The warranty does not stand independent of the sale, but is inseparably connected with and forms a part of it. It is only one of the stipulations in the main contract, and it can neither be alleged nor proved, nor judicially found, except as a part of the sale. It is evident, therefore, that the judgment in Wayne County, in affirming the warranty, also affirmed, of necessity, the contract of sale; and that the existence and validity of that contract were therefore necessarily within the issue in that case and are now *res adjudicata*. To constitute the judgment in one case a bar to another action it is not essential that the object of the two suits should be the same, or that the parties should stand in the same relative position to each other. It would not be claimed by the plaintiffs in error that because they were plaintiffs in one suit and defendants in the other, therefore their judgment should not conclude them, if the point in controversy were the same in both cases. . . . But we do not understand that an inquiry concerning the amount of damages sustained by a breach of warranty necessarily involves the question of the payment of the purchase price. If the contract is a valid one, it is immaterial to the plaintiff's action in such a case whether he bought for cash or upon a credit not yet expired. The object of the suit is foreign to the question of payment. He sues to recover the difference between the actual value of the articles received on the contract and what their value would have been had they answered the warranty; and unless the vendor defends on the ground of non-

8. Parties to Negotiable Paper.—There is no such privity between the various parties to negotiable instruments that a judgment in an action by one will prevent another from proceeding with a suit of his own. Each case must stand upon its merits and cannot be proven by simply producing a prior judgment. Still, even in this class of cases, a bar may appear in some cases. The relation of parties here is regulated more or less by the special provisions relating to mercantile law, hence the doctrine of *res judicata* is subject to more than an ordinary amount of modification. Some few illustrations will be given below.[1]

payment of the purchase price, the court does not concern itself with that question. The parties in such a case are at liberty to settle their controversies in one suit or by cross-action; but whether one suit is brought or two the damages are measured in the same way. If the vendee, instead of bringing a cross-action, sets up the breach of warranty by way of recoupment, the vendor is entitled to recover the purchase price; while the vendee will have awarded to him, by way of reduction, such damages as he can show he has sustained by a breach of the promise of warranty. . . . If, however, the vendee thinks proper to bring an independent suit upon the warranty, the damages of the respective parties are not measured by any different standard. If the vendee recovers in that suit, he is conclusively presumed to recover the full difference between the value of the articles delivered and their value as it would have been had they complied with the warranty. If the only issue in the case is upon the warranty, the court will not concern itself with the inquiry how much of the purchase price has been paid." Bellinger *v.* Craigue, 31 Barb. (N. Y.) 537; Thornton *v.* Thompson, 4 Gratt. (Va.) 121; Freeman *v.* Clute, 3 Barb. (N. Y.) 424; Walker *v.* Chase, 53 Me. 258; Betts *v.* Starr, 5 Conn. 550; 13 Am. Dec. 94; Jennison *v.* West Springfield, 13 Gray (Mass.) 544; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134; Sawyer *v.* Woodbury, 7 Gray (Mass.) 502; 66 Am. Dec. 518; Castle *v.* Noyes, 14 N. Y. 329; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350.

1. Jordan *v.* Ford, 7 Ark. 416; Crabb *v.* Larkin, 9 Bush (Ky.) 154; Barker *v.* Cassidy, 16 Barb. (N. Y.) 177; Elliott *v.* Woodward, 18 Ind. 183; Fenn *v.* Dugdale, 31 Mo. 580.

In Lloyd *v.* Barr, 11 Pa. St. 41, the court by Bell, J., said: "The now defendant had then a full opportunity to controvert his liability on the note in question, and to cross-examine the witnesses produced by the bank to prove it; a privilege which constitutes one of the principal tests of estoppel by judgment. The very point, too, to establish which that judgment is now pleaded, was then in issue. Notice to the defendants of the dishonor of the note was a material allegation in that action. And though no technical issue was formed by a formal plea, there was a substantial one under one system of arbitration, requiring proof of everything necessary to show the bank's right to recover." Leslie *v.* Bonte, 130 Ill. 498; Darlington *v.* Gray, 5 Whart. (Pa.) 487; Morris *v.* Lucas, 8 Blackf. (Ind.) 9; Wells *v.* Coyle, 20 La. Ann. 396; Levi *v.* McCraney, 1 Morr. (Iowa) 91. In the last case it was held there was such privity, that if the indorsee sues the maker, and the defendant wins on the merits, the payee can bring no other action.

If a note has been put in judgment, the parties to it are barred so that no defense arising from the relation of surety and principal before the judgment can be made. Marshall *v.* Aiken, 25 Vt. 334.

In a suit by an indorser of a draft against the acceptor, no demand, notice, etc., can be proven by offering a prior judgment in evidence. But it, together with an execution thereon, may be evidence of payment, and of final ownership. Green *v.* Gonigs, 7 Barb. (N. Y.) 652.

A parol acceptance may be sufficient to fix the liability of the acceptor. Barker *v.* Bucklin, 2 Den. (N. Y.) 55; 43 Am. Dec. 726; Cailleux *v.* Hall, 1 E. D. Smith (N. Y.) 5; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 254; 8 Am. Dec. 492; Delaware, etc., Canal Co. *v.* Westchester Co. Bank, 4 Den. (N. Y.) 99; Snow *v.* Walker, 42 Tex.

154; Pease *v.* Whitten, 31 Me. 117; Hill *v.* More, 40 Me. 515; Pearl *v.* Harris, 121 Mass. 390; Burrows *v.* Guthrie, 61 Ill. 70; Kellogg *v.* Fancher, 23 Wis. 21; 99 Am. Dec. 96; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341; Gaylord *v.* King, 142 Mass. 495.

Where the maker of a note sues the payee, or indorsee, and the defense is payment, an indorser, though not a party, and though not notified of the suit, may, in a subsequent suit against himself in the name of the same plaintiff, plead the judgment as evidence of the amount due on the note. Spencer *v.* Dearth, 43 Vt. 112. Upon the rule of mutuality between joint makers of a note and the creditor, where one prevails on a defense of payment and afterwards suit is brought against another, the court by Wilson, J., in an elaborate opinion, said: "The assumption that one of the makers of a joint and several note is a stranger merely to a judgment in favor of another maker of the same note, in an action upon it, where the judgment was rendered upon the defense of payment in full, is contrary to the legal effect of their relation. This assumption treats the engagement of joint and several promisors as several and independent contracts, and the promisors as liable to no common duty, and as having no common rights or interests in regard to payment of the note or defense against it when payment had been made. This is not the nature of their engagement, nor the relation created by it; but each signer of a joint and several promissory note undertakes for himself, and as surety for the other signers, to pay the note according to its tenor. When one of the signers has paid the note in full, or made payment on it, such payment is, as between the makers and payee, regarded as payment made by all the makers; it constitutes a defense to the claim common to all the promisors. If action be brought against one of them, and the defense of payment is interposed, and it prevails, and judgment is rendered against the plaintiff, on the ground that the note was paid in full before the commencement of the suit, the plaintiff by such adjudication has had his day in court. The question of payment determined against him was not only a full defense for the promisor against whom that suit was instituted, but also a full discharge for the other makers from the debt indicated by the note, and the judgment as conclusive evidence of such payment could not be excluded in a subsequent action against a maker of the note, though not a party of record to the former adjudication, without unjust discrimination as to the respective rights and remedy of the parties in the prosecution and defense of suit or suits upon such a contract. . . .

"And if he [the creditor] proceed to trial and final judgment, in a suit against one or more of the makers of the note, and not against all, upon the defense of payment, or other defense to the merits that would discharge the claim as to all the promisors, we may assume, until it be shown that he has just cause for a new trial in the same action, that he has had such a trial and adjudication of the matters involved as the law contemplates, coextensive with the rights accorded to the party against whom he sought to enforce the claim. In such trial and adjudication upon matter of defense to the whole merits of the plaintiff's claim, such as payment of the note in full, and final judgment is against the plaintiff, such judgment is not on grounds personal to the maker of the note the plaintiff had elected to sue, but it is also in effect on the ground that he has no cause of action against the other makers of the note, or either of them. And if such judgment be not held as conclusive evidence against the plaintiff, in a subsequent suit against the other maker or makers of the note where the identical matter adjudicated in the former suit is involved in the latter, it would follow that the payee or indorsee of such note could have as many opportunities to litigate such matter as there were makers of the note, and in all this the latter would have but one opportunity to make defense, for they all constitute only one of the contracting parties.

"This objection is not obviated by the fact that in separate suits each maker of the note in the suit against him has his day in court and the benefit of a trial. A rule that would not allow a judgment in favor of one of the makers of the note upon such defense as a legal bar to a recovery against another maker of the same note, would compel each maker of the note in a suit subsequently tried against him to litigate the same question or questions which had been adjudicated in the former suit or suits, irrespective of the for-

9. Garnishees.—Some authorities hold that a judgment against garnishees merges the former indebtedness, while others hold that such a judgment is merely a lien upon the funds in the hands of the garnishees. However, when judgment is had against, and satisfied by, them, it is a bar to a claim of the defendant in the case up to the amount paid under the garnishment. The principle is the same as to trustees in those States where the similar action is called a trustee process.[1]

mer adjudication or its result, by which the plaintiff would have had the advantage of two or more trials in different suits but of the same matter; and if he should finally prevail against one of such makers he would have had only one trial and judgment upon the matters involved."

The court proceeded to argue the proposition on the ground that the maker against whom the plaintiff at length prevails, after failing as against the others, would be deprived of all claim of indemnity against his co-debtors. The court maintained the same doctrine as to offset, and said: "Where one of the makers, in a suit against him, upon the defense of part payment or offset of a claim in his favor has reduced the amount of the note, another maker of it, in a subsequent suit, can legally claim that the plaintiff should be bound by the former adjudication as showing the balance due upon the note at that time. Such claim being mutual as between the parties to the first suit would not be so between those to the second, and for this reason the merits of it could not be litigated as an offset between the latter. This is one of the reasons for holding the former judgment upon such matter conclusive. The claim is by the former adjudication merged in the judgment, and, thereafter no action will lie upon it. Hence it would not do to say that the plaintiff, in a suit on the note against another maker, could collect of him that part of the note which had been satisfied by offset of the claim against the plaintiff. To allow him to do this, would allow him in the first suit, by offset to the note, to pay and satisfy a debt due from himself to one maker of the note, and in the second to collect the whole note of another maker thereof. It can make no difference that the claim in offset was originally a matter personally between the parties to the first suit, because by its adjudication and offset the effect is the same as if the defendant in the first suit before its commencement had made a payment from his own private funds to apply on the note and the same had been allowed in assessing the damages. Upon the same principle, where judgment is rendered against the plaintiff in a suit in his favor against one of the makers of the note, and the ground on which the plaintiff failed to recover is that the note had been paid in full, or satisfied by offset of a claim due from the plaintiff to the defendant, such judgment should be regarded a legal bar to a recovery against either of the other makers of the note, though not a party to the former adjudication. To this extent, effect should be given to the judgment in view of the privity existing between the promisors, and in view of the fact of such payment or offset determined by the judgment. In such a case after the question of payment, or other matter in full satisfaction of the note, has been once determined by such judgment against the plaintiff, there can be no foundation for a suit against any other maker of the note. If a maker of the note, who was not a party to the former suit, would not for that reason or other reasons be bound by the judgment, if it had been the other way, there can be no good reason why the judgment should not be conclusive of the matter determined as against the payee who was a party to the former adjudication."

See further on the general subject, BILLS AND NOTES, vol. 2, p. 313.

1. As to the requirements for the discharge of trustee or garnishee, whether judgment, or execution, or both and satisfaction, is a question upon which the authorities differ. Cook *v.* Field, 3 Ala. 53; 36 Am. Dec. 436; Sessions *v.* Stevens, 1 Fla. 269; Brannon *v.* Noble, 8 Ga. 549; McAllister *v.* Brooks, 22 Me. 80; 38 Am. Dec. 282; Brown *v.* Somerville, 8 Md. 444; Meriam *v.* Rundlett, 13 Pick. (Mass.) 511; Burnap *v.* Campbell, 6 Gray (Mass.) 241; Home Mut. Ins. Co. *v.* Gamble, 14 Mo. 407; Brown *v.* Dudley,

10. Third Parties—*a.* GENERAL STATEMENT OF RULE.—We have considered the position and relations of privies to an action, and there remains to be noticed third parties, who may or may not be affected by a judgment in a case, to such an extent as to have no remedy over. It is not a clear dividing line which separates privies and third parties. Parties, although previously considered, are those who have the right to control the proceedings in an action. They may or may not be parties to the record—the interest they have in the suit and not their record status determining their relation to the suit. The party of record may request the real party in interest to come in and conduct the case. Further, the record party may be ignored by the court, and the party really interested may be the one whose standing and position in the case will alone be considered in the disposition of the case. In other words, parties are those chiefly interested, whether they are direct parties to the action or not, and hence there is some uncertainty always as to who are the real parties in an action until the

33 N. H. 511; Newton *v.* Field, 16 Ark. 216; Hirth *v.* Pfeifle, 42 Mich. 31; Tams *v.* Bullitt, 35 Pa. St. 308.

Judgment must be proven and be valid. The payment must have been actual but not voluntary. Judgment must have been properly obtained in the proper court, and in some States execution must have issued. Barton *v.* Smith, 7 Iowa 85; Dobbins *v.* Hyde, 37 Mo. 114; Loring *v.* Folger, 7 Gray (Mass.) 505; Richardson *v.* Hickman, 22 Ind. 244; Gunn *v.* Howell, 35 Ala. 144; 73 Am. Dec. 484; Pratt *v.* Cunliff, 9 Allen (Mass.) 90; Thayer *v.* Tyler, 10 Gray (Mass.) 164; Robertson *v.* Roberts, 1 A. K. Marsh. (Ky.) 247; Bunker *v.* Tufts, 57 Me. 417; Whipple *v.* Robbins, 97 Mass. 107; 93 Am. Dec. 64; Chase *v.* Haughton, 16 Vt. 594; Ruff *v.* Ruff, 85 Pa. St. 333; Pierce *v.* Chicago, etc., R. Co., 36 Wis. 283.

In Wadsworth *v.* Marsh, 9 Conn. 481, the court said: "The plaintiff has done nothing which was not induced by the disclosure of the defendant. If his disclosure was false, is the plaintiff to be estopped by it? Such a consequence cannot be admitted. On the contrary, if the defendant, by a false disclosure, has contracted contradictory obligations, and subjected himself to superadded liabilities, the fault and the misfortune are both his own; but no person can be estopped by an act which is the result either of duress or the fraud or falsehood of another." Hibernia, Sav., etc., Soc. *v.* Inyo Co., 56 Cal. 205; Boyle *v.* Maroney, 73 Iowa, 70; Scamahorn *v.* Scott, 42 Iowa 529; Puffer *v.* Graves, 26 N. H. 256; Jones *v.* Tracy, 75 Pa. St. 417; Webster *v.* Adams, 58 Me. 317.

In Pierce *v.* Carleton, 12 Ill. 358; 54 Am. Dec. 405, the court said: "In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as a garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that, too, in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment. And in this doctrine the authorities generally agree." See, further, on the general subject, GARNISHMENT, vol. 8, p. 1096. And see, particularly, the subdivision of that title, *Force and Effect of the Judgment*, pp.

facts have been to some extent considered. Of privies it may be safely said that they are those who may fairly claim to be interested through either party. All others are third parties, and may or may not have any connection with the case. They certainly cannot set up any defects in the title of one claiming in some other way, in order to maintain their own title, even though they could show and maintain collusion or fraud.[1] Strangers cannot raise questions upon the merits of former actions. They may show, for the purpose of establishing certain facts, that such a suit was brought, judgment rendered, date, amount and other facts; also that a principal has been obliged to pay for an agent,

1251–4. See also FOREIGN ATTACHMENTS, vol. 8, p. 288.

1. In Duchess of Kingston's Case, 20 How. St. Tr. 355; 2 Smith's Lead. Cas. 424, the court said: "What has been said at the bar is certainly true as a general principle, that a transaction between two parties in a judicial proceeding ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the deposition of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers." Hood *v.* Hood, 110 Mass. 463; Humes *v.* Scruggs, 94 U. S. 22; Andrews *v.* Herring, 5 Mass. 210; Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U. S. 244; Winston *v.* Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Marvin *v.* Hampton, 18 Fla. 131; Mackey *v.* Coates, 79 Pa. St. 350; Sheldon *v.* White, 35 Me. 233; Stevens *v.* Thompson, 17 N. H. 103.

"It is a general rule that a verdict shall not be used against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence the parties must be the same; for then the benefit and prejudice would be mutual and reciprocal where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterward make use of it; for between him and a party to such verdict, the matter is *res novo*, although his title turn upon the same point." Starkie on Ev., p. 331.

In Foster *v.* Powers, 64 Tex. 247, the court said: "No person can be divested of title to his property in a suit between other parties of which he has no legal notice, and a judgment rendered in such a suit is not binding upon him and is not admissible in evidence against him in any future proceeding in which the title to the property is in controversy." Maple *v.* Beach, 43 Ind. 51; Dugge *v.* Stumpe, 73 Mo. 513; Hardin *v.* Blackshear, 60 Tex. 132; Owens *v.* Alexander, 78 N. Car. 1; Rowland *v.* Day, 17 Ala. 681; Hale *v.* Finch, 104 U. S. 261; Morrison *v.* Mullin, 34 Pa. St. 12.

In McCoy *v.* McCoy, 29 W. Va. 794, it was said: "No party can ever be estopped, or in any way prejudiced by any judgment or decree, if the record in the first suit on its face shows that he had no opportunity to be heard in opposition to the entry of such judgment or decree." Wilkie *v.* Howe, 27 Kan. 518; McDonald *v.* Matney, 82 Mo. 358; Heephrey *v.* Redick, 21 Neb. 80; Brock *v.* Garrett, 16 Ga. 487; Cockey *v.* Milne, 16 Md. 200.

And in Comstock *v.* Ames, 1 Abb. App. Dec. (N. Y.) 415; 3 Keyes (N. Y.) 357, the court by Hunt, J., said: "A fraud upon one does not form a claim on behalf of a stranger to the transaction not claiming under the party defrauded. A fraud is an individual and personal thing; it is a cause of complaint to the person only upon whom it is committed; no other person can claim a benefit from it; a recovery by any other person is no defense to a claim by the party defrauded."

In Ritter *v.* Brendlinger, 58 Pa. St. 70, where a judgment creditor tried to

prevent a former judgment creditor of the same debtor from collecting because his note had not been stamped properly, the court said: "It is not easy to see what he has to do with that. The judgment is not void which was finally entered upon the bills. The judgment is the act of the court, and if erroneous, the error can be reached only by the party defendant. No stranger can contest it, and especially in this collateral way. If the defendant has not moved to set aside the judgment, certainly the plaintiff in this bill cannot complain for him or for the government. The plaintiff having a judgment, unimpeached for fraud upon the rights of creditors, standing upon the record and in full force, no other judgment creditor can intervene for the government or for the defendant. As a purchaser, the plaintiff in the bill has no better right. He took subject to the lien of the judgment and as a mere volunteer for the use of creditors, and his title must give way to the judgment." Train *v.* Gold, 5 Pick. (Mass.) 380; Elliott *v.* Hayden, 104 Mass. 180; Palmer *v.* Hayes, 112 Ind. 289; Follansbee *v.* Walker, 74 Pa. St. 306; Estelle *v.* Peacock, 48 Mich. 469.

In Valentine *v.* Mahoney, 37 Cal. 389, it is said: "Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies."

In Morrison *v.* Mullin, 34 Pa. St. 12, the court said: "It contravenes the first principles of justice to hold a man bound by a judgment against which he has neither an opportunity to defend nor notice in any way that he was to be directly involved in the consequences." McLelland *v.* Ridgeway, 12 Ala. 482; Buford *v.* Rucker, 4 J. J. Marsh. (Ky.) 551; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280; Jackson *v.* Myrick, 29 Me. 490; Putnam School *v.* Fisher, 34 Me. 172; Alexander *v.* Walter, 8 Gill (Md.) 239; 50 Am. Dec. 688; Morrison *v.* Loftin, 44 Tex. 16; Lawrence *v.* Haynes, 5 N. H. 33; 20 Am. Dec. 554; Niller *v.* Johnson, 27 Md. 6.

In Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 136, the court said, that action prosecuted in "names of nominal parties, cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision." Linton *v.* Harris, 78 Ga. 265; Wood *v.* Ensel, 63 Mo. 193; Daskam *v.* Ullam, 74 Wis. 474; Montgomery *v.* Vickery, 110 Ind. 211; Cole *v.* Favorite, 69 Ill. 457; Conger *v.* Chilcote, 42 Iowa 18; Stoddard *v.* Thompson, 31 Iowa 80.

In Lathrop *v.* American Emigrant Co., 41 Iowa 548, where plaintiff claimed title to land entered upon under indemnity granted for swamp lands in the county and defendant in another county claimed under the swamp-land act, when the plaintiff attempted to show defendants' deed fraudulent and void, the court by Beck, J., said: "Now the defects in defendant's title based upon the alleged fraudulent acts set out in the third and fourth counts of plaintiffs' answer to the cross-bill, which were assailed by defendant's demurrer, if established would not constitute ground upon which plaintiffs may recover the lands. They must recover upon the strength of their own title, not upon the defects of that of their adversary. The counts demurred to, therefore, set up no matter tending to establish plaintiffs' right to the land. Can plaintiffs urge the matter alleged in these counts to defeat defendant's title to the land? As to this title, and to each link in the chain thereof, plaintiffs are strangers, and for that reason cannot set up fraud and defects pertaining thereto to defeat defendant's claim of right based thereon. Secrist *v.* Green, 3 Wall. (U. S.) 744; Gregg *v.* Forsyth, 24 How. (U. S.) 179; Ritter *v.* Brendlinger, 58 Pa. St. 68; Thompson's Appeal, 57 Pa. St. 175; Comstock *v.* Ames, 3 Keyes (N. Y.) 357. This rule is based upon sound reason as well as upon authority. Plaintiffs claim no rights under the title set up by defendant. The defects and infirmities set up in the counts assailed by the demurrer, if established, would not entitle them to recover. And whatever should be the judgment of the court upon issues involving these matters, it would not bind the persons whose rights were affected by the alleged frauds, and who were either parties or privies to the transaction, for they are not parties to this action. It would be vain, therefore, to determine these issues in this action. The respective conflicting titles under which the parties' claim are by this action brought before the

surety for principal debtor, or any similar liability. Principals cannot impeach judgments under which subordinates acted at the time of their wrongdoing.[1] Where, in determining a chain of title, certain judgments or decrees are necessary, a stranger may use them merely for that purpose in order to perfect his titles.[2]

court for adjudication. If the lands are found to be swamp lands, defendant will be entitled to a decree as against plaintiffs; and, on the other hand, if it be determined that they are not covered by the swamp-land grant, but were subject to entry by swamp-land scrip, plaintiffs will recover in this action as against the defendant whatever judgment will be entered; it will only bind those who are parties to the record, and the rights of others will not be affected thereby."

The question of mutuality may be the turning point as to whether a judgment is a bar. Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507; North Vernon *v.* Voegler, 103 Ind. 314.

Judgment creditors cannot attack a judgment for fraud unless it is for a fraud upon them, and as a fraudulent judgment will stand except in so far as the fraud affects it, such a judgment will not be entirely vacated. Thompson's Appeal, 57 Pa. St. 178.

Where evidence of a partition suit was offered which had been followed by a sale of the interests of several parties to the action, and defendants objected because of irregularity of sale, and a judgment by default against infant defendants, the court held that as they were strangers to the partition, the defendants could not object when the parties to the decree made no complaint. Gregg *v.* Forsyth, 24 How. (U. S.) 180.

1. Mylar *v.* Hughes, 60 Mo. 105; Adams *v.* Balch, 5 Me. 190; Inman *v.* Mead, 97 Mass. 315; Casler *v.* Shipman, 35 N. Y. 540; Yorks *v.* Steele, 50 Barb. (N. Y.) 404; Taylor *v.* Means, 73 Ala. 468; McCamant *v.* Roberts, 66 Tex. 260; Goodhue *v.* Daniels, 54 Iowa 19; Hardwick *v.* Hook, 8 Ga. 354; Smith *v.* Chapin, 31 Conn. 530; Stephens *v.* Jack, 3 Yerg. (Tenn.) 403; 24 Am. Dec. 583; Heyman *v.* Landers, 12 Cal. 107.

2. Barr *v.* Gratz, 4 Wheat. (U. S.) 220. In this case the court, by Story, J., said: "In our opinion, this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title and constituting a part of the muniments of his title. Without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed to the lessors of the plaintiffs, which was made under the authority of that decree; and, under such circumstances, to reject the proof of the decree would be in effect to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit because they were *res inter alios acta*. The rule seems to be this: That records have been admitted in evidence, in suits not between the same parties or privies, where, upon the facts of the trials and the recoveries in such records, the interests of others hung as incidents or consequences. And the production of such record is proof that the suit was brought, and the recovery had as therein set forth. But the consequence to others resulting from those facts apparent from the face of the record are to be etablished by appropriate evidence of such other facts as may be necessary to sustain the action or defense." See Key *v.* Dent, 14 Md. 98.

Debtors and Creditors.—In Candee *v.* Lord, 2 N. Y. 269; 51 Am. Dec. 294, the court by Gardiner, J., said: "In creating debts or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation of debtor and creditor against others. First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and, second, because the claims of other creditors upon

b. CORPORATION AND ITS MEMBERS.—There is no such privity between a corporation and the holders of its stock as to create a bar, if a suit is brought by either. This applies to the officers of the corporation as well as to the common stockholders, although the officers may be liable for malfeasance or nonfeasance in office when there would be no liability upon the stockholders. Where, however, some statutory provision fixes a personal responsibility upon the stockholders, there is a varied opinion as to the effect of a previous judgment against the corporation, and the stockholders in any case may be bound by judgment against the corporation.[1]

the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others; consequently, neither a creditor nor stranger can interfere in the *bona fida* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor does not arise until the latter has violated the tacit condition annexed to the debt; that he has done and will do nothing to defraud his creditors. Where, however, fraud is established, the creditor does not claim through the debtor but adversely to him, and by a title paramount which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped. It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or after contestation, is, upon all questions affecting the title of his property, conclusive evidence against his creditors to establish, first, the relation of creditor and debtor, between the parties to the record, and second, the amount of the indebtedness."

"But," the chancellor said, in Eamestón *v.* Lyde, 1 Paige (N. Y.) 637, "if he abandons the pursuit or lingers on the way before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance." And in Voorhees *v.* Seymour, 26 Barb. (N. Y.) 583, the court, quoting this, said: "The time-honored maxim holds good here as elsewhere: *Vigilantibus, non dormientibus, leges subveniunt.*" In the last case it was held that if two creditors stand on equal footing, the one first instituting proceedings will have the preference unless he sleeps upon his rights. See Chamberlain *v.* Bradley, 101 Mass. 188; 3 Am. Rep. 331; Fogg *v.* Plumer, 17 N. H. 112; Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152; Webb *v.* Den, 17 How. (U. S.) 577.

In Pile *v.* McBratney, 15 Ill. 314, the court said: "It is true, as a general rule, that a judgment or decree only binds parties and privies, and that, as against strangers, the record is only evidence of the fact that the judgment or decree has been pronounced, and of the legal consequences resulting from that fact. But there is a class of cases in which the judgment or decree is *prima facie* evidence against third persons of a fact that was necessarily found thereby. Where a fact may be established by proof of general reputation, such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding the same fact is *prima facie* evidence thereof against third persons. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation."

1. "Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it." Gaskill *v.* Dudley, 6 Met. (Mass.) 546; 39 Am. Dec. 750; Hudson *v.* Carman, 41 Me. 84; Stephens *v.* Fox, 83 N. Y. 313.

In Hawkins *v.* Glenn, 131 U. S. 329, the court said: "A stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member." Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67; Glenn *v.* Leggett, 135 U. S. 533; Hawes *v.* Anglo-Saxon Pet. Co., 101 Mass. 216; Hamilton *v.* Glenn, 85 Va. 901; Howard *v.* Glenn, 85 Ga. 238;

c. PARTNERSHIP AND ITS MEMBERS.—There is a privity of the strongest kind between the various members of a partnership, so far as relates to all matters within the scope of the partnership business. If any one member of a firm enters into any transaction with a third party, he is liable, and in addition to the liability he incurs, if he does not satisfy it, there may be an action over against the firm as such, and the other partners may be brought in upon a joint liability in a matter with which they had nothing to do and of which, in fact, they may be entirely ignorant. There are fewer bars to an action in cases of partnership and the members of it than in almost any other, and this is so because of the general liability existing between partners by which each is equally liable for the actions of all the others, so long as the transactions are kept within the reasonable scope of the partnership business.[1]

d. WITNESSES.—A judgment is not a bar against one simply because he was a witness in the case, even though he was interested therein. Yet the circumstances of his appearance may be such that he would be considered estopped from taking part in any further action involving the same issues. This would be true where he was a real and not a nominal party to the suit.[2]

Came *v.* Brigham, 39 Me. 35; McMahon *v.* Macy, 51 N. Y. 155.

"It is not strictly *res judicata* against the stockholders, but such strong evidence of the indebtedness that it can only be questioned on the ground of fraud or mistake." Merchants' Bank *v.* Chandler, 19 Wis. 434; Miller *v.* White, 50 N. Y. 137; Lowry *v.* Inman, 46 N. Y. 119; Wheeler *v.* Miller, 24 Hun (N. Y.) 541; Brewer *v.* New Gloucester, 14 Mass. 216; Milliken *v.* Whitehouse, 49 Me. 529; Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424; Farnum *v.* Ballard Vale Mach. Shop, 12 Cush. (Mass.) 507; Larrabee *v.* Baldwin, 35 Cal. 155; Handrahan *v.* Cheshire Iron Works, 4 Allen (Mass.) 396; Lamar Ins. Co. *v.* Gulick, 102 Ill. 41; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 33 W. Va. 761.

In Wadsworth Poor School *v.* Meetze, 4 Rich. (S. Car.) 55, the court said: "In law, there is no identity between a corporation and the persons who compose it. A conveyance to a corporation vests the estate in the corporation and not in the persons who compose it; and actions for wrongs to the estate of the corporation cannot be redressed by an action in the name of the individuals of whom it is composed." And see generally, Graham *v.* Boston, etc., R. Co., 118 U. S. 161; Moss *v.* McCullough, 5 Hill (N. Y.) 131; Clark *v.* Wolf, 29 Iowa 197; State *v.* Rainey, 74 Mo. 229; Lyman *v.* Faris, 53 Iowa 498; Morris Co. *v.* Hinchman, 31 Kan. 729; Brooks *v.* Hill, 1 Mich. 124; Squires *v.* Brown, 22 How. Pr. (N. Y.) 35. See also CORPORATIONS, vol. 4, p. 184.

1. Alexander *v.* State, 56 Ga. 479; Peters *v.* Sandford, 1 Den. (N. Y.) 224; *Ex parte* Higgins, 3 De G. & J. 33; Page *v.* Thomas, 43 Ohio St. 38; 54 Am. Rep. 788; Peck *v.* Williams, 113 Ind. 256; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Moores' Appeal, 34 Pa. St. 411; Sturges *v.* Beach, 1 Conn. 507; Leake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80; Williard *v.* Williard, 56 Pa. St. 127; Sharpe *v.* Davis, 76 Ind. 17; Lauffer *v.* Cavett, 87 Pa. St. 479; Meily *v.* Wood, 71 Pa. St. 488; 10 Am. Rep. 719; Saunders *v.* Reilly, 105 N. Y. 12; 59 Am. Rep. 472; Davis *v.* Delaware, etc., Canal Co., 109 N. Y. 47; Donellan *v.* Hardy, 57 Ind. 393; Stadler *v.* Allen, 44 Iowa 198. See generally PARTNERSHIP, vol. 17, p. 824.

2. Yorks *v.* Steele, 50 Barb. (N. Y.) 397, where suit was brought against a sheriff for the possession of a horse by one claiming the ownership, the horse having been taken on execution against a third person as judgment debtor, and the action resulted in a judgment for the claimant, it was held that the judgment debtor, against whom the execution had been issued under which the horse had been taken, was not debarred

from bringing an action against the successful claimant for the possession of the horse by the fact that he was a witness for the sheriff in the first action, because he was not in privity with the sheriff, was not a party to the record, and had no right to control the proceedings or appeal from the judgment. The court, by Johnson, J., said: "Why, then, should he be bound by the adjudication? It was not a judgment against him in any sense, nor upon any right or interest which would subject him to an action for a recovery over, as in case of a failure of title upon the sale of chattels. But, besides all this, that was an action like this, to recover the possession of the horse merely from the sheriff, and all that was there necessarily determined was that the defendant had at the time the right of possession as against the sheriff. Upon what the case turned we do not know. We can readily imagine a case in which such a judgment might have been rendered without determining the question whether the plaintiff here was at the time the real owner of the property as between him and this defendant. But, however that may be, it is plain, so far as appears, that the plaintiff has never yet had his day in court on the question of his title. There is nothing which proves or tends to prove that the present plaintiff defended, or had any right to defend, the former action. It is claimed by the defendant's counsel that the sheriff, who was defendant in the former action, was, in a legal sense, the agent or trustee of the present plaintiff in regard to the property, if it was really his. But this clearly is not so in any such sense as to make this plaintiff a party in that action, either in form or substance. The sheriff, who was defendant in the former action, was the agent of this plaintiff's adversary, and was acting under a power not derived from this plaintiff but given to him by the law for the purpose of taking the plaintiff's property from him by force, if necessary, and against his will. They were not in privity as master and servant or principal and agent. The plaintiff here was under no obligation, legal or moral, to defend the sheriff in that action, and had no legal right to do so, or even to interfere with it in any way whatever."

"It is a general if not universal principle that an action and judgment between two persons shall not bind or affect a third person who could not be admitted to make a defense, to examine witnesses, or to appeal from the judgment. . . . It is of no consequence, *prima facie*, that the plaintiff was a witness for the defendant in the action brought by this defendant. He had no right as a witness to examine or cross-examine other witnesses, or to call other witnesses, who might have a better knowledge of the facts than himself. In short, as a mere witness, he had no charge or control of the case whatever. And supposing the judgment was erroneous for any reason, he had no right of appeal, and no standing by which he could be heard to correct the error." Wright *v.* Andrews, 130 Mass. 149; Schroeder *v.* Lahrman, 26 Minn. 87; Parker *v.* Moore, 59 N. H. 454; Hobbs *v.* McLean, 117 U. S. 567; Blackwood *v.* Brown, 32 Mich. 104; Leinkauff *v.* Munter, 76 Ala. 194; Case *v.* Reeve, 14 Johns. (N. Y.) 79; McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65; 52 Am. Rep. 6; Castle *v.* Noyes, 14 N. Y. 329; Wilkinson *v.* Thigpen, 71 Ga. 497; Goodnow *v.* Litchfield, 63 Iowa 275; Stryker *v.* Goodnow, 123 U. S. 527; Folger *v.* Palmer, 35 La. Ann. 743; Brady *v.* Brady, 71 Ga. 71; Hale *v.* Finch, 104 U. S. 261; Thrasher *v.* Haines, 2 N. H. 443; Wilkie *v.* Howe, 27 Kan. 518; Cannon River Mfg. Assoc. *v.* Rogers, 42 Minn. 123; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9; Shay *v.* McNamara, 54 Cal. 169; Harmon *v.* Auditor, 123 Ill. 122; Cole *v.* Favorite, 69 Ill. 457; Graham *v.* Boston, etc., R. Co., 118 U. S. 161; Barney *v.* Dewey, 13 Johns. (N. Y.) 224; 7 Am. Dec. 372.

In Stevens *v.* Sabin, 20 N. H. 532, a suit was brought against a deputy sheriff for not safely keeping property under attachment. As the attachment in question was subject to a prior one where the amount to be paid had been varied, the point at issue was the measure of damages. As the prior damages were reduced without the aid or assistance of the second plaintiff, it was claimed he could not benefit by the reduction of such prior damages. But the court said that "the review reversed the original judgment and the judgment obtained by the review took the place of the original judgment. It was obtained upon a new trial of the issue, and must be regarded as the only judgment existing so far as regards the matter in issue. The entire absence of the plaintiff's interposition in prose-

e. LIENS AND ADVERSE HOLDINGS.—As to liens, the parties are not to be regarded as privies, but as strangers, and a suit to bind them must make them parties. Liens ordinarily take precedence in the order of their priority. In case of a mortgage, a foreclosure may remove subsequent liens, such as attachments. It is of importance that every holder of a lien should jealously guard and protect his rights. A partition is exceptional; hostile third parties need not come in and contest, even though they have notice, or indeed are parties of record.[1]

III. ISSUES—1. General Rule.—There are principal and subordinate or collateral issues, as well as many incidental and trivial matters upon which the court may merely give *dicta* or throw out

cuting the review cannot, as has been intimated, preclude his taking an obvious advantage to himself in which the review has resulted; nor is that advantage to be incumbered by any accounting with the defendant for the pains and expenses that he incurred in prosecuting the review. He did not do it at the request of the plaintiff, nor is there anything in the cause to warrant us in saying that he did not do it for purposes wholly foreign to the plaintiff's interests, although the result has been incidentally favorable to them. For whatsoever purpose or from whatsoever motive the act was done, we are bound only to know that its conclusive effect was to reduce the judgment and thus to exonerate the property to that extent; that the plaintiff being entitled to an interest in that property subject to the judgment of Lovell and wife, it is the final judgment, and not that which was reversed and vacated, that must indicate the amount of their incumbrance; that this reduction of the judgment having been procured by the defendant, without the privity or request of the plaintiff, does not preclude the latter from taking advantage of it, and is a full answer to any claim on the defendant's part to retain out of the fund a recompense or reimbursement on account of the incidental advantage which the plaintiff has derived from his voluntary act."

1. Cook *v.* Allen, 2 Mass. 466; Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 448; Hall *v.* Harris, 11 Tex. 303; Foltz *v.* Wert, 103 Ind. 404; Wells *v.* Benton, 108 Ind. 585; Walke *v.* Moody, 65 N. Car. 599; Gay *v.* Rainey, 89 Ill. 221; 31 Am. Rep. 76; Shirley *v.* Brown, 80 Mo. 244; Lippencott *v.* Wilson, 40 Iowa 425; Cook *v.* Dillon, 9 Iowa 407; 74 Am. Dec. 354; Blankenship *v.* Douglass, 26 Tex. 225; 82 Am. Dec. 608; Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165; 47 Am. Dec. 305; Jenkins *v.* Fahey, 73 N. Y. 355; Foxcroft *v.* Barnes, 29 Me. 128; Croghan *v.* Livingston, 17 N. Y. 218; Kenney *v.* Phillipy, 91 Ind. 511; Linehan *v.* Hathaway, 54 Cal. 251; Forder *v.* Davis, 38 Mo. 107; Dabney *v.* Manning, 3 Ohio 321; 17 Am. Dec. 597; Bobb *v.* Graham, 89 Mo. 200; Pentz *v.* Kuester, 41 Mo. 450; Jordan *v.* Van Epps, 85 N. Y. 427; Fleenor *v.* Driskill, 97 Ind. 27; Colton *v.* Smith, 11 Pick. (Mass.) 311; 22 Am. Dec. 375; Christy *v.* Spring Valley Water Works, 68 Cal. 73.

In Thrift *v.* Delaney, 69 Cal. 188, the court said: "There can be no doubt that a judgment rendered in an action to recover the possession of real property . . is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar, in another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession."

In cases of partition, see Gay *v.* Parpart, 106 U. S. 679; Embry *v.* Palmer, 107 U. S. 3; Burns *v.* Hodgdon, 64 Cal. 72; Phelan *v.* Tyler, 64 Cal. 80; Burroughs *v.* De Couts, 70 Cal. 361; Childs *v.* Hayman, 72 Ga. 791; Luntz *v.* Greve, 102 Ind. 173; Bryan *v.* Uland, 101 Ind. 477; Avery *v.* Payne, 12 Mich. 540; Eberts *v.* Fisher, 54 Mich. 294;

suggestions. Many of these questions are not considered issues which will be governed by the general rule relating thereto. There may be one or many issues in a case, and so far as they are directly passed upon, whether principal or subordinate, they will be regarded as adjudicated. There was formerly quite a variance among the authorities, but they have now practically come to an agreement upon the doctrine set forth in the Duchess of Kingston's case, which alleges that the issues actually tried and hence adjudicated may be shown by parol and need not necessarily appear from the record. If an issue is directly decided in a case it then becomes *res judicata.*[1]

De La Vega *v.* League, 64 Tex. 205; Brevoort *v.* Brevoort, 70 N. Y. 136; Monarque *v.* Monarque, 80 N. Y. 320.

See, generally, the various titles, such as MORTGAGE, vol. 15, p. 725; PARTITION, vol. 17, p. 660, etc.

1. The *New Hampshire* Supreme Court, in King *v.* Chase, 15 N. H. 15; 41 Am. Dec. 675, by Parker, C. J., says: "Any fact attempted to be established by evidence and controverted by the adverse party may be said to be in issue, in one sense; as, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried and may be the only matter put in controversy by the evidence. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleadings which is in issue. The declaration and pleadings may show specifically what this is or they may not. If they do not, the party may adduce other evidence to show what was in issue and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseisin* or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish the fact one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence it is direct and essential. But in another sense, it is incidental and collateral. It is not a matter necessary of itself to the finding of the issue. It may be made so by the parties. . . This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert, which may be involved in the first. It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded; and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied, if the plaintiff had title. That matter, then, is settled. The verdict and judgment may be given in evidence in another action for the oats between these parties, and is conclusive. But that is the extent of what was in issue. It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue. But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring

another suit for those oats, against the same defendant and, relying upon some other title than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is, that it is his title which has been tried, and he is concluded. The title, however, which has been tried was only his title to the oats. The question whether the mortgage was fraudulent came up only incidentally by reason of his relying on that as his title. But the mortgage was not a matter in issue. And while the finding is conclusive on the question of his title to the oats, it is neither conclusive nor evidence upon anything else, because nothing else was in issue.

"It appears from this, that it is important to apply the rule to what was in issue in the action, and not to what was merely incidentally in controversy in the evidence. It is important for the security of both parties. In this case there might be no great mischief if the rule were held to apply to matter in evidence instead of that in issue. The controversy in the former case seems to have been simple. If the parties were the same, the plaintiff might not complain of injustice if it were held that he is concluded by the finding of the former jury; having once submitted the controversy raised by the evidence, whether the mortgage was fraudulent, to a jury, and their verdict having shown that they must have so found it. But the principle applicable here must be applied in other cases where the matters in evidence are more complicated, and where it would admit of more doubt how the jury regarded the evidence and what facts they actually found. The rule then would have to be confined to what the jury must necessarily have found which would still shut out as evidence a great many matters actually tried, and as clearly found as anything found in relation to his mortgage, or it must in many cases be left to the testimony of jurors what facts they did find; which when applied to all the controverted matters of evidence arising in a cause, might lead to great uncertainty and confusion. On the other hand, it would be great injustice to the defendant in the former action to hold the matter in question was whether the plaintiff's mortgage was fraudulent or not; that this was tried in that case, and not his title generally; and that the plaintiff might commence another suit for the oats and set up another title, because no other title except the mortgage title had been tried. The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage, the defendant may show that the mortgage is fraudulent by the same evidence by which that matter was shown before."

In the Duchess of Kingston's Case, 2 Smith's Lead. Cases (6th Am. ed.) 663, which was a case for bigamy, the court said: "This is ranked as a case of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect: viz., that the party has failed in his proof, and that the libelant is free from all matrimonial contract, as far as yet appears, leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause, and if such sentence is no plea to a new suit there . . . it cannot conclude a court which receives the sentence from going into new proofs to make out that or any other marriage. So that, admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all, . . . such sentence can be no proof of anything to be inferred by argument from it, and therefore it is not to be inferred that there was no marriage at any time or place because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true." De Mora *v.* Concha, 29 Ch. Div. 268; Pittapur *v.* Garu, L. R., 12 Ind. App. 16; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 120; 15 Am. Dec. 256; Jenkins *v.* International Bank, 111 Ill. 462; Morse *v.* Elms, 131 Mass. 151; Kirkland *v.* Trott, 75 Ala. 321; Young *v.* Pritchard, 75 Me. 513.

"Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded."

Iowa Co. *v.* Mineral Point R. Co., 24 Wis. 124; Wilson *v.* Deen, 121 U. S. 525; Edgell *v.* Sigerson, 26 Mo. 583; Hanley *v.* Foley, 18 B. Mon. (Ky.) 519.

In Campbell *v.* Consalus, 25 N. Y. 613, the court said: "It must appear that the matter set up as a bar was in issue in the former suit. If a suit is brought to procure the entry of satisfaction of a mortgage, and the judgment is, that the mortgage is not satisfied because a specified amount remains unpaid, this judgment is, in subsequent controversies between the parties, conclusive that the mortgage was not paid, but the amount due is still unsettled, because it was not in issue in a former suit." Hunter *v.* Davis, 19 Ga. 413; Henry *v.* Davis, 13 W. Va. 230; Beeson *v.* Comly, 19 Mich. 103.

"The principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the litigation." Horton *v.* Hamilton, 20 Tex. 606; Watts *v.* Rice, 75 Ala. 289; Dickinson *v.* Hayes, 31 Conn. 417; Brady *v.* Pryor, 69 Ga. 691; Howard *v.* Kimball, 65 Me. 308; Eastman *v.* Cooper, 15 Pick. (Mass.) 276; 26 Am. Dec. 600; Lentz *v.* Wallace, 17 Pa. St. 412; 55 Am. Dec. 569.

"It is not the object of the suit, the recovery, or fruits of the litigation alone, that constitutes the estoppel, but the facts put in issue and found, upon which the recovery is based." Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187; Lee *v.* Kingsbury, 13 Tex. 68; 62 Am. Dec. 546; Phelan *v.* Gardner, 43 Cal. 306; Allen *v.* Butman, 138 Mass. 586; Hazen *v.* Reed, 30 Mich. 330; Walsh *v.* McIntire, 68 Md. 402; Whitman *v.* Merrill, 125 Mass. 127; Lea *v.* Lea, 99 Mass. 493; 96 Am. Dec. 772.

"The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon." Lewis' Appeal, 67 Pa. St. 153; Land *v.* Keirn, 52 Miss. 341; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 81; 25 Am. Dec. 539; Sewall *v.* Robbins, 139 Mass. 164; Almy *v.* Daniels, 15 R. I. 312; McCravey *v.* Remson, 19 Ala. 430; 54 Am. Dec. 194; Koon *v.* Mallett, 68 Iowa 205; Hymes *v.* Estey, 116 N. Y. 501; Houser *v.* Ruffner, 18 W. Va. 244; Smith *v.* Sherwood, 4 Conn. 276; 10 Am. Dec. 143; Stannard *v.* Hubbell, 123 N. Y. 520; Kidd *v.* Laird, 15 Cal. 161; 76 Am. Dec. 472; Lorance *v.* Platt, 67 Miss. 183; McCoy *v.* McCoy, 29 W. Va. 794; Fuller *v.* Eastman, 81 Me. 284; Putnam *v.* Clark, 34 N. J. Eq. 532; Miller *v.* Cook, 77 Va. 806; Chouteau *v.* Gibson, 76 Mo. 38; Logansport *v.* Humphrey, 106 Ind. 146; Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646; Wayne Co. *v.* Kennicott, 94 U. S. 498.

In Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733, the court said: "The estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." Illinois, etc., R. etc., Co. *v.* Cobb, 82 Ill. 183; Tuska *v.* O'Brien, 68 N. Y. 446; Dorris *v.* Erwin, 101 Pa. St. 239; Duncan *v.* Bancroft, 110 Mass. 267; Newell *v.* Carpenter, 118 Mass. 411; Pray *v.* Hegeman, 98 N. Y. 351; Oldham *v.* McIver, 49 Tex. 556; May *v.* Marks, 74 Ala. 249; Bunker *v.* Tufts, 57 Me. 417; Cabot *v.* Washington, 41 Vt. 168; Morgan *v.* Burr, 58 N. H. 470; Garwood *v.* Garwood, 29 Cal. 514; Scotland Co. *v.* Hill, 112 U. S. 183; Adams *v.* Cameron, 40 Mich. 506; State *v.* Ramsburg, 43 Md. 325; Pollard *v.* Hanrick, 74 Ala. 334; Fogler *v.* Clark, 80 Me. 237; Boyd *v.* Alabama, 94 U. S. 645.

If there is a general verdict every direct issue in the case is concluded. Hall *v.* Zeller, 17 Oregon 381; Blodgett *v.* Dow, 81 Me. 197; Bowen *v.* Mandeville, 95 N. Y. 237; New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239; Tierney *v.* Abbott, 46 Wis. 329.

A suit was brought upon a lost note, payable on demand, and a judgment was pleaded on a similar note except that it was payable one day after date. Here, even though it was intended to declare upon the same note, yet as there was a variance between the declarations the previous judgment was held no bar, and the court said that, "If, in the former action, the defense had been simply a failure of consideration or payment, it would not be ap-

parent, perhaps, on the face of the record, that the variance was material, as it would not prejudice the defendant. But when, as in this case, the issue was *non est factum*, then the variance was material, for it proved the defendant's answer and defeated the action." Pattison *v.* Jones, 27 Ind. 457.

In Foster *v.* The Richard Busteed, 100 Mass. 409; 1 Am. Rep. 125, the court said: "To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is offered in evidence. It is not enough that the question was in issue in the former suit; it must also appear to be precisely determined. Where, in the answer, various matters of defense are set forth, some of which relate to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, it is impossible to hold the decree a bar to future proceedings."

Insolvency.—If there has been a decree affirming the regularity and validity of the proceedings, a petition to set aside or annul them bars an application subsequent to that by any creditor or other person in interest, as it has already appeared that the previous proceedings have determined the *status* of the debtor. Merriam *v.* Sewall, 8 Gray (Mass.) 316; Begein *v.* Brehm, 123 Ind. 160; Palmer *v.* Hussey, 119 U. S. 96; Brown *v.* Covenant Mut. L. Ins. Co., 86 Mo. 51; Meckley's Appeal, 102 Pa. St. 536; Chapman *v.* Brewer, 114 U. S. 158; Head *v.* Daniels, 38 Kan. 1; Wiley *v.* Pavey, 61 Ind. 457; 28 Am. Rep. 677.

In Wilson *v.* City Bank, 17 Wall. (U. S.) 489, the court said: "First: That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due, and he is without just defense to the action, is necessary to show the preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act. Second: That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act. Third: That though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law. Fourth: That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition." Boynton *v.* Ball, 121 U. S. 457; Hill *v.* Harding, 130 U. S. 699; Bowman *v.* Harding, 56 Me. 559; Palmer *v.* Preston, 45 Vt. 159; 12 Am. Rep. 191; Bates *v.* Tappan, 99 Mass. 376; Dimock *v.* Revere Copper Co., 117 U. S. 559; Meckley's Appeal, 102 Pa. St. 536; Biddle's Appeal, 68 Pa. St.; 13 McAlpine *v.* Sweetser, 76 Ind. 78.

In Rahm *v.* Minis, 40 Cal. 421, the court said: "The defendant was entitled to plead his discharge in insolvency in bar of the action by supplemental answer. If the fact was pleaded, the judgment of the court is conclusive that the plaintiff was entitled to his judgment notwithstanding the alleged discharge in insolvency. If he omitted to plead the discharge in insolvency, the judgment is equally conclusive upon him, as it would have been had his defense been accord and satisfaction, payment, etc., which he had neglected to plead." Mount *v.* Manhattan Co., 41 N. J. Eq. 211; Lewis *v.* Sloan, 68 N. Car. 557; Thornton *v.* Hogan, 63 Mo. 143.

Attachments.—Where an attachment and judgment is had, a judgment for a trespass involving the same subject-matter will be barred. Walker *v.* Fuller, 29 Ark. 448; *In re* Pitman, 1 Curt. (U. S.) 186. A suit upon an attachment bond is not necessarily a bar, for the attachment may not have been prosecuted as it should or could have been. Sackett *v.* McCord, 23 Ala. 851; Pennoyer, etc. *v.* Neff, 95 U. S. 714; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308; Easterly *v.* Goodwin, 35 Conn. 273; 95 Am. Dec. 237.

In Duchess of Kingston's Case, 2 Smith Lead. Cas. (5th Am. ed.) 890, the court said: "Properly speaking, however, proceedings by attachment are not proceedings *in rem*, but against the interest of the defendant and those claiming under him in the thing attached. Thus, a judgment rendered on the attachment of a debt or fund, or of specific assets of any other description, will not be a bar to any other demand than that of the person against whom the attachment was issued and of those claiming under him, even if it consist in an adverse claim to the property attached, or grow out of its negotiation when it is a negotiable se-

curity." Megee *v.* Beirne, 39 Pa. St. 50; Kieffer *v.* Ehler, 18 Pa. St. 388; Myers *v.* Beeman, 9 Ired. (N. Car.) 116; Ormond *v.* Moye, 11 Ired. (N. Car.) 164; Barber *v.* Hartford Bank, 9 Conn. 407; Eastman *v.* Wadleigh, 65 Me. 251; 20 Am. Rep. 695; Easterly *v.* Goodwin, 35 Conn. 279; 95 Am. Dec. 237; Banta *v.* Wood, 32 Iowa 473; Kane *v.* Cook, 8 Cal. 449.

Paupers.—An adjudication of domicil or the confirmation of an order of removal is conclusive, and if an order is discharged or quashed it has no effect whatever. Rex *v.* Bentley, Burr. Sett. Cas. 426; West Buffalo *v.* Walker Tp., 8 Pa. St. 177; Brigham *v.* Fayerweather, 140 Mass. 411; Renovo *v.* Half Moon, 78 Pa. St. 301.

A former adjudication that a pauper has or has not a settlement in a place is conclusive on the question. Jennison *v.* West Springfield, 13 Gray (Mass.) 544; Cabot *v.* Washington, 41 Vt. 168; De Mora *v.* Concha, 29 Ch. Div. 268. But see Bethlehem *v.* Watertown, 47 Conn. 237; Cabot *v.* Washington, 41 Vt. 168.

Exemption.—Where property is exempt from levy a judgment, attachment, garnishee or trustee process can have no effect upon the title or create any lien thereon. The property is free and clear of any and all claims which may be made upon it, and this, too, if the exemption is not formally claimed. Wilson *v.* Stripe, 4 Greene (Iowa) 552; 61 Am. Dec. 138; Dumbould *v.* Rowley, 113 Ind. 353.

Holding for Officer.—In Dezell *v.* Odell, 3 Hill (N. Y.) 215; 38 Am. Dec. 628, the court by Cowen, J., said: "It may be conceded that had the defendant's claim been interposed at the time of the levy, and he had signed the receipt in terms without prejudice to his right, the question would have been open. The creditor would thus have been put upon his guard and enabled to seek for other property, on finding that his debtor had no title to that in question. Indeed, here was a course of action on the part of the receiptor directly calculated to influence the conduct of the creditor in a way prejudicial to his interests, unless we hold the receiptor. The officer, being induced to part with the possession or to forbear taking actual possession by the receiptor, recognizing his right and agreeing to take or hold for him was itself an injury; if we now let the defendant go free, we then have a clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. . . . The argument is that it should not be applied in favor of an officer coming under pretence of legal authority and demanding the property. It is thought the receiptor should be taken to have been coerced into the giving of a receipt as the only expedient for retaining the possession. I think otherwise. If a man have a title, an officer is no more, in respect to him, than a mere stranger. He may either use the necessary force to retain possession, or take the more usual and prudent course of an action at law for the wrongful seizure. In short, his remedies are in this respect the same as those of any other proprietor whose rights are improperly interfered with. The intendment against him is therefore the same as it would be against a man in possession of land taking a demise from an adverse claimant. It is not enough for him afterwards to show that he had a title. If he can show in addition that he was drawn into the admission of an adverse title by fraud, or perhaps by some gross mistake of fact, he may be able to defend himself. But by taking and holding he draws the onus of showing the fraud or mistake upon himself. The defendant below offered no proof of the kind; but, on the contrary, it is entirely apparent that the title which he proposed to set up at the trial was known to him at the time of the levy and receipt. The officer was, when he came to sell, for the first time apprised that the defendant had title. This was in general terms. At the trial he proposed to show that he had purchased it of a third person with his own funds. In short, his conduct may be summed up in this way: He had fraudulently deprived the creditor of possession through the officer, baffled him in his search for other property, and, in the use of all means for collecting his debt, drawn him by equivocal conduct into the expense of an action, and at the trial claims the whole as constituting a legal defense." Ladrick *v.* Briggs, 105 Mass. 508; Dewey *v.* Field, 4 Met. (Mass.) 381; 38 Am. Dec. 376; Welland Canal Co.

v. Hathaway, 8 Wend. (N. Y.) 480; Heath *v.* Keyes, 35 Wis. 668.

Breach of Warranty.—In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action. In such an action the complaint contained two counts: one upon a special contract for the sale and delivery of the goods; the other upon a claim for goods sold and delivered. The answer denied the contract, and the other allegations of the complaint; but set up a contract between the parties somewhat different, containing a guaranty as to quality, and alleging that the quality of the goods was not in accordance with the contract, and the breach was relied on as a complete defense. The evidence was introduced upon all the issues made by the pleadings. The trial court instructed the jury that "if the plaintiffs, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." Plaintiffs had verdict and judgment for the price. It was held that in a subsequent action by the defendants against plaintiffs, on the breach of warranty, for the difference in value between the goods delivered and those contracted for, the former suit was no bar, and that the matter in dispute, to wit, this breach of warranty, was not adjudged. Earl *v.* Bull, 15 Cal. 421. But where a party to an action, being fully apprised of his rights, suffers judgment to go against him when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery of the amount claimed, either in whole or in part, he cannot, in a subsequent proceeding at law or in equity, be allowed to re-agitate questions which were, or should have been, adjudicated at the former trial. Shelbina Hotel Assoc. *v.* Parker, 58 Mo. 327. See also, Lowenstein *v.* McIntosh, 37 Barb. (N. Y.) 257.

Issues Omitted.—In Seddow *v.* Tutop, 6 T. R. 607, the court by Lord Kenyon said: "If a party attempt, on the trial of his action, to prove a demand against the defendant, and fail, he cannot set it up again on a second action; but if he can clearly show that he omitted to give any evidence of his demand in the action, he is not concluded from doing so afterward. In truth, this is a question of great delicacy. We must take care not to tempt persons to try experiments in one action, and when they fail, to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action are the same. He ought to show, beyond all controversy, that the second is a different cause of action from the first, in which he failed. In this case it is clearly shown that this demand was not inquired into in the former action." Thorpe *v.* Cooper, 5 Bing. 116; Newell *v.* Carpenter, 118 Mass. 411.

Failure in First Action.—In Stafford *v.* Clark, 2 Bing. 377; 9 E. C. L. 437, the court said: "If plaintiff, having several causes of action against the defendant, on the trial offers evidence on these causes, and fails for want of sufficient evidence to sustain some of them, he cannot bring another action for those causes of action on which he failed. Where the plaintiff fails to recover all that he is entitled to for want of some proof on the first trial, he should move to set aside the verdict that he has obtained."

Points in Issue Not Decided.—A judgment is conclusive as to all questions within the issue, though they may not all be directly contested. Thomas *v.* Hite, 5 B. Mon. (Ky.) 590; Schmidt *v.* Zahensdorf, 30 Iowa 498; Colwell *v.* Bleakley, 1 Abb. App. Dec. (N. Y.) 400; Underwood *v.* French, 6 Oregon 66; 25 Am. Rep. 500.

Questions Which Could Not Have Been Adjudicated.—A judgment is not conclusive as to such questions, whether there was any attempt to pass upon them or not. In Fifield *v.* Edwards, 39 Mich. 264, the court by Cooley, J., said: "There can be no bar if the demand to which, by their evidence, the parties directed the attention of the court, and which the court rejected, was not within the issue and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his

day in court and an opportunity to establish his claim. The fact that a suit has been instituted and evidence produced is of no importance whatever; in fact, the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff, in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor." Athearn *v.* Brannan, 8 Blackf. (Ind.) 440; Harding *v.* Hale, 2 Gray (Mass.) 399; Jenkins *v.* Harrison, 66 Ala. 345; Teal *v.* Terrell, 48 Tex. 491; Baker *v.* Rand, 13 Barb. (N. Y.) 152; Spoors *v.* Coen, 44 Ohio St. 497.

Evidence of What Was Adjudicated.—In Clemens *v.* Clemens, 37 N. Y. 59, the court said: "The estoppel extends, beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings; and that while there exists a strong presumption that the judgment covers every matter in the issues and apparently settled by the judgment, yet that this presumption may be overcome by clear proof that no evidence was given as to that by the plaintiff, or that defendant failed to take advantage of some defense which he might have made available."

Parol evidence is admissible to show what was settled in the former suit. Wilson *v.* Deen, 121 U. S. 525; Russell *v.* Place, 94 U. S. 606; Strauss *v.* Meertief, 64 Ala. 299; 38 Am. Rep. 8; Gates *v.* Bennett, 33 Ark. 475; Taylor *v.* Dustin, 43 N. H. 493; White *v.* Chase, 128 Mass. 158; Foye *v.* Patch, 132 Mass. 105; Estill *v.* Taul, 2 Yerg. (Tenn.) 467; 24 Am. Dec. 498; Greenlee *v.* Lowing, 35 Mich. 63; Emery *v.* Fowler, 39 Me. 326; 63 Am. Dec. 627; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580; Legrand *v.* Rixey, 83 Va. 862; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 80; 25 Am. Dec. 539; Davis *v.* Brown, 94 U. S. 423; Walker *v.* Chase, 53 Me. 258; Bridge *v.* Gray, 14 Pick. (Mass.) 55; 25 Am. Dec. 358; State *v.* Morton, 18 Mo. 53; Driscoll *v.* Damps, 16 Wis. 106; Phillips *v.* Berick, 16 Johns. (N. Y.) 136; 8 Am. Dec. 229; Spradling *v.* Conway, 51 Mo. 51; Wood *v.* Faut, 55 Mich. 185; Butler *v.* Suffolk Glass Co., 126 Mass. 512; Lorillard *v.* Clyde, 122 N. Y. 41. In Hickerson *v.* Mexico, 58 Mo. 61, the court said: "It is undoubtedly true that in some of the earlier cases, it was decided that a judgment was conclusive as to all facts arising upon the record which were, or might have been, passed upon. But it is now generally, if not universally conceded, that parol evidence may be received for the purpose of showing whether a question was determined in a former suit. The record may first be put in evidence and then it may be followed by such parol evidence as may be necessary to give it effect, or show on what issue it was granted. When a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. In order to show by evidence *aliunde* that the matter is *res judicata*, it must appear, not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination. If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where matters could have been proved in the former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown." Briggs *v.* Wells, 12 Barb. (N. Y.) 567; Chrisman *v.* Harman, 29 Gratt. (Va.) 494; 26 Am. Rep. 387; Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 533.

In Russell *v.* Place, 94 U. S. 606, the court by Field, J., said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to the question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example,

2. Directness—*a*. THE RULE.—The rule in regard to the issue, if decided, is that judgment must be rendered directly upon the point. There are various requirements to make it possible, and some modifications where the point can be as surely and squarely decided in some way other than a direct one. All questions to be passed upon or concluded by the judgment must be open for consideration, must bear upon the case, and not relate merely to collateral or incidental facts. All questions irrelevant to the case are left open as if they had not been touched upon in the case;

if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." Wilson *v.* Deen, 121 U. S. 525; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733; Hood *v.* Hood, 110 Mass. 463; Newton Mfg. Co. *v.* White, 47 Ga. 400; Follansbee *v.* Walker, 74 Pa. St. 306; Sweet *v.* Maupin, 65 Mo. 65; Whitehurst *v.* Rogers, 38 Md. 503; Post *v.* Smilie, 48 Vt. 185; Robinson *v.* Lane, 14 Smed. & M. (Miss.) 161; Supples *v.* Cannon, 44 Conn. 424; Dunlap *v.* Glidden, 34 Me. 519; King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675; Bottorf *v.* Wise, 53 Ind. 32; Clemens *v.* Murphy, 40 Mo. 121.

In Cunningham *v.* Foster, 49 Me. 68, the court said: "It is a well settled rule of law that if a verdict, award, or judgment of a court of competent jurisdiction, has apparently, but not necessarily, covered the very ground on which a second action is brought, though this would be, perhaps, *prima facie* evidence that the matter had passed *in rem judicatam*, yet it may still be averred, and proved by parol testimony, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided, in the former case."

Burden of Proof.—In accordance with general rules, the one offering parol evidence of any bar to an action must sustain the burden of proof. Morgan *v.* Burr, 58 N. H. 470; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518; Hanchey *v.* Coskrey, 81 Ala. 149; White *v.* Simonds, 33 Vt. 178; 78 Am. Dec. 620; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Pruitt *v.* Holly, 73 Ala. 369.

Evidence Admissible.—Any proper and satisfactory evidence may be allowed to show scope of former judgment. Legrand *v.* Rixey, 83 Va. 862; Miller *v.* Deaver, 30 Ind. 371; Rockwell *v.* Langley, 19 Pa. St. 502; Greenlee *v.* Lowing, 35 Mich. 63.

Issues Withdrawn.—Matters which would otherwise have been considered as concluded by the decision of the case may be withdrawn, so that they are in no way affected by the decision. Smith *v.* Talbot, 11 Ark. 666; Finnegan *v.* Campbell, 74 Iowa 158; Sterlman *v.* Sites, 35 Pa. St. 216; Glenn *v.* Savage, 14 Oregon 567; Wood *v.* Corl, 4 Met. (Mass.) 203; Croft *v.* Steele, 6 Watts (Pa.) 373; Thompson *v.* Myrick, 24 Minn. 4. For a variety of cases bearing upon different phases of issues see the following cases: Newell *v.* Carpenter, 118 Mass. 416; Kidd *v.* Laird, 15 Cal. 182; 76 Am. Dec. 472; Bissell *v.* Kellogg, 60 Barb. (N. Y.) 627; Hasbrouck *v.* Lounsbury, 26 N. Y. 598; Herring *v.* Hoppock, 15 N. Y. 411; Chapman *v.* Smith, 16 How. (U. S.) 132; Goodrich *v.* Chicago, 5 Wall. (U. S.) 566; Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. (U. S.) 137; Oleson *v.* Merrihew, 45 Wis. 397; Mallory *v.* Mariner, 15 Wis. 178; Ingraham *v.* Camden, etc., Water Co., 82 Me. 335.

Law or Fact.—It is a question of fact for jury to pass upon evidence offered of the identity of actions, but so far as the record is used to determine the matter the court considers it as a question of law. Himmelman *v.* Sullivan, 40 Cal. 125; McQueen's Appeal, 104 Pa. St. 595; 49 Am. Rep. 592; Lilley *v.* Adams, 108 Mass. 50; Thomas *v.* Joslin 36 Minn. 1; Chaffe *v.* Morgan, 30 La. Ann. 1307; Louisiana Levee Co. *v.* Louisiana, 31 La. Ann. 250; Hanley *v.* Foley, 18 B. Mon. (Ky.) 519.

likewise matters purely and entirely incidental or extraneous. Anything thrown out or ruled out as not pertinent to the case is not barred as against any subsequent action where it might be competent. Any incidental or temporary decision pending the trial of the principal cause of action is not finally settled thereby. Any matters which are not involved in the judgment, and do not and need not appear in the findings, are not concluded from subsequent action. Questions of evidence, of fraud, or collusion and an almost infinite variety of points may be heard and even passed upon by court or jury, yet if they have no relevancy, pertinency and real connection with the issues of the case as set forth by the pleadings, the verdict is not binding as to them against a second action. Some subordinate matters which are closely related with the main question may necessarily be settled by the judgment. There are many points which are elementary and present as the foundation upon which to base an action, which, though not passed upon directly, yet are impliedly and as a matter of course disposed of in a way to make it possible to consider the main question. Any conclusions which a court or jury must evidently have arrived at in order to have reached the judgment or verdict rendered will be fully concluded. If a decision could not have been reached without passing upon certain minor matters, and yet the decision is reached, it is a fair and inevitable conclusion that those matters have been considered and passed upon, and that the conclusion as to them was such as it must be to harmonize with the subsequent judgment depending so largely upon them. The rule is that whatever is directly adjudged and also whatever must be established in fact, and in any way made the subject of proof conclusive, before any such judgment could have been rendered, is binding upon parties, privies or others not strangers, so long as the judgment stands, and all these matters involved are then subject to the doctrine of *res judicata.* All matters included in a judgment which have not really and legally been passed upon, inasmuch as they are outside of, beyond and foreign to the issue, are surplusage and have no effect.[1]

1. Blair *v.* Bartlett, 75 N. Y. 150; 31 Am. Dec. 455; State Ins. Co. *v.* Waterhouse, 78 Iowa 674; Pray *v.* Hegeman, 98 N. Y. 351; Auld *v.* Smith, 23 Kan. 65; Henry *v.* Davis, 13 W. Va. 230; Scully *v.* Lowenstein, 56 Miss. 652; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311; De Graaf *v.* Wyckoff, 118 N. Y. 1; School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Peck *v.* Goodberlett, 109 N. Y. 180; Carter *v.* James, 13 M. & W. 137.

The court in Sawyer *v.* Woodbury, 7 Gray (Mass.) 502; 66 Am. Dec. 518, by Shaw, C. J., said: "This estoppel is attended with conditions and qualifications which must be strictly observed without which it would sometimes operate harshly by excluding the truth. It must be an averment of a fact precisely stated on one side, and traversed on the other, and found by the jury affirmatively or negatively in direct terms, and not by way of inference."

In Harris *v.* Harris, 36 Barb. (N. Y.) 88, the court said: "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to mat-

ters of claim and defense." Cromwell *v.* Sac Co., 94 U. S. 351; Case *v.* Beauregard, 101 U. S. 688; Waugh *v.* Chauncey, 13 Cal. 12; Tuska *v.* O'Brien, 68 N. Y. 446; Gaines *v.* Kennedy, 53 Miss. 103; Jacobson *v.* Miller, 41 Mich. 90; Bates *v.* Spooner, 45 Ind. 489; Clemens *v.* Clemens, 37 N. Y. 59.

A failure to plead defenses which must be pleaded to make them available, is a bar to any attempt to take advantage of them. Kelly *v.* Donlin, 70 Ill. 378; Dewey *v.* Peck, 33 Iowa 242; Malloney *v.* Horan, 49 N. Y. 115; 10 Am. Rep. 335; Murrell *v.* Smith, 51 Ala. 301; Burwell *v.* Knight, 51 Barb. (N. Y.) 267.

In Dutton *v.* Woodman, 9 Cush. (Mass.) 261; 57 Am. Dec. 46, Bigelow, J., said: "We consider the rule well settled in this commonwealth that to render a former judgment between the same parties admissible in evidence in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. And parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action; because in many cases, the record is so general in its character that it could not be known without the aid of such proofs what the precise matter in controversy was at the trial of the former action."

In Rhoades *v.* Selin, 4 Wash. (U. S.) 716, the court said: "Where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally in question before another court, the sentence in the former is conclusive upon the latter as to the matter directly decided, not only between the same parties, but against strangers, unless it can be impeached on the ground of fraud or collusion." Sloan *v.* Price, 84 Ga. 171; Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572; Girardin *v.* Dean, 49 Tex. 243; Thompson *v.* McKay, 41 Cal. 221; Berry *v.* Whidden, 62 N. H. 473; Howe *v.* Lewis, 121 Ind. 110; Woodhouse *v.* Duncan, 106 N. Y. 527; Kenyon *v.* Wilson, 78 Iowa 408; Schuler *v.* Israel, 120 U. S. 506; Sauls *v.* Freeman, 24 Fla. 209; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9; Ellis *v.* Clarke, 19 Ark. 420; 70 Am. Dec. 603.

In the Duchess of Kingston's Case, Everest & Strode, Estoppel 421, the court said: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive, between the parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Williams *v.* Williams, 63 Wis. 58; 53 Am. Rep. 253; Morse *v.* Elms, 131 Mass. 151; Brigham *v.* Fayerweather, 140 Mass. 411; Vaughan *v.* Morrison, 55 N. H. 580; Florida Cent. R. Co. *v.* Schutle, 103 U. S. 118; Coffey *v.* U. S., 116 U. S. 436; Ford *v.* Ford, 68 Ala. 141; Attorney Gen'l *v.* Chicago, etc., R. Co., 112 Ill. 520; Faught *v.* Faught, 98 Ind. 470. But see King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675.

In Towns *v.* Nims, 5 N. H. 263; 20 Am. Dec. 578, an action was brought on a contract for labor for one year, at a fixed price, but the defendant discontinued labor after one month. In a previous action for a month's pay the entire contract for the year was pleaded. The jury found for the former plaintiff, the defendant in second suit; so that either an entire contract for a year never existed, or it had in some way become null. As the question of the contract had been decided, was it a bar? It is enough to say the contract was not directly in issue in the first case. The court by Richardson, J., said: "The question in the action which Nims (the laborer) brought against Towns (the employer) was, whether there was an implied contract to pay for a month's labor. Towns attempted

b. QUESTIONS OF TITLE.—The same principle is true in regard to real actions. The judgment concludes the issues which are really and directly involved in the case, but may leave others open. A judgment in each species of action is final only for its

to prove that the month's labor had been done under a subsisting contract to labor a year, which contract had never been performed by Nims. This, if proved, was a decisive answer to the action, because if the labor had been done under a subsisting special contract to labor for a year, there could be no implied contract. Yet, still the question in issue was, whether there was an implied contract, and, although it must now be concluded that the jury found that there was no special contract, this conclusion is a mere inference from what they did find. They found there was an implied contract, and we infer from this finding that they could not have been satisfied of the existence of a special contract. It is therefore clear that the existence of the special contract was not directly tried in the first suit, and whatever may have been the finding of the jury in that case in relation to the special contract, it can conclude nothing in this case."

In U. S. *v.* Arredondo, 6 Pet. (U. S.) 729, the court said: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under acts done, and the public or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is taken." See generally, Gilbert *v.* Thompson, 9 Cush. (Mass.) 348; Lentz *v.* Wallace, 17 Pa. St. 415; 55 Am. Dec. 569; Haight *v.* Keokuk, 4 Iowa 199; Chouteau *v.* Gibson, 76 Mo. 38; Miller *v.* Bernecker, 46 Mo. 194; Lucas *v.* San Francisco, 28 Cal. 591; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 127; 15 Am. Dec. 256; Greathead *v.* Bromley, 7 T. R. 456.

In Cromwell *v.* Sac Co., 94 U. S. 351, the court by Field, J., said: "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defense never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it

own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trepass committed. In real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is, in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land than the other.[1] In actions of tort and contract the directness of the issues is important, and in all real actions, trespasses, ejectments and other actions where the title to land may be questioned, those issues are adjudicated which had to be directly decided. A general issue may not settle questions of easement, rights of way and the like. In determining title, the question of former conveyance comes up, but the fact of prior conveyances is one matter; their validity is an entirely different issue. If the title is proven in an action of trespass, that is finally settled, and if another action is brought for trespass upon the same land, the question of title is concluded. The title is always a fundamental issue in actions for trespass, ejectment, obstruction of passageway, rent and all actions where the case would fail if it did not appear that the party bringing the action had title or was authorized in some way to act for one who had. Except that there are generally prior issues to be considered, the general principles are the same in actions having to do with land as in all others where the rule of directness of issue is settled and has been already considered.[2]

is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

1. Outram *v.* Morewood, 3 East 346.

2. In Fulton *v.* Hanlow, 20 Cal. 485, the court by Norton, J., reviewed the doctrine of the directness of the issue, alluded to the confusion in the authorities, and said: "The question now before the court is the title to the demanded premises. Was that the point directly in issue in the former action? In order to determine this question, we must consider what was the direct or ultimate object of that action; what was the injury complained of, and what was the relief asked, or which could be obtained by the judgment of the court. It was not an action to quiet title. The complaint did not ask for a judgment that the title was in the plaintiff or not in the defendant; it did not ask a judgment that the title had not passed by the sale, or that a title would not pass by the deed threatened to be executed in pursuance of the sale. The injury complained of was that the threatened deed would be a cloud upon the plaintiff's title; and the only relief sought was an injunction to prevent the doing of the act by which the cloud would be created. It was directly alleged in the complaint and denied by the answer, that the deed would create a cloud upon the title; and this allegation and denial formed the precise issue that was to be decided, and upon the decision of which the judgment was to turn, and the relief asked was to be granted or refused.

In such an action, the only point that could be directly in issue, and be the exact matter settled by the judgment of the court was, whether the threatened deed would be a cloud upon the title. Various reasons were given or facts stated in the complaint to show that the deed ought not to be executed; but whatever may appear to have been the views of the courts upon these facts, they did not, either of them, constitute the direct point in issue. The only judgment that could be given was merely a granting or denial of an injunction; and the only direct point upon which that judgment could be based was that the deed would or would not be a cloud upon the plaintiff's title. Although the judgment of a court of equity is equally effectual as *res judicata* as that of a court of law, the nature of their different jurisdictions must be considered in order to determine what was the exact matter decided. It is suggested that whether or not the deed in question would constitute a cloud upon the title is a conclusion of law, and that the decision of this point would not determine any fact litigated by the parties. Without inquiring whether this should be considered a conclusion of law, or a resulting fact, it is sufficient to say that it is a point put in issue by the pleadings, and upon which the judgment proceeds and rests. Whether the preceding facts alleged are true or not is immaterial, if, being true, they do not make out a case for the exercise of equity jurisdiction. If in order to determine the case as one of equity jurisdiction, it was only necessary to decide whether or not the deed would be a cloud upon the title, that is the direct point in issue, and the only one that becomes *res judicata* by force of the judgment."

See also Spooner *v.* Davis, 7 Pick. (Mass.) 148; Parker *v.* Standish, 3 Pick. (Mass.) 288; Standish *v.* Parker, 2 Pick. (Mass.) 21; 13 Am. Dec. 393.

Trespass.—In Arnold *v.* Arnold, 17 Pick. (Mass.) 4, the court by Putnam, J., said: "The error lies at the threshold. It is in the assumption that the same cause of action was tried in the action of trespass *quare clausum* upon an issue of soil and freehold, and the same cause of action was tried in the writ *sur disseisin* upon the issue of *nul disseisin*, as is to be tried in the writ of right; an assumption which must strike the mind of every lawyer as extraordinary. Who needs to be told that the plea of soil and freehold would be supported by a defendant who should prove an estate for his life in the *locus in quo*, or that in a writ of right the right of property is in question? Who needs to be told that the action of trespass *quare clausum fregit*, and the various writs of entry, and the judgments upon them, affect only the right of possession and entry, and do not conclude as to the mere right? It will be answered that nobody doubts these general propositions, but that the pleas in bar aver that the very right of property was tried in the actions of trespass and entry before brought, and that the now demandant had no legal impediment from giving in evidence, in support of the issues joined in those actions, the same matters that he now has to establish his right of property. But how does that appear judicially? The plea avers that the fact submitted to the jury in the action of trespass, and on which the jury found a verdict, was the mere right of property. The issue to be tried was upon the soil and freehold, and the verdict followed the issue. If the verdict had been upon the mere right of property, it could not have warranted a judgment for the prevailing party on the issue of soil and freehold, for it might be that the plaintiff might have the right of property, and his adversary might have the right of possession. A man entitled to the herbage for the current season might well maintain trespass *quare clausum fregit* against the owner of the fee. The judgment in such action would conclude the parties as to the rights drawn into question by the pleadings, but no farther . . . In every action the verdict is conclusive as to the subject-matter of the suit, and any matter particularly put in issue and found by the jury; and it will not be competent for a party in any other action to deny or plead anything to the contrary of what has been so found and adjudicated. Thus, if a demandant in a writ of entry has a judgment against him by the tenant in a writ of trespass *quare clausum fregit* upon an issue of soil and freehold, he cannot be permitted to say, that at the time when the action of trespass was commenced, the soil and freehold were not in the tenant. So, if the tenant in a writ of right had before prevailed against the demandant in a writ of

entry on a plea of *nul disseisin*, the demandant cannot be permitted to say, contrary to the verdict, that the tenant had disseised him. He must go to trial upon his writ of right with the disadvantages arising from the former verdict against him; and he must establish his right of property in the writ of right (which he was not called upon to establish in the former action) or he cannot prevail." Baker *v.* Barclift, 76 Ala. 414; May *v.* Marks, 74 Ala. 249; Strang *v.* Moog, 72 Ala. 460; Mueller *v.* Henning, 102 Ill. 646; Jenkins *v.* International Bank, 111 Ill. 462; Garwood *v.* Garwood, 29 Cal. 514; Fuller *v.* Eastman, 81 Me. 284; Poole *v.* Dilworth, 26 W. Va. 583; Morgan *v.* Burr, 58 N. H. 470; Painter *v.* Hogue, 48 Iowa 526; Adams *v.* Cameron, 40 Mich. 506. Cabot *v.* Washington, 41 Vt. 168; Heath *v.* Frackleton, 20 Wis. 320.

In White *v.* Chase, 128 Mass. 158, the court, by Morton, J., said: "It is true that an action of tort in the nature of trespass *quare clausum fregit* does not necessarily involve anything more than the right of possession, that the title or seisin may not be in issue, and that the judgment in such action is conclusive only upon the matter adjudged, which is the right of possession." Johnson *v.* Morse, 11 Allen (Mass.) 540; Morse *v.* Marshall, 97 Mass. 519. But the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury or court, or a referee, the verdict or finding, and the judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel. Eastman *v.* Cooper, 15 Pick. (Mass.) 276; 26 Am. Dec. 600; Dutton *v.* Woodman, 9 Cush. (Mass.) 255; 57 Am. Dec. 46; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733. Stapleton *v.* Dee, 132 Mass. 279; Illinois, etc., R. Co. *v.* Cobb, 82 Ill. 183; Parker *v.* Hotchkiss, 25 Conn. 321; Sewall *v.* Haskins, 26 Vt. 209; Howard *v.* Albro, 100 Mass. 236; Hargus *v.* Goodman, 12 Ind. 629; Masten *v.* Olcott, 101 N. Y. 153; Graves *v.* Campbell, 74 Tex. 576; Hall *v.* Wooters, 54 Tex. 231; Moran *v.* Mansur, 63 N. H. 377; Keyser *v.* Sutherland, 59 Mich. 455; Casler *v.* Shipman, 35 N. Y. 533.

"Where the declaration in an action of trespass, or trespass on the case, for an injury to land, alleges that the plaintiff was well seised and possessed of the land as a good indefeasible estate in fee simple, it is sufficient on the trial for the plaintiff to show a lawful possession at the time when the injury was committed. And a judgment for the plaintiff in such a case, upon a general issue, is conclusive evidence between the parties and their privies, only of such title as the plaintiff was bound to prove." 1 Hilliard on Torts 498.

In Keyser *v.* Sutherland, 59 Mich. 455, the court said: "A judgment in trespass cannot, in our opinion, under any circumstances, be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the same. If the contrary doctrine was supported by the common law, it would not be in harmony with the laws of this State, but inconsistent with our statutes, in relation to the actions of ejectment and trespass. A party is entitled to but one trial, as a matter of right, in this State, in an action of trespass, while in ejectment, upon payment of costs of the first trial, he has an absolute right to another trial, of which no court can debar him. How. Stat., § 7822; Dennison *v.* Genesee Co., 37 Mich. 285. A single judgment in ejectment is not necessarily final for any purpose. Rice *v.* Auditor Gen'l, 30 Mich. 13. A judgment in trespass, on the contrary, is final unless set aside by the trial court or reversed by an appellate one. If a judgment in trespass, therefore, was permitted to be a bar to a subsequent action of ejectment by the same parties, and involving the title to the same premises, the statutory right of new trial, granted in ejectment, could easily be nullified. The plaintiff, at liberty to choose his form of action, would bring trespass and settle his title in one trial. Under the decisions in the State of *New York*, holding a judgment in trespass *quare clausum* a bar to an action of ejectment, we find it quite 'common for a party, claiming the title to land and the right of possession, and who desires to avoid the delays consequent upon the statutory right to new trials in an action of ejectment to bring his action in trespass and so establish his right to the title and possession upon a single trial.' Shumway *v.* Shumway, 42 N.

3. Certainty—*a.* GENERAL STATEMENT OF RULE.—It is not only necessary that every issue should be directly adjudicated upon in order to subject it to the doctrine of *res judicata*, but such issues must be clear, definite and certain. It must be known

Y. 145. We do not feel justified in thus rendering the right, granted by the law-making power, to a new trial in ejectment abortive and ineffective, as has been done in our sister State. We should hesitate thus to annul this statute, even if the well-settled rule of the common law authorized the bar contended for in this case."

Ejectment.—In Stevens *v.* Hughes, 31 Pa. St. 381, the court said: "Originally an ejectment was only an action of trespass by a lessee against one who had ousted him of his term. The plaintiff recovered damages, not possession. The freehold was not in controversy, certainly not directly. . . . A verdict and judgment in trespass *quare clausum fregit*, upon any plea, could not operate as an estoppel in ejectment. Such having been the original nature of the action, any number of successive ejectments could be brought, and the tenant in possession could never protect himself by the result of a former trial. . . . The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, not to the character of the subject-matter of the controversy. The apparent exception nowhere else exists. That there is no charm about land as land which relieves it from the operation of the general rule that a judgment between the same parties or their privies, directly upon the same matter, is the end of controversy—that it is an estoppel against future litigation of the same question—is evident from the fact that a fine, a common recovery, a simple judgment in a writ of right, and, indeed, judgments in any real action, have always been held to be conclusive. Whatever, therefore, may be the rule in regard to ejectments, there is neither reason nor authority for the position that a judgment upon a traverse of a plea of *liberum tenementum* in trespass does not estop a party to it, or his privy, from again asserting or denying the same freehold in a subsequent action of trespass." Britton *v.* Thornton, 112 U. S. 526; Boyle *v.* Wallace, 81 Ala. 352; Minke *v.* McNamee, 30 Md. 294; 96 Am. Dec. 577; Sutton *v.* Dameron, 100 Mo. 141; Avery *v.* Fitzgerald, 94 Mo. 207; Jones *v.* DeGraffenreid, 60 Ala. 145; Hinton *v.* McNeil, 5 Ohio 509; 24 Am. Dec. 315; Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 531; 17 Am. Dec. 98; Glover *v.* Stamps, 73 Ga. 209; 54 Am. Rep. 870; Allen *v.* Salinger, 103 N. Car. 14; Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187; Benton *v.* Benton, 95 N. Car. 559; Craig *v.* Watson, 68 Ga. 114; Doak *v.* Wiswell, 33 Me. 355; Foster *v.* Evans, 51 Mo. 39; Marshall *v.* Shafter, 32 Cal. 176; Satterlee *v.* Bliss, 36 Cal. 489; Chase *v.* Irvin, 87 Pa. St. 286.

In Hawley *v.* Simons, 102 Ill. 115, the court said: "A judgment at law, whether in an ejectment suit or in some other form or action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again." See also Hodges *v.* Eddy, 52 Vt. 434; Hill *v.* Cooper, 8 Oregon 254; Dawley *v.* Brown, 79 N. Y. 390; Johnson *v.* Pate, 90 N. Car. 334; Lamar *v.* Knott, 74 Ga. 379; Regan *v.* West, 115 Ill. 603; DeAmesti *v.* Castro, 49 Cal. 325; Moring *v.* Ables, 62 Miss. 271; 52 Am. Rep. 186.

The rule as to conclusiveness in ejectment has been more or less variable. Miles *v.* Caldwell, 2 Wall. (U. S.) 35; Gibson *v.* Lyon, 115 U. S. 439; Brownsville *v.* Cavazos, 100 U. S. 138; Cagger *v.* Lansing, 64 N. Y. 417; Stephenson *v.* Wilson, 50 Wis. 95; Gordinier's Appeal, 89 Pa. St. 528. For various other cases involving title, see Thoms *v.* Sewell, 30 La. Ann. 359; Jackson *v.* Wood, 3 Wend. (N. Y.) 36; Hymes *v.* Estey, 116 N. Y. 501; Johnson *v.* Hurst (Ky. 1888), 9 S. W. Rep. 828; Bisel *v.* Tucker, 121 Ind. 249; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 308, 581; Jarboe *v.* Severin, 112 Ind. 572; Fogg *v.* Plumer, 17 N. H. 115;

just what has been passed upon by the court, for the informal and incidental submission of collateral questions to the court will not conclude them and bar their subsequent submission to a judicial tribunal. No degree of probability will be sufficient; the issue must be removed from the questionable domain of uncertainty and doubt and become distinct and certain in its character. The assumption or presumption must be inevitable, when there are two or more possible courses open in rendering a decision. Absence of doubt and the presence of certainty is of vital importance.[1]

b. WHAT IS NECESSARILY WITHIN THE ISSUE.—If it is desired to avoid barring any issues which may be raised in a subsequent case, care should be taken to have the court or jury render a verdict only upon the issues particularly involved, and not give a general verdict. If a case includes a variety of issues which are submitted to the jury at the trial, with sufficient evidence to establish them, it will be *prima facie* proof that all these issues have been determined, and included in, and concluded by, the verdict, if such verdict is a general one which presumably covers every

Moran *v.* Mansur, 63 N. H. 377; Springs *v.* Schenck, 106 N. Car. 153; Avery *v.* Fitzgerald, 94 Mo. 207; Kimmel *v.* Benna, 70 Mo. 52; Foster *v.* Evans, 51 Mo. 39; Ekey *v.* Inge, 87 Mo. 493; Blessing *v.* Edmonson, 49 Tex. 333; Hodges *v.* Eddy, 52 Vt. 431.

1. Independent School Dist. *v.* Stone, 106 U. S. 183; Kelly *v.* State, 25 Ohio St. 567; Martin *v.* Gernandt, 19 Pa. St. 130; Calkins *v.* Copley, 29 Minn. 471; Burlen *v.* Shannon, 99 Mass. 207; 96 Am. Dec. 733; German *v.* Clark, 71 N. Car. 417; Chamberlain *v.* Gaillard, 26 Ala. 504; Dickenson *v.* Hayes, 31 Conn. 427; Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 333.

In Vaughan *v.* O'Brien, 39 How. Pr. (N. Y.) 519, the court by Bockes, J., said: "We are asked to infer that the judgment was pronounced on the merits—that is, to infer that the adjudication proceeded on a particular ground, and, basing our conclusion upon such inference, to hold the adjudication conclusive. As I understand the rule, 'a particular ground of adjudication can never be inferred and relied upon as conclusive' to bar a right of action. A judgment is no evidence of a matter to be inferred from it by action. The rule is that it must clearly and distinctly appear from the record, or from proof *aliunde* the record when such proof is admissible, that the particular ground urged was considered and passed upon (or was available) in the former suit, or the adjudication will not operate as a bar in a subsequent action. The onus of proof, too, in such case, is on the party who relies on the adjudication as a bar."

Stafford *v.* Elliott, 59 Ga. 837; Glazier *v.* Streamer, 57 Ill. 91; Tillotson *v.* Mitchell, 111 Ill. 518; Johnson *v.* Owen, 33 Iowa 512; Mojarrieta *v.* Saenz, 80 N. Y. 547; Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639; Vanbibber *v.* Beirne, 6 W. Va. 168; Burgess *v.* Seligman, 107 U. S. 20; Roach *v.* Brannon, 57 Miss. 490; Lawrence University *v.* Smith, 32 Wis. 587; Blodgett *v.* Perry, 97 Mo. 263; Ripley *v.* Billings, 46 Vt. 542; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 475; Rust *v.* Bennett, 39 Mich. 521; Bennett *v.* Dean, 41 Mich. 472; Barron *v.* Cobleigh, 11 N. H. 559; Walker *v.* Carleton, 97 Ill. 582; Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Keating *v.* Orne, 77 Pa. St. 89; Moors *v.* Albro, 129 Mass. 9; Turnipseed *v.* Hudson, 50 Miss. 429; 19 Am. Rep. 15; Ship Belle of the Sea *v.* Johnson, 20 Wall. (U. S.) 421.

Where uncertainty arises in a deed, either as to what it conveys, or in what respect it is irregular or void, the doubt involved presents the application of the doctrine of *res judicata*. Chase *v.* Walker, 26 Me. 558.

point involved in the case. Such a verdict and the consequent judgment may be pleaded as a bar to a subsequent case involving issues included in the prior suit, the burden being upon the plaintiff to show that some issue or issues apparently included in the verdict were only partially or temporarily barred, or that any such bar has lost its force, or has in some way been removed, the general rule applying that the burden of proof of any fact is upon the one pleading it. All those matters are considered within the issue which must necessarily have been either expressly or impliedly decided, in order to have arrived at any judgment in the case. Consequently, it is not essential that every matter must be formally and directly contested, if it be so connected with the main issue that it could not be ignored or lost sight of. It is usual, not to say unavoidable, to extend as far as possible the effect of the general principle that everything is to be regarded as certain which could be made certain.[1]

1. In Munday *v.* Vail, 34 N. J. L. 418, it was held that a decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding.

See also Gates *v.* Preston, 41 N. Y. 113; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Blair *v.* Bartlett, 75 N. Y. 150; 31 Am. Dec. 455; Fithian *v.* Monks, 43 Mo. 502; Seamster *v.* Blackstock, 83 Va. 232; Reynolds *v.* Stockton, 43 N. J. Eq. 211; Wood *v.* Stanberry, 21 Ohio St. 142; Day *v.* Vallette, 25 Ind. 43; 87 Am. Dec. 353; White *v.* Simonds, 33 Vt. 180; 78 Am. Dec. 620.

In Steinback *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655, the court, by Earl, J., said: "If the plaintiff could succeed in reforming this contract it would not change its scope or effect. It would, according to the decisions in this State, be the same contract still. The only change would be that the plaintiff would have direct written proof of what, without such reformation, would rest upon construction and inference based upon other provisions in the contract and upon parol evidence. The contract would then be in its legal effect the same as that the plaintiff sought to enforce in the former suit. It is admitted by the plaintiff that the judgment against him in the former action is a bar to any recovery in this, unless he can change the contract. Now, what was determined in that action? Clearly that the contract between the parties was such as was embraced in the policy declared on and proved in that action, and that the plaintiff had violated the policy by keeping the fireworks. Now, he seeks to establish in this action that that was not the contract and to have it reformed; and that the real contract between the parties was not violated. He sought, in that action, to recover for his loss, and gave all the proof he could that he was entitled to recover. Now, without alleging that there was more than one contract of insurance, or more than one title or right upon which to base a recovery, he seeks to recover for the same loss."

Where a board of supervisors were judicially required to issue bonds on a subscription, to aid a railroad corporation, and a suit was subsequently brought to compel execution and delivery of the bonds, the defense was that the company had not conformed to the act by which authority for the subscription, etc., had been obtained. The question of the subscription having arisen in a former action where the subscription was forced, the doctrine of *res judicata* applied. People *v.* San Francisco, 27 Cal. 675. In this case the court by Rhodes, J., said: "It will be seen on reading the act that the board could not be required and were not permitted to subscribe to the capital stock of the company unless a majority of those voting upon the proposition voted in favor of the subscription. It was absolutely essential, therefore, in instituting proceedings against the board, to compel the subscription to be made that the relator should allege, and if it was

c. BURDEN OF PROOF.—The burden of proof is upon the defendant who pleads *res judicata* because of a former judgment, to set up that judgment and to show what was determined by it, and what is common to the subsequent action, and the proof must be clear, certain and convincing. In other words, it must be proven with such care and exactness as any other material facts would require.[1]

denied by the board, to prove on the trial, that a majority of the votes cast were in favor of the proposition. The fact must have been found by the court or have been admitted by the pleadings; in other words, the facts must have been alleged and must have been true, for it was the fundamental fact in the action; and in its absence the court could not have rendered the judgment that was pronounced commanding the board to make the subscription and issue the bonds. The matter thus became *res judicata*, and not subject to be again litigated in another action between the same parties." Bell *v.* Merrifield, 109 N. Y. 202; House *v.* Mullen, 22 Wall. (U. S.) 42; Bassett *v.* Connecticut River R. Co., 150 Mass. 178; Lenton *v.* Crosby, 61 Iowa 401; Hoyle *v.* Farquharson, 80 Mo. 377; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 588; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341.

In Russell *v.* Place, 94 U. S. 606, the court said: "If there be any uncertainty in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

No proceeding can be brought for the reformation of a contract after the same party has already brought suit on the contract according to its original terms. Washburn *v.* Great Western Ins. Co., 114 Mass. 175; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498; 33 Am. Rep. 655.

Corporate Seal.—Where an action of *assumpsit* brought against a railroad company was defeated by the defense that the contract sued on was under its corporate seal, and the corporation was afterwards sued in an action of covenant on the same contract, it was held that it could not, in the second suit, deny that the contract had been duly sealed by it as its deed. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307.

Scope.—It has been held that every issue in any way connected with a cause of action, whether pleaded, proven, susceptible of proof or not, has been adjudicated. Thompson *v.* Myrick, 24 Minn. 4, and the New York decisions, *supra*.

In a suit where the question arose whether a party was a trustee or not, and the question may have been upon either of two grounds decided in the negative, the conclusiveness of the judgment is destroyed. Aiken *v.* Peck, 22 Vt. 260.

Promissory Notes.—In Hooker *v.* Hubbard, 102 Mass. 239, it was held that a defendant, who, in an action against him on a promissory note, has availed himself by plea and proof of a subsequent note for the same amount as given in renewal thereof, and has prevailed on that defense, is estopped to set up, in defense against an action by the same plaintiff on the second note, that he gave it upon a condition which never was fulfilled; but not to set up a total or partial failure or want of consideration in the original note. The court said: "Where a conclusion is indisputable, and could only have been drawn from certain premises, the premises are equally indisputable with the conclusion. The judgment already rendered between these parties established that the former note was paid by this one. To be valid as a payment it must necessarily have been valid as a note. That it was so, had therefore been judicially determined, and could not be controverted again."

Stewart *v.* Stebbins, 30 Miss. 81. As a warranty is of no consequence except it has a bearing on a contract of sale of personal property, if an action is brought upon the warranty it concludes the question as to the sale, and so affirms it that any question arising thereon has already become *res judicata*. Barker *v.* Cleveland, 19 Mich. 235.

1. Agnew *v.* McElroy, 10 Smed. &

4. Materiality.—Issues to be affected by the doctrine of *res judicata* must be of material importance; if they are frivolous in their nature, or if irrelevant to the case they are in effect immaterial. If it does not matter whether a point is contested or not, or if it need not be passed upon in the case in hand, it is immaterial. A judgment is conclusive only upon matters directly in dispute and actually decided, and in order to prove these matters material it must appear from the judgment that they were directly adjudicated or that the judgment as given could not have been thus rendered unless some preliminary and perhaps minor matters had been adjudicated, or at least assumed to be settled in a certain way. When a judgment is rendered it only bars subsequent action on matters actually settled by it. It does not matter if the judgment appears to determine other points; if it really does not, they are not barred. Any questions incidentally considered, when irrelevant and not having any direct bearing upon the issue in the case, are not concluded.[1]

M. (Miss.) 552; 48 Am. Dec. 772, in which the court said: "A party who brings a second action must not leave it to nice investigation to see whether the two causes are the same. He ought to show beyond doubt that the second is a different cause of action from the first in which he failed."

In Lawrence *v.* Hufft, 10 Wend. (N. Y.) 85; 25 Am. Dec. 539, a doubtful decision in a former cause prevented a conclusion by the former judgment.

In Foster *v.* The Richard Busteed, 100 Mass. 409; 1 Am. Rep. 125, the court said: "To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is offered in evidence. It is not enough that the question was in issue in the former suit; it must also appear to be precisely determined. Where, in the answer, various matters of defense are set forth, some of which relate to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, it is impossible to hold the decree a bar to future proceedings." See also Attorney-Gen'l *v.* Chicago, etc., R. Co., 112 Ill. 520; Sheldon *v.* Edwards, 35 N. Y. 286; Hanchey *v.* Coskrey, 81 Ala. 149; Rockwell *v.* Langley, 19 Pa. St. 502; Baxter *v.* Aubrey, 41 Mich. 13; Chrisman *v.* Hannan, 29 Gratt. (Va.) 494; 26 Am. Rep. 387; White *v.* Simonds, 33 Vt. 178; 78 Am. Dec. 620; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Morgan *v.* Burr, 58 N. H. 470; National Bank *v.* Bryant, 13 Bush (Ky.) 419; Hall *v.* Zeller, 17 Oregon 381; Cummings *v.* Colgrove, 25 Pa. St. 150.

1. Nichols *v.* Marsh, 61 Mich. 509; De Graff *v.* Wyckoff, 118 N. Y. 1; Coit *v.* Tracy, 8 Conn. 276; 20 Am. Dec. 110; Church *v.* Chapin, 35 Vt. 231; Dickinson *v.* Hayes, 31 Conn. 423; Tams *v.* Lewis, 42 Pa. St. 411; Woodgate *v.* Fleet, 44 N. Y. 13; People *v.* Johnson, 38 N. Y. 65; 97 Am. Dec. 770; Hibshman *v.* Dulleban, 4 Watts (Pa.) 192.

In Burlen *v.* Shannon, 99 Mass. 202; 96 Am. Dec. 733, the court, by Foster, J., said: "The ground taken by the defendant is, that a general verdict and judgment are conclusive in favor of the prevailing party as to all issues actually involved in the trial, upon which any evidence was offered and which were submitted to the jury, although it may not appear that they were the very points on which the decision turned, and it may be doubtful in favor of which party any one of them was found, and even whether as to all of them, the jury came to any conclusion. Such, however, is not, in our opinion, the true doctrine of the law. A judgment and verdict are conclusive only as to those facts which were necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered. . . . But such an inference must be inevitable or it cannot be drawn. These, we understand, to be the limitations of the rule accord-

5. Indivisibility—*a.* IN GENERAL.—Issues are to be considered in their entirety, and cannot be separated and subdivided, thus permitting a multiplicity of actions; even if different remedies are available, the parties must elect their remedy and pursue it, and if they have been unsuccessful or have unwisely chosen their action, they cannot choose another or add another remedy to the one adopted. It is the policy of the law to avoid repetition of suits, and where one action will include all there is in a case, any further action will be discountenanced and discouraged. A recovery on one part of an action, if it be split up, will bar a suit for the whole, or any part.[1]

ing to all the well-considered authorities ancient and modern."

"Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded." Iowa Co. *v.* Mineral Point R. Co., 24 Wis. 124; Hunter *v.* Davis, 19 Ga. 413; Taylor *v.* Dustin, 43 N. H. 493; Henry *v.* Davis, 13 W. Va. 230; Lee *v.* Kingsbury, 13 Tex. 68; 62 Am. Dec. 546; Rogers *v.* Higgins, 57 Ill. 244; Beeson *v.* Comly, 19 Mich. 103.

"A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleadings, which collateral facts are such as are offered in evidence to establish the matters or facts in issue." Garwood *v.* Garwood, 29 Cal. 521; Chesapeake, etc., Co. *v.* Gittings, 36 Md. 276; Phelan *v.* Gardner, 43 Cal. 306; Henry *v.* Davis, 13 W. Va. 230; Glass *v.* Wheeliss, 24 La. Ann. 397; Duncan *v.* Bancroft, 110 Mass. 267; Almy *v.* Daniels, 15 R. I. 312; Dorris *v.* Erwin, 101 Pa. St. 239; Lea *v.* Lea, 99 Mass. 493; 96 Am. Dec. 772; Dutton *v.* Woodman, 9 Cush. (Mass.) 255; 57 Am. Dec. 46; Land *v.* Keirn, 52 Miss. 341; Howard *v.* Kimball, 65 Me. 308; Kitson *v.* Farwell, 132 Ill. 327.

1. In Goodrich *v.* Yale, 8 Allen (Mass.) 454, the court, by Dewey, J., said: "In what cases a former judgment in a suit between parties shall operate as a bar to further litigation by a new action, is a question of much nicety. The difficulty arises, not so much for the want of certain general rules upon the subject, as from the doubt as to which class of cases the one which is the subject of inquiry belongs. A suit and judgment thereon for the same cause of action are said to be absolutely conclusive as a bar to a second action. But it is equally true that the mere fact that the plaintiff has in his former action declared for the same causes of action does not necessarily present a case where the judgment in such action shall be a bar to a subsequent suit for one of the causes set forth in the former. Thus, in Seddon *v.* Tutop, 6 T. R. 607, where the plaintiff in the former action had in different counts declared on a promissory note and for goods sold, and the defendant being defaulted, the plaintiff, upon executing his writ of inquiry, gave no evidence on the count for goods sold and took his damages for the promissory note only, it was held that the judgment was no bar to his recovering in a subsequent action for the goods sold. But in that case there were two distinct demands set forth in distinct counts and not in the least blended together. It is also true, as held in the case of White *v.* Moseley, 8 Pick. (Mass.) 356, that where there are distinct torts, committed consecutively, but in different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second action for the other act.

"On the other hand, the case of Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331, strongly asserts and applies the principle that a judgment in a civil suit upon a certain alleged cause of action is conclusive upon the parties in relation to it, and that another suit for the same cause cannot be maintained for any purpose whatever. In that case the subjects of damages in the different actions were wholly distinct, the one being the loss of a shop, and the second the loss of a

dwelling house. No damages had been claimed or recovered in the first action for the loss of the house; but the loss of each was caused by the same tortious act, and one recovery for any part of the damages caused by such act was held a bar to a second action. It was said by the court in that case: 'It would be unjust, as well as in violation of the fixed rule of law, to allow the plaintiffs to subject the defendant to the hazard and expense of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof.' . . . The case is barren of all evidence as to the nature of the grievance complained of except as shown by the record of the proceedings in the two actions. We turn, therefore, to the declaration in the first action. We find there that the tort complained of was that on divers days the defendant entered upon the real estate of the plaintiffs without right and raised the gates of their dam, and caused the water to flow down and waste their reservoir, and at times to flood their mill, and then, by shutting the gate, took away the water from their mill. Here the acts causing the damages are stated as a series of connected acts occurring while the defendant was a trespasser by entering without right upon the real estate of the plaintiffs, and the answers of the defendant so treated the same, denying the allegation that he had entered upon the plaintiffs' real estate without right, and denying all the acts alleged as wrongs connected with the trespass. Upon the issues thus joined, that case, as appeared by the copy of the record, was referred to the assessors. 'To assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court.' They did subsequently report that the damages sustained by the plaintiffs in this case amounted to the sum of $125, and judgment was thereupon entered for that sum. It is now said that this judgment is not a bar to the present action, because the court did not submit to the assessors this specific ground of damage, and did not direct them to assess damages for shutting down the plaintiffs' gate. This is true; but it is equally true that they did not direct the assessors to assess damages for causing the water to flow down and waste their reservoir, and at times flood their mill; all of which were alleged as injuries.

"The order seems to have first declared a reference of the case. Then follows an imperfect description of the alleged causes of damages. There is no apparent reason for naming one portion of the case rather than another as the subject for the assessment of damages. It was certainly not a full recital of the plaintiffs' alleged grievances. But if it were to be taken that the assessors only reported upon one of the alleged facts, it is quite clear that it was open to the plaintiffs to ask for a recommittal for that cause and under an enlarged rule. But the plaintiffs were content to take these damages as the damages for the entire trespasses that were set forth in their declaration. But however this may be, we are of opinion that the judgment in the former action must be a bar to the present one, inasmuch as the cause of action, as presented by the plaintiffs on the record, is one and the same. The grievance complained of was an illegal entry upon the plaintiffs' land, and by various acts . . . rendering their mill valueless. The particular acts causing the damage to the mill are not set forth as connected with a separate entry, but as a series of acts, all of which are combined as causing the injury to the mill. It is true that the declaration does not restrict them to the proof of a single entry; but it does connect all these acts with each and every entry. It fails to state them as separate causes of action, or to allege them to have occurred at different times." See also Gibson *v.* Hale, 57 Tex. 405; Burritt *v.* Belfy, 47 Conn. 323; 36 Am. Rep. 79; Kaehler *v.* Dobberpuhl, 60 Wis. 256; Webster *v.* Lee, 5 Mass. 334; Warren *v.* Comings, 6 Cush. (Mass.) 103; Goodrich *v.* Yale, 97 Mass. 15; Baird *v.* U. S., 96 U. S. 430; Hayward *v.* Clark, 50 Vt. 612; Converse *v.* Colton, 49 Pa. St. 346; Goddard *v.* Selden, 7 Conn. 521; O'Neal *v.* Brown, 21 Ala. 482; Nightingale *v.* Scannell, 6 Cal. 506; 65 Am. Dec. 525; Oliver *v.* Holt, 11 Ala. 574; 46 Am. Dec. 228; Clark *v.* Jones, 1 Den. (N. Y.) 519; 43 Am. Dec. 706; Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 475; 93 Am. Dec. 631; Alcott *v.* Hugus, 105 Pa. St. 350; Stevens *v.* Lockwood, 13 Wend. (N. Y.) 644; 28 Am. Dec. 492; Borugesser *v.* Harrison, 12 Wis. 544; 78 Am. Dec. 757; Sykes *v.* Gerber, 98 Pa. St. 179; Willard *v.* Sperry, 16 Johns. (N. Y.) 121; Badger

b. ACTIONS EX CONTRACTU.—If all the items which go to make up a claim are connected or have to do with one and the same cause of action, the issue is considered as indivisible. Actions for goods sold, labor performed, money had and received, and the like are considered as founded on an entire and inseparable transaction. It may be said generally that any and all claims arising under any single contract should be considered together as one transaction.[1] Where a compromise is entered into, even

v. Titcomb, 15 Pick. (Mass.) 409; 26 Am. Dec. 611; Ingraham *v.* Hall, 11 S. & R. (Pa.) 78.

In Simes *v.* Zane, 24 Pa. St. 243, where a pledge given by a debtor had been wrongfully appropriated by the creditor, the court, by Lowrie, J., said: "The improper application of the pledge gave the plaintiff the right to reclaim it in several forms of action; but he cannot sue for the price received for a part of them, and for the other part in kind, or for damages for the wrongful conversion of it. . . . If he did not recover enough, the fault was the adoption of an incomplete remedy or in the result of it, and he cannot sue again. The record of the first proceeding is necessarily conclusive that he had received then the full amount, whatever may be the fact, and he could have no pretense of right to recover now for more than the value of what remained unsold. But, the rule that prevents him from splitting up his cause of action into several fragments takes away his right of action for the residue entirely. Having once claimed by action or defense a part of an undivided subject-matter, the law allows him no remedy for the other part, else there would be no limit to litigation." See also South, etc., Ala. R. Co. *v.* Henlein, 56 Ala. 368; Marlborough *v.* Sisson, 31 Conn. 332; Davies *v.* Mayor, etc., of N. Y., 93 N. Y. 250; Nathans *v.* Hope, 77 N. Y. 420; O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496; Berringer *v.* Payne, 68 Ala. 154; Stark *v.* Starr, 94 U. S. 477; Baird *v.* U. S., 96 U. S. 430; O'Beirne *v.* Lloyd, 43 N. Y. 248; Phillips *v.* Berick, 16 Johns. (N. Y.) 136; 8 Am. Dec. 229; Marble *v.* Keyes, 9 Gray (Mass.) 221; Moulton *v.* Trask, 9 Met. (Mass.) 577; Derby *v.* Johnson, 21 Vt. 17. See also ACTIONS —*Splitting of Actions*, vol. 1, p. 184*c*.

In Sykes *v.* Gerber, 98 Pa. St. 179, the court says: "The general rule is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant and expose him to double costs. This is so far modified that where claims are distinct, though all might have been recovered in the first action, it will not bar a second for one which was not demanded or proved in the first. But where the contract is entire, and there is a recovery upon such a contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy." Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Hittick *v.* Traun, 27 Ala. 562; 62 Am. Dec. 778; Clark *v.* Brott, 71 Mo. 473; Perry *v.* Dickerson, 85 N. Y. 345; 39 Am. Dec. 663; Sparhawk *v.* Wills, 6 Gray (Mass.) 163; Gilman *v.* Foote, 22 Iowa 560; Howe *v.* Bradley, 19 Me. 31; Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; 24 Am. Dec. 60; Byrnes *v.* Byrnes, 102 N. Y. 4.

In Dutton *v.* Shaw, 35 Mich. 431, the court said: "The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious greivances." Smith *v.* Jones, 15 Johns. (N. Y.) 229.

1. Brazier *v.* Banning, 20 Pa. St. 345; Gates *v.* Goreham, 5 Vt. 317; 26 Am. Dec. 303; Perry *v.* Dickerson, 85 N. Y. 345; 39 Am. Rep. 663; Shaw *v.* Beers, 25 Ala. 449; Sykes *v.* Gerber, 98 Pa. St. 179; Burritt *v.* Belfy, 47 Conn. 323; 36 Am. Rep. 79; Ahl *v.* Ahl, 60 Md. 207; Rosenmueller *v.* Lampe, 89 Ill. 212; 31 Am. Rep. 74; Wehrly *v.* Morfoot, 103 Ill. 183; Booge *v.* Pacific R. Co., 33 Mo. 212; 82 Am. Dec. 160; Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 475; 93 Am. Dec. 631; Perry *v.* Mills, 76 Iowa 622; O'Connor *v.* Varney, 10 Gray (Mass.)

though the contract is entire, the whole matter may not be settled and a right of action may still be open.[1] The principle of indivisibility applies to book and running accounts.[2] If an accounting is had by the court and a final decree is made where the whole account should have been considered and decided, the decree is a bar to any further accounting.[3] If a contract is made

231; Wright *v.* Butler, 6 Wend. (N. Y.) 284; 21 Am. Dec. 323; Inslee *v.* Hampton, 11 Hun (N. Y.) 156.

In Phillips *v.* Berick, 16 Johns. (N. Y.) 140; 8 Am. Dec. 229, the court by Spencer, J., said: "There is no case or *dictum* which requires the party to join in one suit several and distinct causes of action. It is true the court may, to prevent vexation and cost, consolidate, under some circumstances, several suits brought and pending at the same time. It is in the election of the plaintiff, if he has distinct causes of action, to sue upon all or any of them when he pleases; and he has the further election to unite in one suit, under certain restrictions not now necessary to be stated, several causes of action, but the defendant cannot compel him to do this. If, then, the plaintiff is not bound to unite in one suit distinct causes of action, and if he has a right to elect to proceed by separate suits, and obtain judgment on one of his causes of action, upon what principle is it that he shall lose his deferred cause of action merely because it resembles the one on which he has obtained judgment. The law is not so inconsistent in its provisions, nor indeed so unjust, as to deny to the party the means and the right of showing that, although there is a resemblance between the causes of action, and they belong to the same family, yet that there is not an identity, but that in truth they are distinct and different."

1. O'Beirne *v.* Lloyd, 43 N. Y. 248; Secor *v.* Sturgis, 16 N. Y. 548; Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7; Carleton *v.* Woods, 28 N. H. 290; Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; Denny *v.* Williams, 5 Allen (Mass.) 1; Perry *v.* Harrington, 2 Met. (Mass.) 368; 37 Am. Dec. 98; Eldred *v.* Hazlett, 38 Pa. St. 16; Minor *v.* Walter, 17 Mass. 237; Smith *v.* Chilton, 84 Va. 840; Hunt *v.* Brown, 146 Mass. 253.

2. Buck *v.* Wilson, 113 Pa. St. 423; Magruder *v.* Randolph, 77 N. Car. 79; Corey *v.* Miller, 12 R. I. 337; Lucas *v.* Le Compte, 42 Ill. 303; Pittman *v.* Chrisman, 59 Miss. 126; Oliver *v.* Holt, 11 Ala. 574; 46 Am. Dec. 228; Memmer *v.* Carey, 39 Minn. 458.

In Badger *v.* Titcomb, 15 Pick. (Mass.) 409; 26 Am. Dec. 611, the court by Wilde, J., said: "The defendant next contends that a running account for goods sold, money paid, etc., is an entire demand, incapable of being split up for the purpose of bringing separate suits, and the case of Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; 24 Am. Dec. 60, is relied on in support of this position, and if that case was rightly decided, we think it would maintain the present defense. But we know of no principle of law, nor of any other decided case, on which the decision in that case can be sustained. It is said that the law abhors a multiplicity of suits, and this seems to be the only ground of the decision in that case. But that reason would apply to notes of hand, and other demands unquestionably several and independent. If any evils should arise from multiplying suits which might be joined, it is for the legislature to provide a remedy. There is already a law on this subject, by which a plaintiff who brings several actions on demands which may be joined is restricted in the recovery of his costs, and if the provisions of this law are not sufficient, it is for the legislature to supply the deficiency. As the law is, we think it cannot be maintained that a running account for goods sold and delivered, money loaned, or money had and received at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred." But see Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; 32 Am. Dec. 448; Ingraham *v.* Hall, 11 S. & R. (Pa.) 78; Bunnell *v.* Pinto, 2 Conn. 431; Avery *v.* Fitch, 4 Conn. 362; McLaughlin *v.* Hall, 6 Vt. 20.

3. Berry *v.* Whidden, 62 N. H. 473; Clark *v.* Baker, 5 Met. (Mass.) 452; Secor *v.* Sturgis, 16 N. Y. 548.

in the alternative, either interpretation may be adopted, but an election of the one bars the other.[1] That a contract is a conditional one does not affect the general rule, provided the conditions have been complied with.[2] Defenses of various kinds, extensions and renewals of contracts are subject to the same general rule.[3] If contracts are made so that payments are to be upon the installment plan, a suit may be brought upon each separate installment when it becomes due and is not paid. The contract is indivisible but by special provision the payments are made in a partial way. A suit upon one or more installments will be no bar to an action upon any other installment.[4] If a judgment, by mistake, gives or omits to give credits, the question of amount is still open.[5] If an account has gone to judgment, it is a bar to all items which should have been connected, unless it is shown that there is some fraud or mistake.[6] Where there are breaches of a continuous or continuing contract, the prior breaches or those which have already occurred should be included in one action, but future or subsequent breaches may be sued on, one by one, as they occur. After one suit has been adjudicated, and a suit is brought for a breach, after having proven

1. Bickford *v.* Cooper, 41 Pa. St. 146; Merriam *v.* Woodcock, 104 Mass. 326; Perry *v.* Dickerson, 85 N. Y. 365; 39 Am. Rep. 663; Clark *v.* Brott, 71 Mo. 473; Byrnes *v.* Byrnes, 102 N. Y. 4; Wittick *v.* Traun, 27 Ala. 563; 62 Am. Dec. 778.

In Ressequie *v.* Byers, 52 Wis. 650; 38 Am. Rep. 775, the court said: "The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defense before the justice that the defendant's services were of no value, in order to save his rights. He had his election either to recoup his damages *pro tanto* in the justice's court or go for his entire claim in this. It seems to us that this is the better and more convenient rule to lay down upon the subject. If the plaintiff were compelled to make his defense in the justice's court, that the professional services were of no value, and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely defeating the claim for services, or limit his damages to $200, the extent of the jurisdiction of the justice. We are not inclined to adopt a rule that would lead to any such inconvenient consequences." Logan *v.* Caffrey, 30 Pa. St. 196; Cashman *v.* Bean, 2 Hilt. (N. Y.) 340.

2. Jackson *v.* Colver, 1 Wend. (N. Y.) 488; Farrington *v.* Payne, 15 Johns. (N. Y.) 431.

3. Rosenmueller *v.* Lampe, 89 Ill. 212; 31 Am. Rep. 74; Patrick *v.* Hopkins Co. Ct. (Tex. 1887), 6 S. W. Rep. 626; Johnson *v.* Lovelace, 61 Ga. 62.

4. Corbet *v.* Evans, 25 Pa. St. 310; Union R., etc., Co. *v.* Traube, 59 Mo. 355; Priest *v.* Deaver, 22 Mo. App. 276; Armfield *v.* Nash, 31 Miss. 361; Burritt *v.* Belfy, 47 Conn. 323; 36 Am. Rep. 79; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; 32 Am. Dec. 448; Wickersham *v.* Whedon, 33 Mo. 561.

5. Moran *v.* Plankinton, 64 Mo. 337; Keokuk Co. *v.* Alexander, 21 Iowa 377; Kane *v.* Morehouse, 46 Conn. 300; Town *v.* Smith, 14 Mich. 348; Wickersham *v.* Whedon, 33 Mo. 561; Stevens *v.* Damon, 29 Vt. 521; Ewing *v.* McNairy, 20 Ohio St. 315; Winslow *v.* Stokes, 3 Jones (N. Car.) 285; 67 Am. Dec. 242; Stockton *v.* Ford, 18 How. (U. S.) 418.

6. Kane *v.* Morehouse, 46 Conn. 300; Manning *v.* Irish, 47 Iowa 650; Collins *v.* Bennett, 46 N. Y. 490; Woodhouse *v.* Duncan, 106 N. Y. 527; Mally *v.* Mally, 52 Iowa 654; Bierer *v.* Fretz, 37 Kan. 27; State *v.* Brown, 64 Md. 199; Murrell *v.* Smith, 51 Ala. 301;

the breach the only question remaining open is that of damage.[1] Some contracts contain numerous parts or agreements which might be considered independently of each other, and these are divisible contracts, and might have originally been put into many single contracts. The distinction between entire and distinct demands is that the former arise from one and the same

Lawrence Sav. Bank *v.* Stevens, 46 Iowa 429; Ludeling *v.* Chaffe, 40 La. Ann. 645; Decker *v.* Decker, 108 N. Y. 128.

1. Fish *v.* Folley, 6 Hill (N. Y.) 54; Beach *v.* Crain, 2 N. Y. 86; 49 Am. Dec. 369.

In Badger *v.* Titcomb, 15 Pick. (Mass.) 409; 26 Am. Dec. 611, the court by Wilde, J., said: "With respect to the first point, it is undoubtedly true that only one action can be maintained for the breach of an entire contract, unless by the terms of it, it is in its nature divisible. But if one contracts to do several things at several times, an action of *assumpsit* lies upon every default; for although the agreement is entire, the performance is several, and the contract is divisible in its nature. Thus, on a note, or other contract payable by instalments, *assumpsit* lies for non-payment after the first day; or, where interest is payable annually, the payment of the principal being postponed to a future time, *assumpsit* lies for the non-payment of interest, before the principal becomes due and payable. In all such cases, although the contract is in one sense entire, the several stipulations as to payment and performance are several, and are considered in respect to the remedy as several contracts. This principle has long been well settled, although the law in this respect has been very much modified by modern decisions. Still, however, the law seems to remain unchanged in respect to obligations to pay money by instalments, so that debt will not lie till all the days of payment are past. A distinction has been made between a contract to pay five sums of £20 each on five different days, and a contract to pay £100 by five sums of £20 on different days; a distinction, as Lord Loughborough remarks, in the case of Rudder *v.* Price, 1 H. Bl. 550, which is merely verbal, the substantial meaning being the same in each. After the action of *assumpsit* was introduced, a more liberal construction of contracts not under seal was adopted. But, at first, it was held that although when the contract was to pay by instalments, *assumpsit* would lie on default of the first payment, yet the plaintiff was obliged to demand his whole damages, although only one of the several instalments was payable, on the ground that the contract was entire and that no new action could be maintained.

"In the case of Peck *v.* Redman, Dyer 113, the judges were equally divided. It was *assumpsit* on a contract to deliver twenty quarters of barley annually during the lives of the contracting parties. The breach was for non-delivery of the twenty quarters of barley for three years, and the question was whether the plaintiff was entitled to damages in recompense of the whole bargain, as well for the time to come as for the past. The case does not appear to have been decided. The whole doubt and difficulty arose from considering the contract entire and indivisible. This doubt does not appear to have been finally removed until the case of Cooke *v.* Whorwood, 2 Saund. 337, where the court determined that in *assumpsit* to perform an award whereby the defendant was awarded to pay the plaintiff several sums of money at several times, an action might be maintained for such sum only as was due at the time when the action was brought; and that the plaintiff should recover accordingly and have a new action as the other sums became due, *toties quoties*. In Rudder *v.* Price, 1 H. Bl. 550, the cases on this point were reviewed by Lord Loughborough in a very able opinion, and I am not aware that any question has been made as to the law in this particular. So that the principle is well established that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract." See also Kerr *v.* Simmons, 9 Mo. App. 376; M'Evoy *v.* Bock, 37 Minn. 402; Stifel *v.* Lynch, 7 Mo. App. 326; Hanham *v.* Sherman, 114 Mass. 19; Jones *v.* Petaluma, 36 Cal. 231; Dulaney *v.* Payne, 101 Ill. 325; 40 Am. Rep. 205; Leland *v.* Marsh, 16 Mass.

contract, the latter from different contracts.[1] In case of a suit for wages, if the employé sue for a breach of contract, he is

289; Wisconsin *v.* Torinus, 28 Minn. 175; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284; 17 Am. Dec. 157.

The *New York* court of appeals, in Secor *v.* Sturgis, 16 N. Y. 554, by Strong, J., says: "It is entire claims only which cannot be divided within this rule; those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each. A party upon whose person or property successive distinct trespasses have been committed, may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions may be sued on separately. It makes no difference that the causes of action might be united in a single suit; the right of the certain party in whose favor they exist, to separate suits, is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression will enforce a consolidation of the actions. It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action; and this difficulty, connected with neglect in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. . . . The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements."

In Heichew *v.* Hamilton, 4 Greene (Iowa) 317; 61 Am. Dec. 122, a hotel had been sold under the agreement that the vendor or grantor should discontinue the business in the vicinity. He did, however, keep some transients for pay. In a second suit in the matter it was held that the breach and the amount of damage were the only issues which could be raised, without coming within the bar by the previous suit."

1. See opinion of Woodward, J., in Logan *v.* Caffrey, 30 Pa. St. 200.

In Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633, where the city had been enjoined from collecting taxes, the court said: "Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no further than the taxes of the years in question. The taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." Newton *v.* Hook, 48 N. Y. 676; Freeman *v.* Bass, 34 Ga. 355; 89 Am. Dec. 255; Fuller *v.* Shattuck, 13 Gray (Mass.) 70; 74 Am. Dec. 622; Hanham *v.* Sherman, 114 Mass. 19; Cromwell *v.* Sacho, 94 U. S. 351.

In Kilander *v.* Hoover, 111 Ind. 10, the court said: "If it appears that the first judgment involved the whole claim or extended to the whole subject-matter, and settled the entire defense to the whole of a series of notes or claims, and adjudicated the whole subject-matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect to other claims and defenses thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole. Unless, however, it is made to appear that the defenses pleaded to the first claim or demand involved the whole title, or extended to the whole subject-matter of the controversy between the parties, so as to litigate and determine the defendant's liability in respect to the whole transaction, then the judgment is a finality only as to so much of the claims and defenses as were actually litigated in the first suit."

Rake *v.* Pope, 7 Ala. 161; Felton *v.* Smith, 88 Ind. 149; 45 Am. Rep. 454; Hazen *v.* Reed, 30 Mich. 331; Bissell *v.* Spring Valley Tp., 124 U. S. 225; Danziger *v.* Williams, 91 Pa. St. 234.

In Aultman *v.* Mount, 62 Iowa 674, the court said: "To constitute a prior adjudication there must have been something more than an adjudication of a common question of law. There must have been an adjudication respecting some common thing. Does the answer show that there was such adjudication in the former action? In our opinion it does. The defendant, as we have seen, was acting under a written contract. The real question in dispute between the parties in the outset, we apprehend, was as to the construction of the contract. The answer is not very full upon this point, but it is full enough, we think, to warrant us in this conclusion. It contains an averment that the defendant's acts concerning the notes were but one transaction. The demurrer admits this. Taking this to be true, there were not properly three mistakes, but only one. There must then have been some common mistake lying behind the three acts by which the different indorsements were made. If the original contract between the defendant and his principals obligated him to guaranty the notes, then his indorsement of such guaranty, though consisting of three acts, would be essentially one transaction; and the same would be true if the indorsement was made under a mistaken supposition that the contract created such obligation, whether the mistake arose from a wrong construction of the contract or forgetfulness of its provisions. Taking the averments above set out to be true, we think that the point adjudicated in the former action must have been that the contract did not create an obligation to guarantee the notes. That contract, then, constituted the common thing respecting which there has been an adjudication, and a court cannot, as between the same parties, properly be asked to make an adjudication respecting it again." Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308; Furneaux *v.* First Nat. Bank, 39 Kan. 144.

Notes or Bonds in Series.—Where a suit had been brought on the first of two notes for instalments of the purchase money of real estate, and judgment rendered for the plaintiff on issues made upon certain defenses, it was held, in a suit upon the second note, that the defendant was estopped to plead the same defenses. French *v.* Howard, 14 Ind. 455. In an action for the recovery of instalments of interest on a note, wherein the maker set up a fraudulent alteration of the note, judgment was recovered for the plaintiff. It was held that such judgment was conclusive, as against the maker, as to the question of fraudulent alteration, in a subsequent suit on the note itself. Edgell *v.* Sigerson, 26 Mo. 583.

Where the maker of a note paid it and brought an action against an indorser to recover the amount he had paid, on the ground that it was money paid for the indorser's use, and that the note and another note were executed at the indorser's request, for the special purpose of enabling the indorser to raise money and on his agreement to pay it at maturity, and in the action the plaintiff adduced evidence to prove that the two notes were given under the same arrangement and on the same consideration, it was held that the defendant might set up a judgment obtained in a suit on the other note by the indorser against the maker, wherein the same allegations were set up as a defense without success, the indorser having obtained a verdict and judgment thereon. Treadwell *v.* Stebbins, 6 Bosw. (N. Y.) 538.

In Taylor *v.* Chambers, 1 Iowa 124, the principle of the above-mentioned cases was extended to a plea of failure of consideration. But, in Clark *v.* Sammons, 12 Iowa 370, where two notes were executed on the purchase of personal property, and suit was brought on one of them, and the pleas set up were, breach of warranty and failure of consideration, it was held that the first plea was *res judicata* and the second not, in a suit on the other note. The grounds of the distinction are not clearly discernible, as the court said that if the jury found there was a failure of consideration in the first action, that finding could only apply to the first note, since the second was not in litigation.

In Erwin *v.* Lynn, 16 Ohio St. 539, it was held that where the makers of a note so indorsed, delivered it to a party as security for their note of a less sum, between both of whom and a second party it was subsequently agreed that the note should also be held by the first party as security for a

barred from any subsequent action on the same matter. He can sue on the contract or upon a *quantum meruit*, but he cannot make use of both remedies. The same principles apply here as to any other continuing contract, which might be either divisible or indivisible.[1]

c. ACTIONS EX DELICTO.—The same general principles already stated in relation to actions of contract apply to actions of tort, and are more fully illustrated in the appended note.[2]

note of the makers to such second party, a judgment recovered against the indorsers, in a suit by such first party, for the amount due on his note, without including the amount due on that of the second party, merged the contract of indorsement, and such second party could not maintain an action thereon, against the indorsers, for the amount for which it was so held as security for him. See also Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, where the court by Story, J., said: "He has the right to stand upon the singleness of his original contract and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons."

Where a negotiable note has been given in settlement of an account, and subsequently a judgment is obtained upon the account, and the attorney collecting the judgment compromises it at a much less sum than the judgment calls for, and it is satisfied thereon, the original creditor cannot maintain an action either on the note or the judgment. Fogg *v.* Sanborn, 48 Me. 432.

Leases.—For a breach of covenant, see Badger *v.* Titcomb, 15 Pick. (Mass.) 409; 26 Am. Dec. 611; McIntosh *v.* Loun, 49 Barb. (N. Y.) 550; Perry *v.* Harrington, 2 Met. (Mass.) 368; 37 Am. Dec. 98; Stuyvesant *v.* Mayor, etc., of N. Y., 11 Paige (N. Y.) 414; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; 32 Am. Dec. 448.

1. Liddell *v.* Chidester, 84 Ala. 508; Booge *v.* Pacific R. Co., 33 Mo. 212; 82 Am. Dec. 160; Soursin *v.* Salorgne, 14 Mo. App. 486.

In Perry *v.* Dickerson, 85 N. Y. 345; 39 Am. Rep. 663, the court said: "A servant unlawfully discharged may treat the contract as rescinded and sue on a *quantum meruit* for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit. . . . If the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it is his folly or his misfortune. He cannot sever them, and recover part in one action and the residue, when discovered, in another."

Instances.—In Dalton *v.* Bentley, 15 Ill. 421, an agreement was made for the delivery of certain lumber, and a partial payment for the same was made. The plaintiff could sue for breach of contract or for money had and received, but having elected either remedy he would be barred from exercising the other. The court by Caton, J., said: "Where a party brings a suit upon a contract, he affirms it, and must seek his remedy under it for every right which the contract secures to him and which has been withheld by the other party. The contract, when thus affirmed, constitutes an indivisible claim to indemnity, which cannot be divided into several claims, and a part recovered in one action and a part in another."

Where, on an indemnity bond, a plaintiff did not for some reason include and recover in his suit, the costs and counsel fees, he is barred from any further action on the bond for their recovery. Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; but see Scott *v.* Tyler, 14 Barb. (N. Y.) 202.

Where a contract was indefinite, and the terms and times of execution were left vague and uncertain the court construed the contract. Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 472; 93 Am. Dec. 631.

2. In O'Neal *v.* Brown, 21 Ala. 482, the court said: "The principle is that where a tort is committed by taking

several chattels at one time, it gives but one cause of action, if they belong to one person, and the chattels were in his possession at that time, he cannot be allowed to split it up and bring separate suits for separate articles. Nor can it make any difference that he was possessed of some as trustee, and of others in his own right, for the legal title to all, and the possession was in him, and there being but one tort to the possession of one person, it gives, and, indeed, it can give him, only one cause of action, and that is merged when a recovery has been had upon it." McCaffrey *v.* Carter, 125 Mass. 330; Bennett *v.* Hood, 1 Allen (Mass.) 47; 79 Am. Dec. 705; Jarnigan *v.* Fleming, 43 Miss. 710; 5 Am. Rep. 514; Kaehler *v.* Dobberpuhl, 60 Wis. 256; Stickney *v.* Goudy, 132 Ill. 213; Veghte *v.* Hoagland, 29 L. J. L. 125.

In Ware *v.* Percival, 61 Me. 393; 14 Am. Dec. 565, the court said: "A party cannot divide his cause of action, recover compensation in *assumpsit* by waiving the tort, and then, having received such compensation, resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived. He cannot waive all wrongdoing and recover compensation upon that basis, and then treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles." Union R., etc., Co. *v.* Traube, 59 Mo. 355; Knowlton *v.* New York, etc., R. Co., 147 Mass. 606; Cunningham *v.* Morris, 19 Ga. 583; 65 Am. Dec. 611; Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465; Whitney *v.* Clarendon, 18 Vt. 252; 46 Am. Dec. 150; Smith *v.* Way, 9 Allen (Mass.) 472.

In Felter *v.* Beale, 1 Salk. 11, the court by Holt, C. J., said: "Here is not a new battery, and in a trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." Cracraft *v.* Cochran, 16 Iowa 301; Norton *v.* Doherty, 3 Gray (Mass.) 372; 63 Am. Dec. 758; Cunningham *v.* Harris, 5 Cal. 81; Herriter *v.* Porter, 23 Cal. 385; Fowle *v.* New Haven, etc., Co., 107 Mass. 352; Watson *v.* Van Meter, 43 Iowa 76; Whitney *v.* Clarendon, 18 Vt. 252; 46 Am. Dec. 150.

In Fulton *v.* Matthews, 15 Johns. (N. Y.) 433; 8 Am. Dec. 261, a case of trespass brought for seizing goods under an attachment, where the plaintiff divided his claim, the court, by Spencer, J., said: "Upon the main question of this cause, we are clearly of opinion that the judgment in the first suit was a bar to the plaintiff's claim in this action. The only evidence of a conversion was the tortious taking under the attachment. The seizure of the bed and the bedquilts which then lay on the bed was one single indivisible act, and the plaintiff ought not to be permitted to vex the defendants by splitting up his claim for damages into separate suits for each article so seized. There is no difference in this respect between the actions of trover and trespass. . . . There is no reason for a difference in the rule between torts and contracts. Suppose a trespass or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" Rockwell *v.* Brown, 36 N. Y. 207; Leland *v.* Marsh, 16 Mass. 389; Sheldon *v.* Carpenter, 4 N. Y. 579; 55 Am. Dec. 301.

Where one contract is made with a passenger to carry baggage, and another to carry that which is not baggage, and the whole is lost, a judgment to recover the one is not a bar to a suit upon the other. Sloman *v.* Great Western R. Co., 67 N. Y. 208; Millard *v.* Missouri, etc., R. Co., 86 N. Y. 443; Stoneman *v.* Erie R. Co., 52 N. Y. 429. Where there has been an action in replevin, the question of injury to the property while detained and the injury arising from detention are distinct causes of action. Colby *v.* Yates, 12 Heisk. (Tenn.) 267.

In Beronio *v.* Southern Pac. R. Co., 86 Cal. 415, the action was for the recovery of damages for building a railroad in front of lot in block 20 in a certain town. Defendant admitted construction in front of lot in block 19, and alleged that suit had been brought and damages obtained for that, and the position was taken that the action for damages was indivisible and that any further action was barred. The court, ruling for the defendant, said: "We think there was no error in the rulings or instructions of the court in this behalf so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it

was a unit, the construction and operation of a single railroad which was complete at the time. The fact that it damaged two lots belonging to the same man, at the same time and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive, and this has been held to constitute but a single cause of action. Brannenburg *v.* Indianapolis, etc., R. Co., 13 Ind. 103; 74 Am. Dec. 250. In cases of tort, the question as to the number of causes of action which the same person may have, turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one. 1 Sutherland on Damages 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all. 3 Sutherland on Damages 372. This principle is established in Marble *v.* Keyes, 9 Gray (Mass.) 221, and in very many other cases. There is nothing in the authorities cited by appellant in conflict with this view." Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112; Whitney *v.* Clarendon, 18 Vt. 252; 46 Am. Dec. 150; Burritt *v.* Belfy, 47 Conn. 323; 36 Am. Rep. 79; Serrao *v.* Noel, 15 Q. B. Div. 549; Brunsden *v.* Humphrey, 14 Q. B. Div. 141; Roberts *v.* Read, 16 East 215.

Where different articles are taken at one trespass, it is possible that there may be two or more distinct actions, though, generally speaking, one action will prove a bar to all others. If the two suits are pending and no judgment is yet obtained in either, the general doctrine of *res judicata* may need modification. Marble *v.* Keyes, 9 Gray (Mass.) 221.

In the matter of contract and tort, see Goodrich *v.* Yale, 97 Mass. 15; Andrew *v.* Schmitt, 64 Wis. 664; Kronshage *v.* Chicago, etc., R. Co., 45 Wis. 500; Pishaway *v.* Runnels, 71 Tex. 352; Lenoir *v.* Wilson, 36 Ala. 600; Williams *v.* Hay, 120 Pa. St. 485; Stark *v.* Starr, 94 U. S. 477; White *v.* Smith, 33 Pa. St. 186; 75 Am. Dec. 589.

There may be an independent contract and individual tort. An owner may recover in contract for the use of a team, and also in tort for damage to the same while in the possession and control of the temporary bailee. Shaw *v.* Beers, 25 Ala. 449.

If there are various counts in a declaration including several tortious acts, or one count including them all, and a verdict is found upon some of the counts or upon some portions of the single count, and nothing is said as to the remainder, and judgment is entered, the plaintiff is in either case barred upon a subsequent action, including any of the issues included in the prior suit. Shaw *v.* Barnhart, 17 Ind. 185; Goodrich *v.* Yale, 8 Allen (Mass.) 454.

Where a judgment was rendered for the injury to a building by fire, it was held a bar to a suit for injuries from the same causes to other buildings occurring at the same time, and this, too, although the actions were brought by different parties,—in the one case by the insurer, in the other by the owner. Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331.

In Sheldon *v.* Carpenter, 4 N. Y. 579; 55 Am. Dec. 301, the court said: "In an action for malicious prosecution the plaintiff is entitled to recover damages, not only for his unlawful arrest and imprisonment and for the expenses of his defense, but for the injury to his fame and character by reason of the false accusation. The latter, indeed, is in many cases the gravamen of the action. An accusation of crime, made under the forms of law, or on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action for malicious prosecution. The injured cannot be entitled to two recoveries for the same cause, and a recovery in that form must therefore be a bar to a subsequent action for the same identical accusation." Distinct trespasses of course give rise to distinct causes of action. De La Gurrea *v.* Newhall, 55 Cal. 21; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; 32 Am. Dec. 448; Adams *v.* Haffards, 20 Pick. (Mass.) 127; White *v.* Moseley, 8 Pick. (Mass.) 356; Decatur Gas, etc., Coke Co. *v.* Howell, 92 Ill. 19.

Continuing Damages in Tort.—A former recovery is no bar for damages for a continuation of the same tort or nuisance; and after the nature of the nuisance and the rights of parties have

been fixed in the prior action, it is sufficient to prove that the nuisance is continuing in the same condition as before. Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203; 59 Am. Rep. 341; Chicago, etc., R. Co. *v.* McAuley, 121 Ill. 160; Haisch *v.* Keokuk, etc., R. Co., 71 Iowa 606; Omaha, etc., R. Co. *v.* Standen, 22 Neb. 343; St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240; North Vernon *v.* Voegler, 103 Ind. 314; Denver City Irrigation, etc., Co. *v.* Middaugh, 12 Cal. 434; Athens Mfg. Co. *v.* Rucker, 80 Ga. 291; Biger *v.* Ottumwa Hydraulic Power Co., 70 Iowa 145; Stadler *v.* Grieben, 61 Wis. 500.

It is no defense that the nuisance has been placed upon the land of a third party, and it could not be removed without committing trespass, and it is not material that the guilty parties are neither in possession of the property, nor have any interest in the premises upon which the nuisance has been erected or created. The court, in Thompson *v.* Gibson, 7 M. & W. 462, said: "It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."

Where action was brought for flowing plaintiff's land, and judgment was obtained, it is no defense that flowing did occur towards the south only, and not both west and south, as in former action, as the original issue was indivisible. Richardson *v.* Boston, 19 How. (U. S.) 263; Plate *v.* New York Cent. R. Co., 37 N. Y. 472; Jones *v.* Lavender, 55 Ga. 228; Smith *v.* Elliott, 9 Pa. St. 345; Smith *v.* Brunswick, 80 Me. 189; Richardson *v.* Boston, 19 How. (U. S.) 263; Hahn *v.* Miller, 68 Iowa 745.

The prior action may be considered as furnishing *prima facie* evidence of title. Nivin *v.* Stevens, 5 Harr. (Del.) 272; Kent *v.* Gerrish, 18 Pick. (Mass.) 565.

One action may be a bar where all the damage may be shown to be the result of only one act, as where damages arise and continue because of the erection and operation of gas works. Decatur Gas, etc., Coke Co. *v.* Howell, 92 Ill. 19; Whitney *v.* Clarendon, 18 Vt. 253; 46 Am. Dec. 150.

In a second suit the prior action and the continuance of injury need not necessarily be pleaded, though no damage can be recovered for injury prior to the previous suit. It would seem better, however, to recite all the facts in subsequent pleadings. Smith *v.* Elliott, 9 Pa. St. 345; Schoch *v.* Foreman, 3 Brew. (Pa.) 157; Beckwith *v.* Griswold, 29 Barb. (N. Y.) 291.

In cases where there is a continuance of damage, the measure of damage is the injury accruing from the time of the prior suit; the question is whether damages arise from the original act or are continuous from it. Adams *v.* Goodrich, 55 Ga. 233; Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112; Leland *v.* Marsh, 16 Mass. 389.

In Troy *v.* Cheshire R. Co., 23 N. H. 83; 55 Am. Dec. 177, the court said: "There may, of course, be cases where it may be difficult to draw the line, but it is apprehended they will not be numerous. Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there, the damage is an original damage, and may be at once fully compensated, since the injured person has no means in his power to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such an act is necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. Thus, the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but if his works are so constructed that upon the recurrence of a similar freshet the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen, because it is yet contingent whether any such damage will ever arise. If a person erects a dam upon his own land, which throws back the water upon his neighbor's land, he will

6. What Might Have Been Litigated—*a.* GENERAL STATEMENT OF RULE.—As to the extent of the application of the doctrine of *res judicata* to that which might have been litigated but which was not, the decisions are somewhat at variance. It has been said that the doctrine applies to everything which might be litigated as much as to everything which actually was; but this appears to be too broad a statement of the law. A party must at a trial present his entire case, and in support of his case must present all the evidence at his command; having done this, an action is indivisible and the doctrine applies.[1] The tendency of the American cases is to regard all the issues which might have been raised and litigated in any case to be as completely barred as if they had

be answerable for all damage which he has caused before the date of the writ, and, ordinarily, for no more, because it is as yet contingent and uncertain whether any further damages will be occasioned or not, because such a dam is not of its own nature and necessarily injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is in its nature of a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages."

Permanent or Occasional Trespass or Nuisance.—In case of a permanent trespass or nuisance the entire damage can be recovered, while in the case of an occasional trespass or nuisance only the injury up to the time of the writ can be included in assessing damages. In Fowle *v.* New Haven, etc., Co., 107 Mass. 352, the court said: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause." Powers *v.* Council Bluffs, 45 Iowa 652; 24 Am. Rep. 792; Stodghill *v.* Chicago, etc., R. Co., 53 Iowa 345; Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312.

1. The English law on the subject has been thus stated: "I believe I state the rule of the court correctly when I say that when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Henderson *v.* Henderson, 3 Hare 100. See also Bailey *v.* Bailey, 115 Ill. 551; Vail *v.* Rinehart, 105 Ind. 6; Embury *v.* Conner, 3 N. Y. 511; 53 Am. Dec. 325; Martin *v.* Roney, 41 Ohio St. 141; Rogers *v.* Higgins, 57 Ill. 244.

It may be said that the rule is limited in its application to those matters which the parties, under their pleadings and the issue joined in the former action, might legitimately have controverted and have had decided by the verdict and judgment, and has never been so extended as to compel one party, having several causes of action against another, to join them in one action because they were of such a character that the law would permit their union.

been directly adjudicated and included in the verdict.[1] All these collateral or incidental issues are such as *might* have been decided

Eastman *v.* Porter, 14 Wis. 39. See also Williams *v.* Clouse, 91 N. Car. 322; Burford *v.* Kersey, 48 Miss. 643; Fairchild *v.* Lynch, 99 N. Y. 359.

1. In Kelly *v.* Donlin, 70 Ill. 385, the court said: "A valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause. Nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law." See also Strauss *v.* Meertief, 64 Ala. 299; 38 Am. Rep. 8; Dyer *v.* Hopkins, 112 Ill. 168; Warren *v.* Cook, 116 Ill. 199; Elwood *v.* Beymer, 100 Ind. 504; Kurtz *v.* Carr, 105 Ind. 574; Ebersole *v.* Lattimer, 65 Iowa 164; Krutsinger *v.* Brown, 72 Ind. 466; Thompson *v.* Myrick, 24 Minn. 4; Barrett *v.* Failing, 8 Oregon 152; Neil *v.* Tolman, 12 Oregon 289; Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 139; Nolan *v.* Cameron, 9 Lea (Tenn.) 234; Kellogg *v.* Maddocks, 1 Wash. Ter. 407; Danaher *v.* Prentiss, 22 Wis. 316; Newman *v.* Waterman, 63 Wis. 612; 53 Am. Rep. 310. But see Trimble *v.* Fariss, 78 Ala. 260; Carroll *v.* Hamilton, 30 La. Ann. 520; Ledoux *v.* Burton, 30 La. Ann. 576; Barkdull *v.* Herwig, 30 La. Ann. 618; Logan *v.* Herbert, 30 La. Ann. 727; Sexton *v.* Weaver, 141 Mass. 273; Metcalf *v.* Gilmore, 63 N. H. 174; Parker *v.* Roberts, 63 N. H. 431; Boileau *v.* Rutlin, 2 Exch. 665; Sintzenick *v.* Lucas, 1 Esp. 44.

In Griffin *v.* Long Island R. Co., 102 N. Y. 452, the court said: "The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject-matter of the litigation within the purview of the original action, either as matter of claim or of defense."

No one can object to a judgment which he permitted to be rendered through his own carelessness, neglect, or ignorance. Pray *v.* Hegeman, 98 N. Y. 351; Davies *v.* Mayor, etc., of N. Y., 93 N. Y. 250; Smith *v.* Smith, 79 N. Y. 634.

It has been claimed that if one held property in two capacities, individually and as a trustee, that an action relating to the part held in one way would be a bar to an action upon that held in the other. O'Neal *v.* Brown, 21 Ala. 484. This case goes beyond the general rule given as to suing in the same capacity. Matters to be barred must be within and material to the issues of the court. Fairchild *v.* Lynch, 99 N. Y. 360. Extrinsic evidence or the pleadings will determine what has been passed upon in the previous action. Davis *v.* Brown, 94 U. S. 423. In accord are Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 344; 5 Wall. (U. S.) 590; Miles *v.* Caldwell, 2 Wall. (U. S.) 36; Aurora City *v.* West, 7 Wall. (U. S.) 102.

In *Connecticut* a judgment is not conclusive evidence of what issues were decided in the case, but merely *prima facie* of the same. Hungerford's Appeal, 41 Conn. 327.

Where exemptions in the first suit have been waived, the waiver may be pleaded in bar. Sloan *v.* Price, 84 Ga. 171.

A withdrawal of issues in the consideration of the case, or the disregarding of them, may or may not result in a bar. Sullivan *v.* Baxter, 150 Mass. 261; Barrett *v.* Failing, 8 Oregon 152.

In *Ohio* the court said in Ewing *v.* McNairy, 20 Ohio St. 322: "By refusing to relieve parties from the consequences of their own neglect, it seeks to make them vigilant and watchful. On any other principle there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial." This language was cited with approval in Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 237, where the court by Ashburn, J., said: "The rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive; it might tend to unsettle all the determinations of law and open a door for infinite vexation."

In Williams *v.* Clouse, 91 N. Car. 322, the court said: "It is sometimes vaguely said that a judgment or decree is conclusive of everything that might have been litigated and settled in the action, but the statement is far too

broad, unless it be taken as applying to the particular issue or matter actually litigated and determined, and such matters and things as are necessarily implied by them." Lindsley *v.* Thompson, 1 Tenn. Ch. 272; Stewart *v.* Stebbins, 30 Miss. 66; Marsh *v.* Masterson, 101 N. Y. 401.

The simple right to bring a matter into chancery may not bar. Nims *v.* Vaughn, 40 Mich. 356.

A paper may be introduced in a second trial notwithstanding it has been admitted by a lack of denial of it in the former one. Jacobson *v.* Miller, 41 Mich. 90; Murrell *v.* Smith, 51 Ala. 301; Felton *v.* Smith, 88 Ind. 149; 45 Am. Rep. 454.

"All such defenses become *res judicata*. If a judgment does not settle these it settles nothing. It is not only not an end of litigation, but it is not an approximation to the end—there can be no end." Barksdale *v.* Green, 29 Ga. 420.

If there is a failure to prove or to attempt to prove any of the allegations of the pleadings, a judgment is a bar to an action upon any issue declared upon but in no way proven, or upon which no evidence was offered. Bassett *v.* Connecticut River R. Co., 150 Mass. 178; Sutton *v.* Dameron, 100 Mo. 141; Crowley *v.* Mellon, 52 Ark. 1.

But see the opinion in Aurora City *v.* West, 7 Wall. (U. S.) 106, of Miller, J., in which he said: "It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered concluded by that suit. But this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is, that when a former judgment is relied on, it must appear by the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." See also Sewall *v.* Robbins, 139 Mass. 164; Lorance *v.* Platt, 67 Miss. 183; Doonan *v.* Glynn, 28 W. Va. 715; Stannard *v.* Hubbell, 123 N. Y. 520; McKinney *v.* Curtis, 60 Mich. 611; Cavanaugh *v.* Buehler, 120 Pa. St. 441; Trimble *v.* Fariss, 78 Ala. 260; Gilbert *v.* Thompson, 9 Cush. (Mass.) 348; Kidd *v.* Laird, 15 Cal. 161; 76 Am. Dec. 472; Koon *v.* Mallett, 68 Iowa 205; Dickinson *v.* Hayes, 31 Conn. 417.

If a case is taken from a jury and dismissed by the court in an illegal way, this would be no bar to a subsequent action. Bailey *v.* Knight, 8 Tex. 61.

If a judgment upon default is accepted by the plaintiff for a sum less than that to which he was fairly entitled, whether it was done by mistake or otherwise, it is a bar to any action for the remainder claimed to be due. Ewing *v.* McNairy, 20 Ohio St. 321.

Where a mortgagee or his grantee came into possession and an action for redemption was brought by the mortgagor, and for profits, rents and other income for the time the property had been away from his control, the latter could not afterwards bring any action for trespasses committed by the same defendants, notwithstanding no attempt had been made to recover for them in the first action. Steen *v.* Mark, 32 S. Car. 286.

If an action has been brought directly upon a former judgment, the defendant cannot offer any defenses which were open to him in the first action, and he did not avail himself of; such defenses, for instance, as misnomer, or that the plaintiff was not the real party to the action. Mervine *v.* Parker, 18 Ala. 241; Guinard *v.* Heysinger, 15 Ill. 289.

Special damages resulting from a conversion of chattels cannot be obtained after the rendering of a judgment for general damages and for the conversion. Sullivan *v.* Baxter, 150 Mass. 261.

If a request for a nonsuit or discontinuance is disallowed, and the defendant's counterclaim is heard, the plaintiff has his remedy open to him on his original claim in the first case. Jones *v.* Underwood, 35 Barb. (N. Y.) 211; Moreland Tp. *v.* Gordner, 109 Pa. St. 116; Pendergrass *v.* York Mfg. Co., 76 Me. 509; Lord *v.* Chadbourne, 42 Me. 429; 66 Am. Dec. 290; Roberts *v.* Hamilton, 56 Iowa 683; Cheney *v.* Cooper, 14 Neb. 415; Fleming *v.* Hawley, 65 Cal. 492; Bigley *v.* Jones, 114 Pa. St. 510; Benware *v.* Pine Valley, 53 Wis. 527.

"A dismissal on nonsuit not determining the rights of the parties cannot support the plea of *res judicata*. Nor will the reasoning and opinion of the court upon the subject, on the evidence before it, have the force and effect of a thing adjudged, unless the subject-matter be definitely disposed of by the judgment." Fisk *v.* Parker, 14 La. Ann. 491. Philpott *v.* Brown, 16 Neb. 387; Hebler *v.* Shipp, 78 Ky. 64;

Howes *v.* Austin, 35 Ill. 412; Brown *v.* Kirkbride, 19 Kan. 588.

"If the cause be submitted to the justice, and he takes time to make up his judgment, the plaintiff cannot then voluntarily submit to a nonsuit. The case is *sub judice* on the merits, and must be disposed of upon the merits; and I apprehend it is not then in the power of the justice to nonsuit the plaintiff. His determination of the case is equivalent to a verdict of a jury and a judgment thereon; and although he may call his judgment a judgment of nonsuit, and enter it accordingly, if the record or minutes of the trial show that it was rendered after the cause was submitted to him, and after he took time to deliberate, and not at the trial, it will be considered a judgment for the defendant, and will be a bar to any subsequent action." Elwell *v.* M'Queen, 10 Wend. (N. Y.) 522; Muse *v.* Farmers' Bank, 27 Gratt. (Va.) 252; Jones *v.* Graham, 36 Ark. 383.

"That the remedy sought, or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as a compensation or redress for the alleged wrong, or if upon those facts he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek a different remedy upon the same facts or cause of action." Hardin *v.* Palmerlee, 28 Minn. 450.

Where an action was brought on a contract, a judgment rendered for an independent and separate contract does not bar the plaintiff from a second suit on a contract, which was not, but might have been included in the first action. Nor does this contradict the requirement that a plaintiff is bound to submit his entire case. New Orleans, etc., R. Co. *v.* Castello, 50 Ala. 12; Bates *v.* Spooner, 45 Ind. 493; Danaher *v.* Prentiss, 22 Wis. 316; Henderson *v.* Henderson, 3 Hare 115; Sweet *v.* Maupin, 65 Mo. 65; Allebaugh *v.* Coakley, 75 Va. 628; Cunningham *v.* Foster, 49 Me. 68; Hungerford's Appeal, 41 Conn. 322.

Continuing slanders and nuisances, or repetitions, may or may not be included in one action, and that action may or may not be a bar to another, according to the circumstances of the case. Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112; Woods *v.* Pangburn, 75 N. Y. 495; Swift *v.* Dickerman, 31 Conn. 285; Richardson *v.* Boston, 19 How. (U. S.) 263; Shepherd *v.* Willis, 19 Ohio 142; Andrew *v.* Schmitt, 64 Wis. 664; White *v.* Smith, 33 Pa. St. 186; 75 Am. Dec. 589; Stark *v.* Starr, 94 U. S. 477; Corby *v.* Taylor, 35 Mo. 447; Pishaway *v.* Runnels, 71 Tex. 352.

If usury is not pleaded in the action to which it would be a defense and judgment is obtained, no suit will lie to recover the excess paid. Charles *v.* Davis, 62 N. H. 375; Footman *v.* Stetson, 32 Me. 20; 52 Am. Dec. 634.

Where an action was brought to recover money paid to settle a prior judgment which was obtained by fraud, recovery being had both upon an account and a note given to settle it, this judgment was unfavorably considered in the higher court, the judge saying: "The judgment must be reversed. This was overhauling the first judgment and attempting to recover back a portion of it on the ground that it was not due and had been unconscientiously recovered. The allegation of fraud does not alter the nature of the case. It is subtantially an action to recover back money improperly awarded by a former judgment, and is precisely the case of Marriott *v.* Hampton, 7 T. R. 269." Walker *v.* Ames, 2 Cow. (N. Y.) 428.

A plaintiff cannot attack the validity of a municipal ordinance for any reason which might have been offered in a prior action wherein the same ordinance was in question, and in which it was held to be valid. Keokuk Gas Light, etc., Co. *v.* Keokuk, 80 Iowa 137.

Where, on an action on a note, the court required the return of land, the defendant could not bring ejectment and plead questions not raised in the first case, unless he was previously prevented by some good reason, such as accident, fraud, mistake, or the action of his opponent. McWilliams *v.* Walthall, 77 Ga. 7.

A question of usury cannot be raised upon a mortgage note after a foreclosure of the mortgage has taken place. Charles *v.* Davis, 62 N. H. 375.

Where a plaintiff obtains possession of land by means of an ejectment suit, the defendant cannot afterwards recover personal property of his in buildings upon the same land, for such questions ought all to have been raised in the ejectment suit, he then having an opportunity to raise every matter re-

in the former action. They must have been relevant and pertinent to the case, and within the pleadings of that action. The verdict, judgment, or decree in any case will be limited to the subject-matter and the issues embodied in the pleadings and under advisement when the case was adjudicated.[1]

b. RULE IN EQUITY. — In equitable proceedings, the rule regarding the issues, the pleadings, and what shall be regarded as adjudicated by a decree in the case, is similar to what has already been shown to be its force at law, but it applies more forcibly here and must be construed broadly, for equity has great flexibility, and is intended to reach matters and to furnish remedies which at law would be inadequate for the purpose. Here the special object is to do justice to all parties as nearly as possible, and to avoid a multiplicity of suits. In such cases all the equitable claims and defenses should be set forth, and if anything which might and should have been submitted is omitted, for any cause, it is too late to hear it.[2]

lating to the contested premises. Doak *v.* Wiswell, 33 Me. 356.

In a partition suit, if a defendant has in any way acquired title, he must, before decree is entered, set up his deed and prove his claim, or he will afterwards be barred from showing any rights which he had in the premises other than those which led to his being made a party to the petition for partition. In the same way if one holds under a sheriff's deed, he must as a defendant to a partition set up his deed and prove title, for he cannot subsequently maintain an ejectment suit. Bobb *v.* Graham, 89 Mo. 200; Davis *v.* Durgin, 64 N. H. 51; Scuddy *v.* Shaffer, 14 La. Ann. 576; Christy *v.* Spring Valley Water Works, 84 Cal. 541.

If the question of dower is not raised and considered in a partition suit, when it might and ought to have had a bearing in the case, it will be barred from any subsequent consideration. Jordan *v.* Van Epps, 85 N. Y. 428; Rankin's Appeal, 95 Pa. St. 358; Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218; Whitman *v.* Reese, 59 Ala. 532; Brown *v.* Sceggell, 22 N. H. 548; Stewart *v.* Alleghany Nat. Bank, 101 Pa. St. 342.

In Dearborn *v.* Preston, 7 Allen (Mass.) 192, the court said: "To deprive the probate court of its jurisdiction in a matter of this kind in any particular case, it must be made to appear that there is a real doubt and uncertainty in relation to the legal rights of the parties. The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or proportions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal competent to decide it. If the facts in reference to which the alleged dispute or uncertainty arises are all known to and expressly admitted by the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is dispute and controversy concerning their relative shares and proportions of the estate." Foxcroft *v.* Barnes, 29 Me. 128; Brevoort *v.* Brevoort, 70 N. Y. 136; Nash *v.* Church, 10 Wis. 303; 78 Am. Dec. 678; Monarque *v.* Monarque, 80 N. Y. 320; Freeman *v.* Rahm, 58 Cal. 111; Steele's Appeal, 86 Pa. St. 222; Plumer *v.* Plumer, 30 N. H. 570; Bresee *v.* Stiles, 22 Wis. 120.

1. Duncan *v.* Halcomb, 26 Ind. 378; Columbus, etc., R. Co. *v.* Watson, 26 Ind. 52; Bonvillain *v.* Bourg, 16 La. Ann. 365; Baker *v.* Rand, 13 Barb. (N. Y.) 160; Embury *v.* Conner, 3 N. Y. 525; 53 Am. Dec. 325; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 42.

2. "As a general rule, the defendant who has an equitable defense to an action, being now authorized to interpose it by answer, is bound to do so,

and shall not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court." Winfield *v.* Bacon, 24 Barb. (N. Y.) 154; Jenkins *v.* Harrison, 66 Ala. 345; Tuttle *v.* Harrill, 85 N. Car. 456; Radcliffe *v.* Varney, 56 Ga. 222; Hills *v.* Sherwood, 48 Cal. 386; Nims *v.* Vaughn, 40 Mich. 356; Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; St. Louis *v.* Schulenburg, 98 Mo. 613; Parnell *v.* Hahn, 61 Cal. 131; Winpenny *v.* Winpenny, 92 Pa. St. 440.

"A verdict and judgment of a court of record or a decree in chancery puts an end to all points thus decided between the parties to the suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of law and a decree in a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise." Smith *v.* Kernochen, 7 How. (U. S.) 198; Powers *v.* Chelsea Sav. Bank, 129 Mass. 44; Low *v.* Mussey, 41 Vt. 393; Thompson *v.* Lester, 75 Tex. 521; Bonney *v.* Bowman, 63 Miss. 166; Lane *v.* Lane, 80 Me. 570; Wilson *v.* Boughton, 50 Mo. 17.

"Nor is there anything anomalous or unusual in setting up a former adjudication as an estoppel to an action for equitable relief. There is nothing unjust or inequitable in insisting upon an estoppel by a judgment upon the same point; on the contrary, the rule is a beneficial one, and it is a matter in which the public is said to have an interest as well as the parties, that there should be an end to litigation." San Francisco *v.* Spring Valley Water Works, 39 Cal. 473; Smith *v.* Sims, 77 Mo. 269; Williams *v.* Batchelor, 90 N. Car. 364; Putnam *v.* Clark, 34 N. J. Eq. 532; Allis *v.* Davidson, 23 Minn. 442; Sabin *v.* Sherman, 28 Kan. 289; Morse *v.* Elms, 131 Mass. 151; Springs *v.* Schenck, 106 N. Car. 153; Hudson *v.* Judge of Superior Ct., 42 Mich. 239; Bleckeley *v.* Branyan, 28 S. Car. 445; Pollock *v.* Gilbert, 16 Ga. 398; 60 Am. Dec. 732.

All the defenses which might in any way have been available in a foreclosure suit are concluded by a decree. In case of a composition resulting in a new mortgage, in the absence of fraud, no defense can be used in a second foreclosure which could have been used in the first, yet perhaps a bill of review might lie. In Murrell *v.* Smith, 51 Ala. 301, the court said: "Observing the distinction between a mere matter of defense and a cross-claim which may or may not be interposed by the defendant, the former action was in the same court of equity, the peculiar province of which is to put an end to litigation. The obligation upon the defendant to put in issue every matter allowed to him is greater in that court then in a court of law. A suit to foreclose a mortgage legitimately puts in issue every reason why the mortgage should not be foreclosed."

In some cases where a supplemental bill would be needed to cover new points arising in the course of the proceedings, it has been held that they would be barred unless passed upon, provided the failure to do it was the fault of the complainant. Hites *v.* Irvine, 13 Ohio St. 288.

Equity will not disturb a judgment at law on the ground of fraud, if it was known in season to have been disclosed in the suit at law. Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436; 1 Am. Dec. 121; Pendleton *v.* Dalton, 92 N. Car. 185; Embry *v.* Palmer, 107 U. S. 3; Pearce *v.* Olney, 20 Conn. 544; Strang *v.* Moog, 72 Ala. 460.

In Marine Ins. Co. *v.* Hodgson, 7 Cranch. (U. S.) 332, the court by Marshall, C. J., said: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

In Vilas *v.* Jones, 1 N. Y. 274, the court said: "When a party goes into chancery after a trial at law he must be able to impeach the justice and equity of the verdict, and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part."

If a discharge in bankruptcy has not been obtained, equity will not render any assistance. Marsh *v.* Mandeville, Miss. 128.

Not only fraud but anything invalidating the original contract must be pleaded and shown in the suit at law or the opportunity will be lost. Hatch *v.* Garza, 22 Tex. 177; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550.

Anything which might have been proven in an action to quiet a title will be barred. Hackworth *v.* Zollars, 30 Iowa 433.

"We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance." Pennington *v.* Gibson, 16 How. (U. S.) 65; Low *v.* Mussey, 41 Vt. 393; McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

All questions relating to the sale or mortgage or foreclosure of real estate must be raised in the original action. Kelly *v.* Donlin, 70 Ill. 385; Rogers *v.* Higgins, 57 Ill. 247; Stockton *v.* Ford, 18 How. (U. S.) 420.

There are some exceptions to the general rule that all matters which were or ought to have been considered in the first action, are *res judicata*, among them are these: When the defense is strictly an equitable one; newly discovered evidence; where there is good excuse for not bringing a question into the first suit; where there has been accident, fraud, or mistake. "When a cause involves matter exclusively within the jurisdiction of equity, its final decision at law will not preclude a re-examination in chancery. Under such circumstances the doctrine of *res judicata* does not apply. For as the matter on which the intervention of equity is asked could not have been determined at law, it cannot be within the estoppel of the legal decision." Pollock *v.* Gilbert, 16 Ga. 398; 60 Am. Dec. 732.

Statutes.—Where a statute permits, but does not require the setting up of equitable defenses in actions at law, no rights are lost. Dorsey *v.* Reese, 14 B. Mon. (Ky.) 127.

In Barton *v.* Radcliffe, 149 Mass. 275, the court said: "The purpose of the statute was not to create any new equitable defenses in addition to those already existing, but to permit a defendant in an action at law to avail himself of those which were recognized by courts of equity, and thus relieve him from the necessity of initiating a new procedure in order to obtain the benefit of them. That a defense should be established under it, such defense must be within the rules and principles of equity jurisprudence. A court of equity will interfere undoubtedly to restrain a party from executing a judgment, when facts appear showing that it would be against conscience that he should do so, of which facts the injured party could not have availed himself in a court of law, or of which he might have availed himself, but which he had been prevented from doing by fraud or accident unmixed with any fraud or negligence in himself or his agents."

Equitable defenses cannot be offered in actions at law in the federal courts. Montejo *v.* Owen, 14 Blatchf. (U. S.) 324; Bennett *v.* Butterworth, 11 How. (U. S.) 669.

Fraud.—Wingate *v.* Haywood, 40 N. H. 437; Dalter *v.* Lane, 13 Iowa 542; White *v.* Crow, 110 U. S. 183; Whittlesey *v.* Delaney, 73 N. Y. 571; Payne *v.* O'Shea, 84 Mo. 129; Brown *v.* Thornton, 47 Ga. 474; Kent *v.* Ricards, 3 Md. Ch. 392; Pearce *v.* Olney, 20 Conn. 544.

In Moore *v.* Gamble, 9 N. J. Eq. 246, the court said: "The court will grant relief against a judgment which is against conscience, which was obtained by fraud or in any other way by which injustice has been done, and where the injured party has had no opportunity for defense, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment is obtained, and timely application for relief is made to this court." Lockwood *v.* Mitchell, 19 Ohio 448; 53 Am. Dec. 438; Spencer *v.* Vigneaux, 20 Cal. 442; Wagner *v.* Shank, 59 Md. 313.

In Stilwell *v.* Carpenter, 2 Abb. N. Cas. (N. Y.) 238, the court laid down the rule as to fraud as follows: "The question of fraud which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it must have occurred in

the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud." California Beet Sugar Co. *v.* Porter, 68 Cal. 369; Barnett *v.* Barnett, 83 Va. 504; Walton *v.* Bonham, 24 Ala. 513; Jaynes *v.* Brock, 10 Gratt. (Va.) 211.

"It is not sufficient ground for relief in equity against a judgment at law, that one of the parties, or that some witness, or many witnesses, testified falsely upon a material question of fact in issue. If, upon such grounds, a court of chancery were to open issues settled by verdict of a jury, and thus relieve suitors from judgments recovered at law, it is difficult to see where litigation would stop, and what stability there would be in the adjudications of courts of law." Smyth *v.* Balch, 40 N. H. 363; Budd *v.* Gamble, 13 Fla. 265; Ross *v.* Wood, 70 N. Y. 8; Demerit *v.* Lyford, 27 N. H. 541.

In U. S. *v.* Throckmorton, 98 U. S. 61, the court by Miller, J., said: "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

Mistake, Accident, etc.—See Kohn *v.* Lovett, 43 Ga. 180; Simmons *v.* Martin, 53 Ga. 620; Kersey *v.* Rash, 3 Del. Ch. 321; Shannon *v.* Reese, 38 Ala. 586; Crim *v.* Handley, 94 U. S. 652; Cole *v.* Hundley, 8 Smed. & M. (Miss.) 473; Powell *v.* Stewart, 17 Ala. 719; Fowler *v.* Roe, 11 N. J. Eq. 367.

"A party who seeks the aid of a court of chancery after a judgment at law against him, on the ground that he was ignorant of the defense, must show the exercise of ordinary diligence to discover it; or that he was prevented by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part." Stinnett *v.* Branch Bank, 9 Ala. 120; Carolus *v.* Koch, 72 Mo. 645; Tutt *v.* Ferguson, 13 Kan. 45; Briggs *v.* Smith, 5 R. I. 213; Sanders *v.* Fisher, 11 Ala. 812; Stroup *v.* Sullivan, 2 Ga. 275; 46 Am. Dec. 389; McVickar *v.* Filer, 31 Mich. 304.

Some defenses concurrent in law or equity may be open, notwithstanding a previous omission. Lucas *v.* Nichols, 66 Ill. 41; Dutil *v.* Pacheco, 21 Cal. 438; 82 Am. Dec. 749; King *v.* Baldwin, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415; Dickson *v.* Richardson, 16 Ark. 114; Dunham *v.* Downer, 31 Vt. 249.

As to errors and irregularities, the court in Risher *v.* Roush, 2 Mo. 95; 22 Am. Dec. 442, where it had been suggested by the court in the previous case that the remedy was in equity, said: "If the party chose to believe in the opinion of the court, it must be at his own hazard, and it now seems to me to be no good ground for relief in equity that the court or his counsel gave him bad advice; he should have excepted to the opinion of the court in refusing to continue, and if on examination this should be found to be error, then he would have had relief; but having failed to do so furnishes no more ground for relief than he would have been entitled to if the court had committed any other error, and he had submitted to it till it was too late to redress it." Smith *v.* Butler, 11 Oregon 46; Pryor *v.* Emerson, 22 Tex. 162; Walker *v.* Villavaso, 26 La. Ann. 42; Katz *v.* Moore, 13 Md. 566.

Where there is a clear and adequate remedy at law and it has not been availed of, it is clear that the aggrieved party cannot come into equity, unless under the exceptions named to the general rule. Agard *v.* Valencia, 39 Cal. 292; Kelly *v.* Hurt, 74 Mo. 581; Ewing *v.* Nickle, 45 Md. 413; Tyler *v.* Hamersley, 44 Conn. 419; 26 Am. Rep. 479; Jordan *v.* Corley, 42 Tex. 284; Coffee *v.* Ball, 49 Tex. 16; Lester *v.* Hoskins, 26 Ark. 63; Higgins *v.* Bullock, 73 Ill. 205; Kelleher *v.* Boden, 55 Mich. 295; Braden *v.* Reitzenberger, 18 W. Va. 286; Shipp *v.* Wheeless, 33

c. CROSS-CLAIMS, SET-OFFS AND RECOUPMENTS. — Where a defendant has any of these defenses or claims, he may set them forth and prove them in an action against him, if they have to do with the same subject-matter, but it is generally optional with him to do so or not. If he allows any of these matters to be litigated he will be bound by the decision. If any of these matters are brought up, and are either subsequently withdrawn, or for any cause are not passed upon, a subsequent action will lie upon them. If these questions are submitted and either allowed or disallowed by court or jury, they cannot be taken advantage of in a subsequent suit of any kind.[1] A set-off cannot be split up so as to have a portion adjudicated in the first suit, and a subsequent action brought for the remainder.[2] If set-offs which should have been ruled out as irrelevant to the first suit are in reality passed upon, they are as completely barred as if there had been no question as to the propriety of considering them.[3] If a set-off as claimed has not yet matured and is not allowed because of that fact, it is no bar to another action after it has fully matured.[4] If an account or claim is unintentionally included in a suit or set-off and is really adjudicated the finding is just as conclusive as in any other case. In short it may be said that if these defenses are submitted they become subject to the general rule as to *res judicata;* if not presented they may, in general, become the subject of a subsequent action.[5]

Miss. 646; Jackson *v.* Patrick, 10 S. Car. 207; Emerson *v.* Udall, 13 Vt. 477; 37 Am. Dec. 604; Hungerford *v.* Sigerson, 20 How. (U. S.) 156; Garrison *v.* Cobb, 106 Ind. 245.

1. Baker *v.* Stinchfield, 57 Me. 363; Doak *v.* Wiswell, 33 Me. 355; Robbins *v.* Harrison, 31 Ala. 160; Hobbs *v.* Duff, 23 Cal. 596; Gaines *v.* Kennedy, 53 Miss. 103; Axtel *v.* Chase, 83 Ind. 546; Davenport *v.* Hubbard, 46 Vt. 200; 14 Am. Rep. 620; Savery *v.* Sypher, 39 Iowa 675; Collins *v.* Bennett, 46 N. Y. 490; Howe *v.* Lewis, 121 Ind. 110; Wright *v.* Salisbury, 46 Mo. 26; Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449; Dunham *v.* Bower, 77 N. Y. 76; 33 Am. Rep. 570; Hackworth *v.* Zollars, 30 Iowa 433; Haynes *v.* Ordway, 58 N. H. 167; Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308; Davenport *v.* Hubbard, 46 Vt. 200; 14 Am. Rep. 620; South, etc., Ala. R. Co. *v.* Henlein, 56 Ala. 368; Gilson *v.* Bingham, 43 Vt. 410; 5 Am. Rep. 289; Blair *v.* Bartlett, 75 N. Y. 150; 31 Am. Rep. 455; Campbell *v.* Mayhugh, 15 B. Mon. (Ky.) 142.

2. Herring *v.* Adams, 5 W. & S. (Pa.) 459; Rice *v.* Whitney, 12 Ohio St. 358.

3. Thompson *v.* Wineland, 11 Mo. 245; Ehle *v.* Bingham, 7 Barb. (N. Y.) 494.

4. Crabtree *v.* Welles, 19 Ill. 55; Carter *v.* Hanna, 2 Ind. 45; Patrick *v.* Shaffer, 94 N. Y. 423.

5. Eastmure *v.* Lawes, 5 Bing. N. Cas. 444; 35 E. C. L. 170. If none of these claims are presented they are not barred. Kezar *v.* Elkins, 52 Vt. 119; Axtel *v.* Chase, 83 Ind. 546; Weaver *v.* Brown, 87 Ala. 533; Fannin *v.* Thomasson, 45 Ga. 535; Haas *v.* Taylor, 80 Ala. 459; Beebe *v.* Bull, 12 Wend. (N. Y.) 504; 27 Am. Dec. 150; Fifield *v.* Edwards, 39 Mich. 264; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518; Garrott *v.* Johnson, 11 Gill. & J. (Md.) 173; 35 Am. Dec. 272; Hobbs *v.* Duff, 23 Cal. 596.

Where by a judgment a set-off does not appear to have been allowed, the conclusion is as effective as a direct decision against it, if it has been properly submitted. Green *v.* Sanborn, 150 Mass. 454; Howe *v.* Lewis, 121 Ind. 110; Stevens *v.* Miller, 13 Gray (Mass.) 283.

"If an adjustment took place between the parties and a writing was executed by them showing the mode of adjust-

d. DEFENSE OF PAYMENT.—The decisions are at variance as to whether the defense of payment is an exception to the general rule. It would seem that in some instances, notably where there

ment, and items charged in the account in set-off were expressly excluded, and judgment was rendered accordingly, it was a withdrawal of such items." Smith *v.* Berry, 37 Me. 298.

A set-off or recoupment for unliquidated damages is optional. Davenport *v.* Hubbard, 46 Vt. 205; 14 Am. Rep. 620.

Where there had been an action for failure to deliver grain and the full value had been recovered, though only a nominal price was paid, the vendor was barred from recovering more than the excess of value over contract price. Dey *v.* Dox, 9 Wend. (N. Y.) 132; 24 Am. Dec. 137; Niday *v.* Harvey, 9 Gratt. (Va.) 454.

On two notes secured by mortgage, the defendant succeeded in proving failure of consideration, but a counterclaim would still lie. Gilfillan, C. J., saying, in the case of Osborne *v.* Williams, 39 Minn. 353: "The matters showing a want of consideration were pleaded for the purpose of showing that the mortgage was void, and that therefore the plaintiff was not entitled to the possession of the property, merely as a defense, and not for the purpose of recovering affirmative relief by reason of the breach of warranty. So that, conceding what is not entirely clear, that the counterclaim might have been set up and litigated in that action, it is enough to say it was not." O'Connor *v.* Varney, 10 Gray (Mass.) 231.

If a suit is brought upon a *quantum meruit*, all damages to be recouped must be claimed then and there. The issue is as to how much, considering all the circumstances, the plaintiff should recover, and the claim of defendant is based upon some of the circumstances of the case. Ressequie *v.* Byers, 52 Wis. 650; 38 Am. Rep. 775; Edwards *v.* Stewart, 15 Barb. (N. Y.) 67; Howell *v.* Goodrich, 69 Ill. 556; Dunham *v.* Bower, 77 N. Y. 76; 33 Am. Rep. 570; Mimnaugh *v.* Partlin, 67 Mich. 391; Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308; Haynes *v.* Ordway, 58 N. H. 167.

Where a judgment is given on default, any counterclaim is allowed of the amount set forth in the action in which such default is obtained, and the defendant is barred from further action on same. Abbott *v.* Stevens, 117 Mass. 340; Hudelmeyer *v.* Hughes, 13 Mo. 87; Briggs *v.* Richmond, 10 Pick. (Mass.) 391; 20 Am. Dec. 526. As to cross-actions, see Davenport *v.* Hubbard, 46 Vt. 200; 14 Am. Rep. 620; Foster *v.* Milliner, 50 Barb. (N. Y.) 385; Dunham *v.* Bower, 77 N. Y. 76; 33 Am. Rep. 570.

If there has been a judgment by default, and a set-off which was included was too small, a suit will lie for the balance. Minor *v.* Walter, 17 Mass. 237; McEwen *v.* Bigelow, 40 Mich. 215. Where a chattel is brought and a note given, the maker can recoup damages or bring a separate action for fraud at his option. Robbins *v.* Harrison, 31 Ala. 163; McDonald *v.* Chistre, 42 Barb. (N. Y.) 37.

Where an attempt has been made to recoup damages, any further claim is barred. South, etc., Ala. Co. *v.* Henlein, 56 Ala. 368.

In regard to warranty, see Barker *v.* Cleveland, 19 Mich. 237; Fairfield *v.* McNany, 37 Iowa 75; Barth *v.* Bent, 43 Barb. (N. Y.) 628. "The defendant having elected to avail himself of his claim against the plaintiff for damages by means of a separate action, and having brought his action and prosecuted it till a verdict was rendered, could not also avail himself of the same claim in mitigation of damages in this suit." Stevens *v.* Miller, 13 Gray (Mass.) 283.

If a counterclaim is not adjudicated it is no bar. Baker *v.* Stinchfield, 57 Me. 363; Haas *v.* Taylor, 80 Ala. 459; Hobbs *v.* Duff, 23 Cal. 596. "We see no reason why an abortive attempt to invoke a jurisdiction not possessed by the justice should forever preclude the party from all right to redress in another action." Lancaster, etc., Mf'g. Co. *v.* Colgate, 12 Ohio St. 344.

A counterclaim founded on contract cannot be set up in an action for fraud, and it is not barred by any attempt to so set it up. People *v.* Denison, 84 N. Y. 272.

If a defendant fails to put in certain claims through a reliance upon a compromise made with the plaintiff and which the latter fails to recognize, the prior judgment is no bar to a subsequent action. Savery *v.* Sypher, 39 Iowa 675.

has been a default, the decisions formerly recognized exceptions, but it is believed that the tendency of recent decisions is to make no exception.[1]

See generally on this subject, SET-OFF, RECOUPMENT, AND COUNTER-CLAIM, vol. 22.

1. In a case where a note had been, in part, paid, no indorsement having been made, in Rowe *v.* Smith, 16 Mass. 307, the court by Parker, C. J., said: "Our first impression was against this action; but, upon further consideration, we think it can be maintained. It is not like the cases in which after judgment suffered an action is brought to recover back the sum, or a part of it which was the foundation of the judgment. In those cases, a new trial is the only proper remedy; and when there has been any mistake or accident, our statute furnishes relief. Here, the creditor by his own fault recovered judgment for his whole debt when a part of it had been paid. It was his duty to credit the sum paid on the note; and not having done it, he is to be considered as retaining the money for the use of his debtor. The debtor might well lie by and suffer judgment to go against him by default, relying upon a deduction of the sum paid before judgment. . . . It is not attempted to disturb the judgment; it is not complained of; it is not alleged that too much has been recovered. The ground of the action is that the defendant has received fifty dollars of the plaintiff which he is not entitled to retain. He might have retained it if he had chosen to indorse it on the note or deduct it from his damages; but not having done either he cannot conscientiously retain the money." See also Fowler *v.* Shearer, 7 Mass. 14; Rowe *v.* Smith, 16 Mass. 306; Loring *v.* Mansfield, 17 Mass. 394; Fuller *v.* Shattuck, 13 Gray (Mass.) 70; 74 Am. Dec. 622; Bobe *v.* Stickney, 36 Ala. 482; Doyle *v.* Reilly, 18 Iowa 108; 85 Am. Dec. 582; Footman *v.* Stetson, 32 Me. 17; 52 Am. Dec. 634; Baker *v.* Stinchfield, 57 Me. 363; Greenabaum *v.* Elliott, 60 Mo. 25.

"Where the prosecution of an action will impeach a former judgment, it cannot be maintained; but where the claim does not impeach the former judgment, but arises out of the fraud, breach of trust, or neglect of the party, the action may be maintained." Woodward *v.* Hill, 6 Wis. 143; State *v.* McBride, 76 Ala. 51; Mitchell *v.* Sandford, 11 Ala. 695; Loomis *v.* Pulver, 9 Johns. (N. Y.) 244; Ruff *v.* Doty, 26 S. Car. 173; Bird *v.* Smith, 34 Me. 63; 56 Am. Dec. 635; Clay *v.* Clay, 13 Tex. 195.

Where a judgment by default had been obtained on a note, upon which a partial payment had already been made, and no credit for it was given, it was held that no remedy would lie to recover the payment. Binck *v.* Wood, 43 Barb. (N. Y.) 315; Smith *v.* Weeks, 26 Barb. (N. Y.) 463; Loring *v.* Mansfield, 17 Mass. 394, the latter case being overruled in Stephens *v.* Howe, 127 Mass. 164.

Equity may grant some relief, or action for money had and received might lie. Smith *v.* McCluskey, 45 Barb. (N. Y.) 610; Tilton *v.* Gordon, 1 N. H. 33; Kirklan *v.* Brown, 4 Humph. (Tenn.) 174; 40 Am. Dec. 635.

"It is clear that if there be a *bona fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation." Duke de Cadaval *v.* Collins, 4 A. & E. 867; 31 E. C. L. 206; Nuffer *v.* Allen, 12 Jur. N. S. 930; Marriott *v.* Hampton, 7 T. R. 269.

Where a partial payment has been made for goods purchased, if the purchaser is unable to prove such payments in an action for the price, he cannot recover the amount previously paid by him. Wilson *v.* Cameron, 1 Kerr 142.

It cannot be claimed that there was a breach of trust, as contracting and litigating parties can hardly be claimed to have any fiduciary relations with each other. Loring *v.* Mansfield, 17 Mass. 395; Fowler *v.* Shearer, 7 Mass. 23; Mitchell *v.* Sandford, 11 Ala. 695; Smith *v.* Weeks, 26 Barb. (N. Y.) 468; Broughton *v.* McIntosh, 1 Ala. 103. For dissenting opinions and points overruled, see Corey *v.* Gale, 13 Vt. 639; Snow *v.* Prescott, 12 N. H. 539; Tilton *v.* Gordon, 1 N. H. 34.

Although generally when money has been paid on legal process, it cannot be recovered, yet the transaction may be *res inter alios acta*, and an assignee or successor may recover it. Phillips *v.* Hunter, 2 H. Bl. 402; Follett *v.* Hoppe, 5 C. B. 226; 57 E. C. L. 225.

7. Identity.—*a.* THE RULE.—To make a matter *res judicata* there must be a concurrence of the four conditions following, namely: first, identity of the subject-matter: second, identity of cause of action: third, identity of persons and parties: fourth, identity in the quality of the persons for or against whom claim is made.[1] Inference, probability that points have been considered, arguments on issues, or even an adjudication may not be enough to show that identical issues have been adjudged by the court, for either the issues may not have been considered, they may be different, or, in connection with others, they may have been only incidentally treated. Generally speaking, any issue properly before the court in a given case is concluded, if adjudicated.[2]

Where a vessel was insured, and the vessel having been lost the insurance was paid, a suit was brought by the company to recover the insurance money, claiming that the vessel was lost before the insurance was put on, which fact had been purposely concealed. The prior action was held to be a bar, because "provision being made by the statute for a review of judgments within a time thought reasonable by the legislature, it must be supposed that a limit was intended of the right of parties to complain of the wrong done." Homer *v.* Fish, 1 Pick. (Mass.) 436; 11 Am. Dec. 218; Dey *v.* Dox, 9 Wend. (N. Y.) 129; 24 Am. Dec. 137; Pearl *v.* Wells, 6 Wend. (N. Y.) 291; 21 Am. Dec. 328; First Presbyterian Church *v.* New Orleans, 30 La. Ann. 259; 31 Am. Rep. 224.

Where payment for goods was made partly in cash and in part by note, and an overpayment was made, and a judgment was obtained on the note, a subsequent suit to recover amount paid upon the judgment was allowed. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

Where, after a judgment, a promise had been made to allow certain credits which should have been but were not considered in making up the amount of the judgment, it is open to prove the promise. Thayer *v.* Mowry, 36 Me. 287.

For cases of compromise payment, see Smith *v.* Chilton, 84 Va. 840; Hunt *v.* Brown, 146 Mass. 253.

A claim of usury is barred if not presented at the proper time. Montague *v.* McDowell, 99 Pa. St. 265; Heath *v.* Frackleton, 20 Wis. 320.

For a neglect to plead bankruptcy the debtor is prevented to set it up at any future time, the court saying in Rahm *v.* Minis, 40 Cal. 421, that the defendant "was entitled to plead his discharge in insolvency in bar of the action by supplemental answer. If that fact was pleaded, the judgment of the court is conclusive that the plaintiff was entitled to his judgment, notwithstanding the alleged discharge in insolvency. If he omitted to plead the discharge in insolvency the judgment is equally conclusive upon him as it would be had his defense been accord and satisfaction, payment, etc., which he had neglected to plead." See on the general subject PAYMENT, vol. 18, p. 148.

1. Benz *v.* Hines, 3 Kan. 397; Slocomb *v.* De Lizardi, 21 La. Ann. 355; 99 Am. Dec. 740; State *v.* Jumel, 30 La. Ann. 861; Bouvier's Law Dict., *Res Judicata.*

2. **Identity.**—In Cromwell *v.* Sac. Co., 94 U. S. 351, the court by Field, J., said: "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the in-

strument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Issues must be identical in fact and substance, not in name merely. If they were similarly described, yet if they actually were different in the two cases no bar would exist. Palmer *v.* Hussey, 87 N. Y. 303.

The principal upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the litigation. Horton *v.* Hamilton, 20 Tex. 606.

A special deposit in defendant's hands is not included in a judgment rendered for money on general deposit in the same hands. Byrnes *v.* Byrnes, 102 N. Y. 4.

When one is barred in any action, real or personal, by a judgment on demurrer, confession, verdict, etc., he is barred as to that, or the like action of the like nature for the same thing forever. Westcott *v.* Bock, 2 Colo. 335.

Where the settlement of the mother had been fixed in a prior action, in a subsequent action relating to her minor son, it was held that as his settlement was hers, it had been already adjudicated. Cabot *v.* Washington, 41 Vt. 168.

"The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon." Lewis' Appeal, 67 Pa. St. 153.

Where there is a failure to show in defense that labor was unskillfully performed, no claim for damages can be maintained against the former plaintiff. Merriam *v.* Woodcock, 104 Mass. 326.

Where there has been a partition of lands, there is no bar to an action regarding any lands not included in the partition. Ihmsen *v.* Ormsby, 32 Pa. St. 198; Mersereau *v.* Pearsall, 19 N. Y. 111.

Where a claim against a partnership debt had been adjudicated, it did not bar a claim against one as special partner by way of a creditor's bill to account for assets of the firm in his possession. Bell *v.* Merrifield, 109 N. Y. 202.

Where a wife was a joint maker of a note, her separate indebtedness was in issue and judgment was found against her. In an action to foreclose a mortgage, it was held that the judgment had fixed her individual indebtedness. Lieb *v.* Lichtenstein, 121 Ind. 483.

Where, in an action for trespass to land, the plaintiff shows his purchase from the State, and obtains judgment, the opportunity to prove which had the better right to purchase is still open. Bosquett *v.* Crane, 51 Cal. 505.

Validity of patent may be settled by a judgment on the question of infringement. Goucher *v.* Clayton, 11 Jur. N. S. 107.

Where the validity of the appointment of a receiver is decided, it is a bar. Griffin *v.* Long Island R. Co., 102 N. Y. 449.

Proceedings on probate accounts and the probating of wills, may establish a bar. Blackwell *v.* Bragg, 78 Va. 529; Johns *v.* Hodges, 62 Md. 525; Duhe's Succession, 42 La. Ann. 252.

An action on guaranty of number of acres in a farm can be maintained after an action for deceit in misstating the number of acres in it has been decided. Schriver *v.* Eckenrode, 87 Pa. St. 213.

A decree for a divorce does not necessarily pass upon the question of the validity of the marriage. Williams *v.* Williams, 63 Wis. 58; 53 Am. Rep. 253.

Where a discharge in bankruptcy has been opposed, the objector cannot afterwards show that the discharge was fraudulently obtained. Wales *v.* Lyon, 2 Mich. 276.

Where a physician recovers for service, it is a bar to any claim for malpractice. Gates *v.* Preston, 41 N. Y. 113; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Edwards *v.* Stewart, 15 Barb. (N. Y.) 67.

A motion may be a bar to another motion. Roulhac *v.* Brown, 87 N. Car. 1.

If a judgment is rendered as to the right to split an action it is conclusive. Lorillard *v.* Clyde, 102 N. Y. 59.

A judgment for or against a coupon on a bond is generally conclusive as to any other coupon on the same bond. Bissell *v.* Spring Valley Tp., 124 U. S. 225; Block *v.* Borboun Co., 99 U. S. 686; Whitaker *v.* Johnson Co., 12 Iowa 595.

The same is true of a series of notes between the same parties growing out of the same transaction, where failure of consideration, fraud or other defense is shown. Mason Lumber Co. *v.* Buchtel, 101 U. S. 638; Eastman *v.* Cooper, 15 Pick. (Mass.) 276; 26 Am. Dec. 600; Cleveland *v.* Creviston, 93 Ind. 31; 47 Am. Rep. 367; Felton *v.* Smith, 88 Ind. 149; 45 Am. Rep. 454; Davis *v.* Hart, 66 Miss. 642; Kilander *v.* Hoover, 111 Ind. 10; Freeman *v.* Bass, 34 Ga. 355; 89 Am. Dec. 255; Bank of New London *v.* Ketchum, 66 Wis. 428; Young *v.* Brehe, 19 Nev. 379; Bouchand *v.* Dias, 3 Den. (N. Y.) 243.

To find that something is due on a mortgage is not the same as fixing the amount. Campbell *v.* Consalus, 40 Barb. (N. Y.) 511.

Where one purchased land at a sheriff's sale, which was not properly made by the sheriff, and another mortgage was foreclosed shutting out the prior purchaser, who brought suit to set aside the satisfaction of judgment and to have the money repaid to him, an action remained on the sheriff's official bond for breach of duty. Moore *v.* State, 114 Ind. 414.

Some cases hold that a fact must appear on the face of the pleadings to be estopped. Newell *v.* Carpenter, 118 Mass. 411; Towns *v.* Nims, 5 N. H. 259; 20 Am. Dec. 578. See Garwood *v.* Garwood, 29 Cal. 521; Sanderson *v.* Peabody, 58 N. H. 116.

In an action based upon a lease, any conclusion arrived at as to its validity, or the reverse, will be recognized in subsequent actions. Wilson *v.* Deen, 121 U. S. 525; Nemetty *v.* Naylor, 100 N. Y. 562; Jacobson *v.* Miller, 41 Mich. 90.

Action resulting in a judgment for lessees for a breach of lease where liability for rent came in question, did not bar a claim for rent. Parsons *v.* Crawford, 64 N. H. 23.

Where a lessor was, through the false representations of one of several lessees, induced to let them remain as tenants, even though they failed to pay the rent, and to refuse to let the premises to responsible tenants, an action was open against the lessee for false representations, because his liability was several after judgment against all for the rent. New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288; Collins *v.* Bennett, 46 N. Y. 490.

In Sherman *v.* Dilley, 3 Nev. 21, the court said it was not required that the exact point "should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. But when the fact is not directly put in issue by the pleadings, and it was not a fact necessary to be passed upon before judgment could be rendered, then parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action. If this be not done, the judgment would, as evidence, be conclusive of nothing but the material facts directly put in issue by the pleadings, or such as it was necessary to pass upon in finding the verdict or rendering the judgment."

Plaintiff was her fathers's sole devisee and legatee. At the time of his death he was seised of an estate which had been devised to his use for life, remainder to be equally divided among his nine children. Arbitrators were appointed to determine disputes among

these children with power to sell both the trust estate and the father's individual estate and divide the proceeds. Among the father's alleged individual assets was a note signed by one of his sons. In the note the amount of this note was deducted from the son's share in the trust estate. But, before the award, he had assigned his interest in the trust estate. The assignee refused to allow the deduction; and the arbitrators settled with him by applying to the payment of his claim a portion of plaintiff's individual property placed in their hands to facilitate a settlement of the estate. Plaintiff then brought an action against the arbitrators to recover the amount so paid, and recovered a judgment. It was held that this judgment did not avail for plaintiff in an action against the arbitrators for an accounting upon the proceeds of the sale of her father's individual estate, since the subject-matter in the first case was the individual property of the plaintiff, and the issue was whether the arbitrators had authority to apply it as they did, while in the second action the subject-matter was the father's estate to which the plaintiff was entitled only after all just claims against it were satisfied; and the issue was whether the son's note constituted a part of the father's estate, and if so, whether the arbitrators negligently failed to use means to secure it. Green *v.* Iredell, 31 S. Car. 588. See Samuels *v.* Oliver, 130 Ill. 73; Southern Fertilizer Co. *v.* Reams, 105 N. Car. 283.

A judgment abating a nuisance in a highway is conclusive of a highway and a nuisance in existence. Hahn *v.* Miller, 68 Iowa 745; McLeod *v.* Lee, 17 Nev. 103; Byrne *v.* Minneapolis, etc., R. Co., 38 Minn. 212.

Where a plaintiff claimed her father had given her a certain note, and yet she sued the administrator of her father's estate for the same, and besides that had a process pending for an accounting and title to land, the court having passed upon advancements, accounts and general distribution of the estate, it appeared from plaintiff's actions that she did not regard the note as a gift, and she was not allowed to claim it. Watson *v.* Carman, (Ky. 1888) 6 S. W. Rep. 450.

In Cleaton *v.* Chambliss, 6 Rand. (Va.) 86, the court, by Carr, J., said, in regard to the unnegotiable bonds which were given but not paid and judgment was obtained upon them, that: "Here the foundation of the action is the promise, there the foundation is the bond. The issue was upon *non est factum;* that was the point decided, the allegation taken and found; an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If, then, the judgment on the bonds had been pleaded, the plea could not have availed; for if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of *nul tiel* record would have overthrown it." Clark *v.* Young, 1 Cranch (U. S.) 181; Edgell *v.* Sigerson, 26 Mo. 583.

Where a special contract was pleaded for labor and a failure of the plaintiff to keep it, a verdict was found for the plaintiff. The plaintiff was barred from bringing an action on the special contract. Hawley *v.* Foley, 18 B. Mon. (Ky.) 519.

An issue concluded in the first action cannot be overcome by tendering an immaterial issue in the second. Montgomery *v.* Harrington, 58 Cal. 270; Wixson *v.* Devine, 80 Cal. 385; Leonard *v.* Whitney, 109 Mass. 265; Sheble *v.* Strong, 128 Pa. St. 315; Bowen *v.* Mandeville, 95 N. Y. 237; Fishburne *v.* Ferguson, 85 Va. 321.

Where a plaintiff obtained a judgment in ejectment, the tenant was concluded by the judgment, and could deny neither title nor possession. Walsh *v.* McIntire, 68 Md. 402; Jackson *v.* Randall, 11 Johns. (N. Y.) 405; Kille *v.* Ege, 82 Pa. St. 102.

Also see as to replevin, Whitman *v.* Merrill, 125 Mass. 127; Allen *v.* Butman, 138 Mass. 586.

Plaintiff sued and attached on one of two notes and sought to apply any surplus to the second note. Defendant recovered damages for wrongful attachment, but admitted making the notes. Second note was subject of new suit. Crum *v.* Boss, 48 Iowa 433.

A judgment on the construction of by-laws is conclusive. Cauhape *v.* Parke, 46 Hun (N. Y.) 306.

Where executions were issued against a third party claiming property taken under previous execution, and such claim failed of proof, the party obtaining later executions could not sue sheriff for not levying, there appearing to be no reason for believing the claimant owned the goods. Hill *v.* Reitz, 24 Ill. App. 391.

For cases of breach of promise and divorce, see Ireland *v.* Emerson, 93 Ind.

1; 47 Am. Rep. 304; Rand *v.* Rand, 58 N. H. 536.

Where defendants have gained verdicts in actions on contracts, no suits to reform the contracts will lie. Washburn *v.* Great Western Ins. Co., 114 Mass. 175; Metcalf *v.* Gilmore, 63 N. H. 174; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498; 33 Am. Rep. 655; Sykes *v.* Gerber, 98 Pa. St. 179; Thomas *v.* Joslin, 36 Minn. 1; Thwing *v.* Great Western Ins. Co., 111 Mass. 93.

Matters which have been adjudicated may be barred though they come up in some way in a suit for a different cause of action. Fuller *v.* Eastman, 81 Me. 284; McCoy *v.* McCoy, 29 W. Va. 794; Bigelow *v.* Winson, 1 Gray (Mass.) 299; Logansport *v.* Humphrey, 106 Ind. 146; Wayne Co. *v.* Kennicott, 94 U. S. 498; Chouteau *v.* Gibson, 76 Mo. 38; New York Ins. Co. *v.* Clemmitt, 77 Va. 366.

Where defense to a suit was that street assessments were void, the claim being for labor, and a second suit was brought on a second assessment, neither was void because the other was valid. Walling *v.* Burgess, 122 Ind. 299; Dyer *v.* Scalmanini, 69 Cal. 637; Bollong *v.* Schuyler Nat. Bank, 26 Neb. 281; Sketchley *v.* Smith, 78 Iowa 542. Some cases allow more liberality and do not regard all issues heard as concluded. Taylor *v.* Dustin, 43 N. H. 493; Bernard *v.* Mayor, etc, of Hoboken, 27 N. J. L. 412; Roberts *v.* Robeson, 27 Ind. 454.

Where mortgagee obtained judgment in action by mortgagor for breach of warranty by mortgagee's tenant, a recoupment for damages was barred. Turner *v.* Allen, 66 Ind. 252.

Foreclosure of chattel mortgage is no bar to a note or other indebtedness which it was intended it should secure. Craft *v.* Perkins, 83 Ga. 760.

Where it was sought to restrain a mandamus directed to county authorities to levy a tax to pay a judgment on bonds against the county, it was held that the findings in the judgment that the bonds were authorized by a statute prescribing no limit of taxation for their payment, could not be controverted. U. S. *v.* Knox Co., 122 U. S. 318; 133 U. S. 155; Labette Co. *v.* U. S., 112 U. S. 217; Ralls Co. Ct. *v.* U. S., 105 U. S. 733; State *v.* Rainey, 74 Mo. 229.

If a defendant in an action for specific performance has previously conveyed a portion of the real estate involved, and relief is asked for as to the portion remaining, a judgment bars damages for the partial sale. Thompson *v.* Myrick, 24 Minn. 4.

Where two notes were given in payment for land and one was paid with money of the wife of the purchaser, the grantor being cognizant of the fact, and the latter recovered judgment on the second note and held the land for it, the wife could sue the grantor for the money she had paid. Chappell *v.* Boyd, 61 Ga. 662.

A defendant receiving judgment in an action of forcible entry and detainer may not be a bar to a second action, unless it is very clear that it was for the same cause of action. Merrin *v.* Lewis, 90 Ill. 505.

A sues B for non-performance and for money on account of the agreement. B defends and sues A on the agreement. A recovers money advanced, and B total amount, but a new trial was given on B's action. A's judgment barred B from showing performance, and it might be that it was shown in the former case. Butler *v.* Suffolk Glass Co., 120 Mass. 512.

A railroad company's right of ownership is not settled because an injunction to prevent interference with its right of way is disallowed. Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525.

Where land was bought for a sum and the interest thereon, the same having been paid and a suit for the interest failed, the question of payment of interest could not be raised in a subsequent action for specific performance. Noyes *v.* Kern, 94 Ill. 521.

Generally, on the subject of identity of issues, see Strang *v.* Moog, 72 Ala. 460; Brady *v.* Huff, 75 Ala. 80; Baker *v.* Barclift, 76 Ala. 414; Garwood *v.* Garwood, 29 Cal. 514; Parnell *v.* Hahn, 61 Cal. 131; Jordan *v.* Faircloth, 34 Ga. 47; Mueller *v.* Henning, 102 Ill. 646; Jenkins *v.* International Bank, 111 Ill. 462; Rhoads *v.* Jones, 95 Ind. 341; Rucker *v.* Steelman, 97 Ind. 222; Farrar *v.* Clark, 97 Ind. 447; Faught *v.* Faught, 98 Ind. 470; Jones *v.* Vert, 121 Ind. 140; Boyer *v.* Berryman, 123 Ind. 451; Painter *v.* Hogue, 48 Iowa 426; Brant *v.* Plumer, 64 Iowa 33; Wilcox *v.* Johnson, 34 Kan. 655; Boyd *v.* Moore, 34 Kan. 119; Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541; Davis *v.* Young, 36 La. Ann. 374; Carre *v.* New Orleans, 41 La. Ann. 996; State *v.* Ramsburg, 43 Md. 325;

b. POSITION AND RELATION OF ISSUES.—The identity and directness of issues have been considered at length; and, further, those issues which might have been adjudicated. Also reference has been made to those issues which have been collaterally or incidentally connected with the main issues in a case. The subject-matter and issues should be substantially the same; the form of action may vary and perhaps the cause. At any rate, the same matters must be submitted to a decision if one action is to bar another. However, the best test perhaps as to whether a prior action is a bar, is to determine whether the same evidence will be sufficient and competent to sustain the two actions. Any facts or issues for which the same evidence might be and has been presented, are barred.[1]

Bunker *v.* Tufts, 57 Me. 417; Adams *v.* Cameron, 40 Mich. 506; Hatch *v.* Coddington, 32 Minn. 92; Linne *v.* Stout, 44 Minn. 110; Yeoman *v.* Younger, 83 Mo. 424; Haynes *v.* Ordway, 58 N. H. 167; Littlewood *v.* Mayor, etc., of N. Y., 89 N. Y. 24; 42 Am. Rep. 271; Pendleton *v.* Dalton, 92 N. Car. 185; Bell *v.* McColloch, 31 Ohio St. 397; Martin *v.* Roney, 41 Ohio St. 141; Sykes *v.* Gerber, 98 Pa. St. 179; Hicks *v.* Aylsworth, 13 R. I. 562; Williams *v.* Robinson, 63 Tex. 576; Humason *v.* Lobe, 76 Tex. 512; Tilson *v.* Davis, 32 Gratt. (Va.) 92; Poole *v.* Dilworth, 26 W. Va. 583; Andrew *v.* Schmitt, 64 Wis. 664; Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. (U. S.) 137; Boyd *v.* Alabama, 94 U. S. 645; Hunter *v.* Stewart, 4 De G. F. & J. 168; —— *v.* Campbell, 3 Wils. 240; Buckland *v.* Johnson, 15 C. B. 145; 80 E. C. L. 145.

1. In Taylor *v.* Castle, 42 Cal. 371, the court said: "A judgment is a bar if the cause of action be the same, though the form be different. The cause is the same when the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgments for the plaintiff in the present action would have authorized a judgment for him in the former. The present action would have been sustained upon proof of a contract and the performance on the part of the plaintiff, and non-payment by the defendants. This proof would not have sustained the former action. Therefore the judgment is not a bar." Bull *v.* Hopkins, 7 Johns. (N. Y.) 22; National Bolivian Co. *v.* Wilson, L. R., 5 App. Cas. 176; Outram *v.* Morewood, 3 East 346.

In Betts *v.* Starr, 5 Conn. 553; 13 Am. Dec. 94, the court said: "Although the object and purpose of two actions being different, the judgment in one cannot be used by way of bar to the other, it does not follow that in the second action either party can be permitted to contradict what was specially adjudicated in the first."

The court, by Duer, J., in Birckhead *v.* Brown, 5 Sandf. (N. Y.) 141, in regard to the "same cause of action" as a basis of conclusiveness, says: "The position that in order to raise an estoppel by a prior judgment, the cause of action in the second suit must in all respects be the same as in the first, we feel no difficulty or doubt in rejecting. It is not, indeed, absolutely novel; but it is repugnant to the reasons of public policy embodied in the maxim, *Interest reipublicæ ut sit finis litium*, upon which the doctrine of the conclusiveness of a judgment is founded; and so far from being sustained by authority, it is contradicted by many decisions. The decisions clearly show that the identity which the law requires is widely different from that upon which the learned counsel for the plaintiffs insisted." Cannon *v.* Brame, 45 Ala. 262; Duncan *v.* Stokes, 47 Ga. 595; Percy *v.* Foote, 36 Conn. 102; Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646; Gayer *v.* Parker, 24 Neb. 643; Gates *v.* Goreham, 5 Vt. 317; 26 Am. Dec. 303; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Hitchin *v.* Campbell, 2 Wm. Bl. 827.

Where an action at law is brought upon a note given in lieu of purchase money for land, the judgment is conclusive as to the amount, and no credits can afterwards be admitted, though they were paid in a bill for specific per-

c. ORDER OF THE SUITS.—It is not material which action was first instituted, if it has not reached a final termination. The case in which the first judgment is rendered is the prior one, and that, too, whether, it is a domestic or foreign judgment, when we are considering the question of *res judicata*.[1]

d. MERE EVIDENTIAL FACTS.—It is the issue or issues involved which determine whether a matter is *res judicata* or not. Whether issues are identical or not, to be sure, is determined by the test of whether the same evidence will support and prove or contradict them. Collateral issues may not be finally concluded, but such matters as come in directly or by necessity from implication in arriving at a decision are *res judicata*.[2]

formance in completing the contract of purchase. Bobe *v.* Stickney, 36 Ala. 482.

A judgment for even nominal damages in a suit for possession, will bar a suit for rents due prior to the judgment. Stewart *v.* Dent, 24 Mo. 111.

An estoppel depends not upon the action, but upon the identity of the evidence. In an action for cutting and carrying away wheat, a verdict and judgment for the defendant is a bar for cutting and carrying away the same wheat in an action for trespass *quare clausum fregit.* Johnson *v.* Smith, 8 Johns. (N. Y.) 383.

In some cases it is not required that the causes of action shall be similar in both cases. In an action of slander the plaintiff was accused of stealing cloth; the defendant pleaded the truth of his statements in defense. Plaintiff offered a former judgment against him in trover for the same cloth. The defendant in the action pending could not set up title or justification. Perkins *v.* Walker, 19 Vt. 145; Jones *v.* Fales, 4 Mass. 255.

An account changes the nature of the indebtedness. The claim is upon the balance, but upon the balance which has been arrived at. Pattison *v.* Jones, 27 Ind. 457.

Suit on a contract in which there was a promise, of which there has been a breach. The breach is not a bar to an action in tort for misrepresentations at the time the contract was made, the issues being quite different. Norton *v.* Huxley, 13 Gray (Mass.) 290.

A second judgment cannot be prevented by showing a prior judgment against the plaintiff, where the evidence, if offered in the first case, could not have changed the result. Ballou *v.* Billings, 136 Mass. 307; Gordon *v.* State, 71 Ala. 315; Belden *v.* State, 103 N. Y. 1; Marsh *v.* Masterson, 101 N. Y. 401; Cleary *v.* Folger, 84 Cal. 316; Schriver *v.* Eckenrode, 87 Pa. St. 213; Florida Southern R. Co. *v.* Brown, 23 Fla. 106; Nichols *v.* Marsh, 61 Mich. 509; Ireland *v.* Emmorsen, 93 Ind. 1; 47 Am. Rep. 364; Whaley *v.* Stevens, 24 S. Car. 479; Lawrence *v.* Vernon, 3 Sumn. (U. S.) 20; New England Bank *v.* Lewis, 8 Pick. (Mass.) 113.

Where, in an action for possession, a claim was also made for rents and profits, the plaintiff electing so to do, he cannot then bring any independent action for the rents. Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541.

In an action *quare clausum fregit* the defendant contests the title and is defeated. If the plaintiff brings an action to directly try title, the defendant is barred by the previous judgment. Shettlesworth *v.* Hughey, 9 Rich. (S. Car.) 387.

Since the cause of action need not remain the same, although the issue must, an action on a note will bar a similar one. French *v.* Howard, 14 Ind. 455; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 559; 15 Am. Dec. 402; Bouchand *v.* Dias, 3 Den. (N. Y.) 243.

1. Davis *v.* Bedsole, 69 Ala. 362; Child *v.* Eureka Powder Works, 45 N. H. 547; Casebeer *v.* Mowry, 55 Pa. St. 422; 93 Am. Dec. 766; Duffy *v.* Lytle, 5 Watts (Pa.) 120. But see State *v.* Spikes, 33 Ark. 801.

2. In Stringer *v.* Adams, 98 Ind. 539, the court said: "If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action for which he attempted to recover in the first suit."

e. ISSUES MUST PASS INTO JUDGMENT.—Issues involved in a case must have gone to judgment to render them binding or conclusive in any subsequent action. Any allegations in a declaration or complaint which were not submitted to the court are not to be considered in a second suit, for allegations set forth in the pleadings may not have had any foundation in fact. As the greater includes the less, an issue in bar naturally includes an issue in abatement, and if the former is concluded so is the latter as a matter of course, but judgment must have been rendered before this is true. If, then, there be a plea in bar it will overrule or negative any plea by the same party in abatement. Any verdict which leads to the judgment must directly decide a case and not be merely inferential, incidental or collateral—a direct affirmative or negative decision.[1]

An irrelevant issue where there has been a misjoinder is to be simply disregarded, and will neither affect the case nor bar the issue. Bottorff *v.* Wise, 53 Ind. 32.

In Girardin *v.* Dean, 49 Tex. 243, the court said: "It is of no consequence if the reasons urged to sustain the issue presented in this suit may not be precisely those relied upon, or in the mind of the pleader, when framing the petition in the first case. The applicability of the plea depends upon the identity of the cause of action or matter of defense in issue, and not the identity or similarity of the points or grounds urged to support or maintain the action or matter of defense; otherwise litigation would only end when the ingenuity of counsel could not suggest additional grounds in support of the issue, though the gist of the issue may have been more than once considered and decided by the court."

It has been held that the allegations and not the scope of the pleadings would determine what matters were included. Garwood *v.* Garwood, 29 Cal. 521.

Many things may be introduced in a case which are not material, and any judgment does not make them *res judicata.* All irrelevant issues are in no way prejudiced, and subsequent actions will lie upon them. Fish *v.* Lightner, 44 Mo. 270; Gilmer *v.* Morris, 35 Fed. Rep. 682; Billsland *v.* McManomy, 82 Ind. 139; McGee *v.* Overby, 12 Ark. 164; O'Connor *v.* Irvine, 74 Cal. 435.

In Nickerson *v.* California Stage Co., 10 Cal. 520, the court said: "The judgment in replevin constitutes no bar to this action, unless it be shown that it has been satisfied. The cause of action was in both cases the same, but the object was essentially different. In the one case the plaintiff sought to recover a specific personal chattel which was wrongfully detained; in the other the value of such chattel, when, owing to the acts of defendants, it was not in his power to procure a return. . . . The judgment in the action of replevin was, as between the parties, conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value."

It is generally held that the causes of action must be the same. Pinney *v.* Barnes, 17 Conn. 429; Seddon *v.* Tutup, 6 T. R. 609. See Slocomb *v.* De Lizardi, 21 La. Ann. 356; 99 Am. Dec. 740; Smalley *v.* Edey, 19 Ill. 211.

"The true test to determine whether a plea of *autrefois acquit* be a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first." Heikes *v.* Com., 26 Pa. St. 513; Gordon *v.* State, 71 Ala. 315.

1. Sheldon *v.* Edwards, 35 N. Y. 289; Sweet *v.* Tuttle, 14 N. Y. 473; Walker *v.* Fuller, 29 Ark. 448; Mitchell *v.* Geisendorff, 44 Ind. 358; Reid *v.* Dunklin, 5 Ala. 205; Buck *v.* Little, 24 Miss. 463; Sawyer *v.* Woodbury, 7 Gray (Mass.) 502; 66 Am. Dec. 518.

Special findings not necessary to a general verdict, yet in harmony with it, are not regarded as conclusive on facts of which they treat. Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733.

It is not enough that a verdict has been rendered passing upon certain facts. Where there were special find-

IV. ACTIONS—1. In General.—In the discussion of issues it has been necessary to touch upon actions and the causes of action to a greater or less extent. The relation of the causes of action in a first and second suit have been considered. By the great weight of authority it seems that while the issues involved in a case must be exactly the same, yet the object, subject and causes of action need not correspond so nearly, and while the same issues may be treated in different ways as dependent upon the nature of the action, they may be directly in question in one case and only incidentally in another. However, if any of these issues have been directly decided, they are barred from any further consideration of the same either incidentally, collaterally or otherwise.[1]

2. Ex Contractu.—A judgment in an action *ex contractu* will bar another action of the same kind, even though in form the latter is different from the former.[2]

ings, as to the consideration of a note, a general verdict rendered, to which the exceptions of the defendant were sustained, the ruling of the court that the special findings were conclusive was reversed on appeal, as there had been no judgment upon the special points. Hawks *v.* Truesdell, 99 Mass. 558.

1. These general principles apply to proceedings of various kinds. Weir *v.* Marley, 99 Mo. 484; People *v.* Murray, 73 N. Y. 540.

"A cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." Foster *v.* The Richard Busteed, 100 Mass. 412; 1 Am. Rep. 125; Caperton *v.* Schmidt, 26 Cal. 479; 85 Am Dec. 187; Mervine *v.* Parker, 18 Ala. 241; Peay *v.* Duncan, 20 Ark. 85; Divoll *v.* Atwood, 41 N. H. 443; Smith *v.* Whiting, 11 Mass. 445; Spencer *v.* Dearth, 43 Vt. 98; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Thornton *v.* Campbell, 6 Fla. 546; Gray *v.* Gillilan, 15 Ill. 453; 60 Am. Dec. 761; Street *v.* Beckman, 43 Iowa 496; Hollister *v.* Abbott, 31 N. H. 442; 64 Am. Dec. 342; Barker *v.* Cleveland, 19 Mich. 230; Whitehurst *v.* Rogers, 38 Md. 503; Offutt *v.* John, 8 Mo. 120; 40 Am. Dec. 125; Denison *v.* Hyde, 6 Conn. 508.

2. Walker *v.* Fuller, 29 Ark. 448; Cole *v.* Favorite, 69 Ill. 457; Ferguson *v.* Carter, 8 Ga. 524; Brown *v.* Mayor, etc., of N. Y., 66 N. Y. 385; Ware *v.* Percival, 16 Me. 391; 14 Am. Rep. 565; Blackinton *v.* Blackinton, 113 Mass. 231; Merriam *v.* Woodcock, 104 Mass. 326; Taylor *v.* Castle, 42 Cal. 367; Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552; 48 Am. Dec. 772; Harryman *v.* Roberts, 52 Md. 64; Norton *v.* Doherty, 3 Gray (Mass.) 372; 63 Am. Dec. 758; Lindsey *v.* Danville, 46 Vt. 144; Brown *v.* Moran, 42 Me. 44; State Bank *v.* Rude, 23 Kan. 143; Union R., etc., Co. *v.* Traube, 59 Mo. 355; Collins *v.* Bennett, 46 N. Y. 490; Barker *v.* Cleveland, 19 Mich. 230.

Where a judgment has been obtained on a special contract for a certain amount, an action in general *assumpsit* for the same amount is not barred by such judgment. Gage *v.* Holmes, 12 Gray (Mass.) 428.

In Hardin *v.* Palmerlee, 28 Minn. 450, the court said: "That the remedy sought or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if, upon those facts, he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek a different remedy upon the same facts or cause of action."

Where there is an action to foreclose a mortgage and judgment had, any further action on the note secured by it may be barred, especially if the same defense is offered to both actions. Burke *v.* Miller, 4 Gray (Mass.) 114.

"It was resolved that the plaintiff in this action on the case on *assumpsit* should recover not only damages for

the special loss which he had, but also for the whole debt, so that recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so, *vice versa*, a recovery or bar in an action of debt is a good bar in an action on the case on *assumpsit*." Slade's Case, 4 Co. 94*b*.

Where an action may be brought for breach of contract or for the contract price, the former bars further action, while to maintain the latter a willingness to perform all the requirements of the contract must be shown. An election once made must be consistently followed up. Wiseman *v.* Panama R. Co., 1 Hilt (N. Y.) 301.

If a readiness to comply with the terms of the contract is shown, it is not material that a suit has been brought for a breach of contract and a balance of salary due, especially if a claim for damages is waived and the only question is as to salary claimed. Suits for compensation due for services may be instituted as fast as any amount becomes due, and these are no bar to the right to elect between a suit for wages and one for breach of contract. Thompson *v.* Wood, 1 Hilt (N. Y.) 96.

Where a corporation had used property not its own, by mistake, thinking the company had purchased it and the real owners of the property had expected to sell, and so had left the company in possession of the same, it was held that where an action on the sale had been defeated, no bar was maintainable against a suit for the use of the property in question. Questions of ownership are not a bar to issues as to use. Cantrelle *v.* Roman Cath. Cong., 16 La. Ann. 443; Rider *v.* Union Rubber Co., 28 N. Y. 386.

In case rent is payable every three months, the landlord cannot sue for a part of that time, without losing the balance, because an entire cause of action is indivisible, and there is no way of avoiding this difficulty. Warren *v.* Comings, 6 Cush. (Mass.) 104.

"No principle is better settled than that a judgment or decree establishes in a most conclusive manner the sum due upon the claim sued upon. The cause of action is merged in the judgment, and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect." Ries *v.* Rowland, 11 Fed. Rep. 657.

Where in the case of a sale of chattels a warranty went with them, the vendee can hold the property and sue on the warranty. If there has been no warranty this cannot be done, as the retention of the property will hold the purchaser liable for the contract price. If the contract is rejected and there is no acceptance of the goods an action will lie for the non-performance of the contract. One or the other must be elected—the contract cannot be accepted and a suit brought for a breach of it. A suit for breach is barred by an action and recovery for the balance of the purchase price. Kellogg *v.* Denslow, 14 Conn. 420; Gilson *v.* Bingham, 43 Vt. 414; 5 Am. Rep. 289.

"The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." Foster *v.* The Richard Bustead, 100 Mass. 412; 1 Am. Rep. 125; Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187; Peay *v.* Duncan, 20 Ark. 85; Hollister *v.* Abbott, 31 N. H. 442; 64 Am. Dec. 342; Coit *v.* Tracy, 8 Conn. 268; 20 Am. Dec. 110; Street *v.* Beckman, 43 Iowa 496; Hargus *v.* Goodman, 12 Ind. 629; Whitehurst *v.* Rogers, 38 Md. 503; Jackson *v.* Lodge, 36 Cal. 37; Thornton *v.* Campbell, 6 Fla. 546; Smith *v.* Whiting, 11 Mass. 445; Finley *v.* Hanbest, 30 Pa. St. 190; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518.

"The principle will be found to run through nearly all the American cases, that the judgment of a court of competent jurisdiction directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; hence a judgment may not only be evidence, but conclusive evidence, in relation to such point, and still be no bar, strictly and technically speaking, to a second action." Spencer *v.* Dearth, 43 Vt. 98; Merriam *v.* Whittemore, 5 Gray (Mass.) 316; Lindsey *v.* Danville, 46 Vt. 144; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Lynch *v.* Swanton, 53 Me. 100; Foye *v.* Patch, 132 Mass. 105; Jones *v.* Commercial Bank, 78 Ky. 413; Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608.

"A party who brings a second action

3. Actions Ex Delicto.—An action *ex delicto* will ordinarily bar another of the same kind for the same cause of action, and where the plaintiff can elect to sue in tort or in contract, a suit in either may bar a subsequent action in the other.[1]

must not leave it to nice investigation to see whether the two causes are the same. He ought to show beyond doubt that the second is a different cause of action from the first, in which he failed." Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552; 48 Am. Dec. 772; Hanchey *v.* Coskrey, 81 Ala. 149; Pruitt *v.* Holly, 73 Ala. 369; Morgan *v.* Burr, 58 N. H. 470; White *v.* Simonds, 33 Vt. 178; 78 Am. Dec. 620.

"If there be any uncertainty in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment was rendered—the whole subject-matter of the action will be at large and open to a new contention unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined." Russell *v.* Place, 94 U. S. 606; Bell *v.* Merrifield, 109 N. Y. 202; Lewis *v.* Ocean Nav., etc., Co. 125 N. Y. 341; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Attorney-Genl. *v.* Chicago, etc., R. Co., 112 Ill. 520; Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118; Hoyle *v.* Farquharson, 80 Mo. 377; Bassett *v.* Connecticut River R. Co., 150 Mass. 178.

1. "In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." Norton *v.* Doherty, 3 Gray (Mass.) 372; 63 Am. Dec. 758; Ware *v.* Percival, 61 Me. 391; 14 Am. Rep. 565; Newby *v.* Caldwell, 54 Iowa 102; Wagner *v.* Wagner, 36 Minn. 239.

An action in *assumpsit* may be barred by an action ending in a judgment in trespass *de bonis asportatis*. If no title appears in the plaintiff he cannot recover in an action of contract. Bull *v.* Hopkins, 7 Johns. (N. Y.) 22.

A plea of not guilty in trespass *de bonis asportatis* determines nothing as to the title of the property, and a subsequent action involving the title is not barred. Harris *v.* Miner, 28 Ill. 140.

If the title has been determined, no subsequent suit for damages will lie. Roberts *v.* Heim, 27 Ala. 678.

An action in *assumpsit* may be barred by an action in trover. Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 555; 48 Am. Dec. 772.

No action can be maintained on an attachment bond for special damages, when there has been a judgment for damages for maliciously and wrongfully suing out an attachment. Hall *v.* Forman, 82 Ky. 505.

Neither a mistake of the parties nor the court will change the effect of the former judgment or a subsequent action. Wickersham *v.* Whedon, 33 Mo. 561; Moran *v.* Plankinton, 64 Mo. 337; Baker *v.* Baker, 28 N. J. L. 13; 75 Am. Dec. 243; Ewing *v.* McNairy, 20 Ohio St. 315; Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477; Kane *v.* Morehouse, 46 Conn. 300; Stevens *v.* Damon, 29 Vt. 521; Lorillard *v.* Clyde, 122 N. Y. 41; Fox *v.* Althorp, 40 Ohio St. 322.

A judgment in action for falsely representing personal property, will bar a subsequent action upon a warranty made when the transaction took place. Norton *v.* Doherty, 3 Gray (Mass.) 372; 63 Am. Dec. 758.

A judgment against an attorney for failure to enter satisfaction of judgment and discharge of execution according to agreement, will bar a subsequent action in tort against him for causing an arrest under said execution. Smith *v.* Way, 9 Allen (Mass.) 472; Beall *v.* Pearre, 12 Md. 566; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423; Rendall *v.* School Dist., 75 Me. 358; Fields *v.* Bland, 81 N. Y. 239.

If one recovers personal property by replevin, the defendant cannot maintain trespass for a wrongful taking. Ewald *v.* Waterhout, 37 Mo. 602.

Suit for the value of borrowed or hired chattels is no bar to an action for use and abuse of them. Shaw *v.* Beers, 25 Ala. 449.

A judgment for the price of goods sold bars an action of fraud against the same defendant in getting credit. Cayers *v.* New York, etc., R. Co., 76 N.Y. 609; Hite *v.* Long, 6 Rand. (Va.) 457; 18 Am. Dec. 719; Bollong *v.* Schuyler Nat. Bank, 26 Neb. 281.

Action and judgment against an officer for malfeasance prevents his going

back of that in offering a defense to any action. Diehl *v.* Holben, 39 Pa. St. 213; West *v.* Meserve, 17 N. H. 434.

If a judgment in trover for the value of goods is obtained against one of several tort-feasors, even though no execution issue and there is no satisfaction of it, an action of trespass against the others will not lie. Hunt *v.* Bates, 7 R. I. 217; 82 Am. Dec. 592; Stevens *v.* Pierce, 151 Mass. 207; Prince *v.* Quincy, 128 Ill. 443; Whittier *v.* Collins, 15 R. I. 90; Andrews *v.* Varrell, 46 N. H. 17; Davis *v.* Bedsole, 69 Ala. 362; Schuler *v.* Israel, 120 U. S. 506; Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683.

An action was brought upon a note given for goods sold to the defendant, and failure of consideration pleaded, based on a false representation of the value of the goods at the time of purchase.. This matter having been litigated, an action for false representations cannot now be maintained. Hudson *v.* Smith, 39 N. Y. Super. Ct. 459; Burnett *v.* Smith, 4 Gray, (Mass.) 52; Lewis *v.* Boston, 130 Mass. 339; Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515; Steen *v.* Mark, 32 S. Car. 286; Gibson *v.* Hale, 57 Tex. 405; Aultman *v.* Gamble, 88 Ala. 424.

An action of trover is barred by an action of detinue, and *vice versa* if trover has been satisfied. Thomason *v.* Odum, 31 Ala. 108; 68 Am. Dec. 159; Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515.

In regard to requirements in case of detinue in some cases, see Patton *v.* Hamner, 33 Ala. 307.

An action of trover which is not maintained on its merits, does not affect an action of contract for hire, but if the former is maintained, the action of contract is barred and the price cannot be recovered. Deens *v.* Dunklin, 33 Ala. 47.

Where an action of *assumpsit* was brought, which failed, an action for deceit in which the evidence was precisely the same as that offered in the former case was barred. Duncan *v.* Stokes, 47 Ga. 593.

Where there has been satisfaction of an attachment for contempt, it bars an action in trespass, based on same subject-matter. Walker *v.* Fuller, 29 Ark. 448; Gilchrist *v.* Bale, 8 Watts (Pa.) 355; 34 Am. Dec. 469; Hatch *v.* Coddington, 32 Minn. 92.

Where a judgment in replevin is obtained against one of several joint takers of goods for a portion of the property, an action of trespass will not lie against them all, unless the balance of the goods could not be found to be replevied. Bennett *v.* Hood, 1 Allen (Mass.) 47 ; 79 Am. Dec. 705; McCaffrey *v.* Carter, 125 Mass. 330; Knowlton *v.* New York, etc., R. Co., 147 Mass. 606.

An adjudication must cover all the property or claims in issue in order to prove a complete bar. Where an action had been successful in collecting price of logs, it appeared that the amount recovered was small and did not include the value of the whole, which facts were admitted to proof by parol. Converse *v.* Colton, 49 Pa. St. 351.

Where a claimant of property recovers it at the trial, he cannot maintain trover against the officer who took it. Krenchi *v.* Dehler, 50 Ill. 177.

A judgment against a bailee for failure to carry and deliver goods according to contract, where the owner has recovered damages without satisfaction, is no bar to an action against the purchaser from the bailee. Hyde *v.* Noble, 13 N. H. 501; 38 Am. Dec. 508.

Where title has been tested, no subsequent action can be maintained on same, unless title has changed meanwhile. Owens *v.* Rawleigh, 6 Bush (Ky.) 656.

Where there was a judgment for the delivery of property and damages for detaining it, and it was not given up, an action in trover for its value can be maintained, notwithstanding the former judgments. Nickerson *v.* California Stage Co., 10 Cal. 521; Carr *v.* Rischer, 119 N. Y. 117; Brown *v.* Moran, 42 Me. 44; Cutler *v.* Cox, 2 Blackf. (Ind.) 178; 18 Am. Dec. 152.

It is not prejudicial to an action of contract, that an action for deceit has been instituted and defeated. Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 262. If an action of contract had been brought for a breach and maintained, it would bar any action in tort, for the prior action would have adjudicated the question of wrongdoing. But the decisions are not uniform regarding this. Wanzer *v.* DeBaun, 1 E. D. Smith (N. Y.) 261; Gould *v.* Hayden, 63 Ind. 443; Grant *v.* Burgwyn, 88 N. Car. 95; Black *v.* Nettles, 25 Ark. 606; Murray *v.* Weigle, 118 Pa. St. 159; Andrews *v.* Varrell, 46 N. H. 17.

If in a judgment on replevin, the goods are not returned and no damages are allowed for detention, an action

4. Penal and Criminal.—A civil action will lie either before or after a criminal prosecution and conviction, and this, too, whether the civil action be contract, tort or replevin. The evidence in criminal and in civil actions, is of a different nature, and the test of identity of evidence does not have any force here. Inasmuch as a difference in the amount of damages is sometimes considered as avoiding a bar, it is certainly clear that a civil action is no bar to a criminal action between the same parties where the verdict would be entirely different.[1]

may be brought upon the bond to recover them; otherwise, if the goods are delivered up and there is no breach of the bond. Smith *v.* Dillingham, 33 Me. 387.

Where an execution had been issued but not satisfied upon an action of trover, an action by same person against a third party for taking the same goods may be barred. White *v.* Philbrick, 5 Me. 151; 17 Am. Dec. 214.

Where there were two joint owners of certain chattels and an execution against one of them, a suit was brought against the officer on his bond, for selling the entire title to the property and judgment obtained. This was a bar to a subsequent action by the joint owner against the officer, for the conversion and sale of the chattels. Nor did the fact that the damages in the first action were nominal, and that it was not properly brought make any difference. Hopkinson *v.* Shelton, 37 Ala. 306; Dunham *v.* Douner, 31 Vt. 249; Carpenter *v.* King, 9 Met. (Mass.) 511; 43 Am. Dec. 405; Rice *v.* Morton, 19 Mo. 263; La Farge *v.* Herter, 11 Barb. (N. Y.) 159; Com. *v.* Haas, 16 S. & R. (Pa.) 252.

Where a plaintiff in replevin failed to get the property in issue, and proceeded in a different action to get judgment and execution, which was not satisfied, and a subsequent action in replevin was brought against another party in whose possession they were found, it was maintained that the previous proceedings had established no bar to the suit. Turner *v.* Brock, 6 Heisk. (Tenn.) 50. See also Sanderson *v.* Peabody, 58 N. H. 116; Brenner *v.* Moyer, 98 Pa. St. 274; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423; Harryman *v.* Roberts, 52 Md. 64; Hancock *v.* Welsh, 1 Stark 347; *Ex parte* Harper, *In re* Brenner, 44 L. J. Bank 57; Blodgett *v.* Dow, 81 Me. 197; Bradley *v.* Brigham, 149 Mass. 141; Adams *v.* Franklin, 82 Ga. 168; Craig *v.* Cosby, 81 Ga. 650.

As to the issue of insanity in actions of different forms, see Warfield *v.* Warfield, 76 Iowa 633; Glaze *v.* Citizens' Nat. Bank, 116 Ind. 492; Pasley *v.* McConnel, 40 La. Ann. 1097; Gerrish *v.* Pope, 39 La. Ann. 517; Day *v.* De Jonge, 66 Mich. 550.

1. Carlisle *v.* Killebrew, 89 Ala. 329; Powers *v.* Davenport, 101 N. Car. 286; Tumlin *v.* Parrott, 82 Ga. 732; Boston, etc., R. Co. *v.* Dana, 1 Gray (Mass.) 83; Pettingill *v.* Rideout, 6 N. H. 454; 25 Am. Dec. 473; Foster *v.* Tucker, 3 Me. 458; 14 Am. Dec. 243; State *v.* Egglesht, 41 Iowa 574; 20 Am. Rep. 612; Moore *v.* State, 71 Ala. 307; Francisco *v.* State, 24 N. J. L. 30. See note Crenshaw *v.* State, 17 Am. Dec. 791.

In Riker *v.* Hooper, 35 Vt. 461; 82 Am. Dec. 646, the court, by Aldis, J., said: "The objection to this ruling [below] is not that the very point was not there litigated between the same parties, but that that action, being a civil suit, the jury might have found the fact upon the mere preponderance of evidence, and that they might not have so found if they had been required to be satisfied of it beyond a reasonable doubt; and, therefore, that their verdict, resting upon such inferior amount of evidence, ought not to be held conclusive or admissible in this penal action. We think the objection stands on solid grounds. All who are conversant with courts must have observed that juries will render verdicts in civil cases upon light evidence, the mere balance of probabilities, when in criminal cases nothing would induce them so to decide. The law justifies them in so doing. The distinction is an important one, and leads to widely different results. To admit the judgment in trover as conclusive here might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to his case."

5. Judicial Acts.—It is essential to consider not only the judgments of courts, but also to know to what extent, if at all, the doctrine of *res judicata* applies to the action of courts in deciding motions, appointing arbitrators, receivers, commissioners and the like, and all matters concerning which anything has to be determined, and to the acts of those who, strictly speaking, are not clothed with judicial authority, yet who, in the performance of the duties of their positions, are required to render decisions in various

There cannot be a division of offenses so that a part bars the whole, nor does the whole bar a minor offense necessarily. Sanders *v.* State, 55 Ala. 42; Jackson *v.* State, 14 Ind. 327; State *v.* Cameron, 40 Vt. 555; State *v.* Morphin, 37 Mo. 373; Moore *v.* State, 59 Miss. 25; State *v.* Elder, 65 Ind. 282; 32 Am. Rep. 68; Munford *v.* State, 39 Miss. 558; Thomas *v.* State, 40 Tex. 36; State *v.* Pitts, 57 Mo. 85; Dunn *v.* State, 70 Ind. 47; Dedieu *v.* People, 22 N. Y. 178; People *v.* Knapp, 26 Mich. 112; State *v.* Martin, 30 Wis. 216; 11 Am. Rep. 567; State *v.* Littlefield, 70 Me. 452; 35 Am. Rep. 335; State *v.* Gleason, 56 Iowa 203; Moore *v.* State, 71 Ala. 307; State *v.* Wister, 62 Mo. 592; Com. *v.* Evans, 101 Mass. 25; Murphy *v.* Com., 23 Gratt. (Va.) 960.

In Wharton on Evidence, § 777, it is said: "The reasons why a judgment in a civil case should bind all subsequent proceedings between the same parties on the same cause of action do not apply, so it is generally argued, when a criminal judgment is sought to be afterwards used in civil litigation. In the first place, while the parties to a civil suit, by appearing, accept the arbitrament of the court, and thereby enter into obligation to be bound thereby, in a criminal prosecution the defendant is regarded as attending by compulsion, and as entering into no such obligation. In the second place, the parties to a civil suit cannot be identical with those to a criminal suit, for in a criminal suit it is the sovereign who, nominally at least, prosecutes. Hence, in the Roman law, as well as in our own, a prior criminal judgment is not conclusive as to a subsequent civil suit for the same subject-matter." Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317; Corbley *v.* Wilson, 71 Ill. 209; 22 Am. Rep. 98; Skidmore *v.* Bricker, 77 Ill. 164; Durant *v.* Essex Co., 7 Wall. (U. S.) 107.

In Coffey *v.* U. S., 116 U. S. 436, the court said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of the preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same." Britton *v.* State, 77 Ala. 202; Com. *v.* Feldman, 131 Mass. 588; Green *v.* Bedell, 48 N. H. 546; Dorrell *v.* State, 83 Ind. 357.

matters.[1] Some matters require a hearing of testimony on either side, some only an interpretation of the law and rules governing in certain cases, while still others must naturally be settled by the arbitrary decisions of those in control, personal judgment determining what such determinations shall be.

1. Leavitt *v.* Walcott, 95 N. Y. 222; Easton *v.* Pickersgill, 75 N. Y. 599; Demarest *v.* Darg, 32 N. Y. 290; Onondaga *v.* Briggs, 2 Den. (N. Y.) 33; Brown *v.* Mayor, etc., of N. Y., 66 N. Y. 391.

Where any decisions are rendered by a tribunal having the proper authority, they render the issues decided *res judicata*. State *v.* Minneapolis, etc., R. Co., 40 Minn. 156; Longfellow *v.* Quimby, 29 Me. 196; 48 Am. Dec. 525; Burke *v.* Perry, 26 Neb. 414; Rounds *v.* Providence, etc., S. S. Co., 14 R. I. 344.

It may be necessary to give the party affected by the decision an opportunity to be heard in order to render the determinations conclusive. Wilcox *v.* Johnson, 34 Kan. 655; Verner *v.* Bosworth, 28 Kan. 670.

When, on a motion to quash an execution, certain matters are passed upon, a similar proceeding on another execution will be barred. Johnson *v.* Latta, 84 Md. 139.

If any former judgment is not regarded in a lower court, it cannot receive any weight in the court of last resort. Hebrew Free School Assoc. *v.* Mayor, etc., of N. Y., 99 N. Y. 488.

Decrees refusing or granting an injunction are conclusive as to matters pertinent to the same. Denver *v.* Lobenstein, 3 Colo. 216.

The jurisdiction of tribunals other than courts must generally be affirmatively shown. Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425; Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. Car.) 274; 9 Am. Dec. 636; Com. *v.* German Soc., 15 Pa. St. 251; Logansport *v.* La Rose, 99 Ind. 117.

An appeal to the supreme court bars a writ of error. If a cross-error is not sustained, any writ of error on same point is concluded. Smith *v.* Wright, 71 Ill. 167.

Ejectments are not generally barred by a bill in equity. Phelps *v.* Harris, 101 U. S. 370; Case *v.* Beauregard, 101 U. S. 688. As to actions upon land, see Montgomery *v.* Samory, 99 U. S. 482.

When a matter comes for determination before a board "it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed." Stoddard *v.* Johnson, 75 Ind. 31; Bissell *v.* Jeffersonville, 24 How. (U. S.) 287; Ricketts *v.* Spraker, 77 Ind. 371; Ela *v.* Smith, 5 Gray (Mass.) 135; 66 Am. Dec. 356; Thorn *v.* West Chicago Park Com'rs, 130 Ill. 594; Kahn *v.* San Francisco, 79 Cal. 388; Venice *v.* Murdoch, 92 U. S. 494; *In re* Buffalo, 78 N. Y. 362; Long *v.* Burnett, 13 Iowa 28; 81 Am. Dec. 420.

Where a defendant was described as of a certain place, and personal service was made, a judgment by default would be a bar to a claim of residence elsewhere. Goodrich *v.* Hunton, 31 La. Ann. 582.

"It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity." Grusenmeyer *v.* Logansport, 76 Ind. 549; Bell *v.* Raymond, 18 Conn. 100; State *v.* Six, 80 Mo. 61; Dore *v.* Dougherty, 72 Cal. 232; Durham *v.* Wilson, 104 N. Car. 595; Wiese *v.* San Francisco Musical Soc., 82 Cal. 645; Spaulding *v.* Chamberlin, 12 Vt. 538; 36 Am. Dec. 358; Hendrickson *v.* St. Louis, etc., R. Co., 34 Mo. 188; 84 Am. Dec. 76; Marsteller *v.* Marsteller, 132 Pa. St. 517; Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208. Decisions of courts not of record are conclusive, if matters are within their jurisdiction. Wyatt *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Waterhouse *v.* Cousins, 40 Me. 333; Porter *v.* Purdy, 29 N. Y. 106; 86 Am. Dec. 283; Goodwin *v.* Sims, 86 Ala. 102; Wanzer *v.* Howland, 10 Wis. 16; People *v.* Hagar, 52 Cal. 182; Angell *v.* Robbins, 4 R. I. 493.

The decisions of tribunals acting within their authority are conclusive. Casey *v.* Galli, 94 U. S. 673; Ela *v.* Smith, 5 Gray (Mass.) 135; 66 Am. Dec. 356; Campbell *v.* Monroe Co., 71 Ind. 185; Vosler *v.* Brock, 84 Mo. 574; Anacosta Tribe *v.* Murbach, 13 Md. 91; 71 Am. Dec. 625; Eureka Clothes

6. Relating to Titles—*a.* IN GENERAL.—The subject of *res judicata* in its relation to titles requires consideration in so many different ways, and under such varied circumstances, and is of so much importance, that it will be considered in detail under its various subdivisions. It may suffice here to say, that the same general principles apply as bear upon other branches of the general subject.

b. PARTITION.—Formerly a writ of partition was regarded merely as a possessory action, and as such it could bar only possessory actions, but now a judgment in a partition case is just as conclusive upon all matters in issue and passed upon as a judgment in any other suit. Generally all questions concerning the title to land may be put in issue and determined; and more, the result is binding upon parties who are or might be interested whether they are *in esse* or not.[1] The effect of the partition, of course, only extends to such parties as the court making it can include in its jurisdiction. A judgment in partition may be pleaded in bar of a writ of entry which is to deal with the same questions of title to the same land.[2] If a person was a party to a partition suit, and the premises have been set off to the various parties in interest, in accordance with the share or amount belonging to each, the same person cannot oust any party receiving a share by means of a writ of ejectment, as the question of title should have been raised in the partition case.[3] Ordinarily the question of the validity of title is not considered, nor is any issue raised upon the deed, so that there is no bar to the raising of any question thereon in a subsequent suit.[4] The extent of the bar, in general, as regards title, deed and parties will be illustrated by reference to some of the decisions.[5]

Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488; Hutton *v.* Lockridge, 22 W. Va. 159; Chesterfield *v.* Perkins, 58 N. H. 573; Lomas *v.* Hilliard, 60 N. H. 148; Watson *v.* Garvin, 54 Mo. 353; Strieb *v.* Cox, 111 Ind. 299; People *v.* Carter, 119 N. Y. 557; Keyes *v.* U. S., 109 U. S. 336; Moffat *v.* U. S., 112 U. S. 24; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636; Stone *v.* Augusta, 46 Me. 127; Howe *v.* Newbegin, 34 Me. 15; Gordon *v.* Farrar, 2 Doug. (Mich.) 411; Chever *v.* Horner, 11 Colo. 68; Chase *v.* Cheney, 58 Ill. 509; 11 Am. Rep. 95; Humphreys *v.* Mayor, etc., of Woodstown, 48 N. J. L. 588; Downer *v.* Lent, 6 Cal. 94; 65 Am. Dec. 489; Connitt *v.* Reformed, etc., Church, 54 N. Y. 551; U. S. *v.* Minor, 114 U. S. 233.

1. De Uprey *v.* De Uprey, 27 Cal. 329; 87 Am. Dec. 81; Lantz *v.* Greve, 102 Ind. 173; Jordan *v.* Van Epps, 85 N. Y. 427; Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am. Dec. 448; L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 445; Forder *v.* Davis, 38 Mo. 107; Bobb *v.* Graham, 89 Mo. 200; Linehan *v.* Hathaway, 54 Cal. 251; Burroughs *v.* De Couts, 70 Cal. 361; Herr *v.* Herr, 5 Pa. St. 428; 47 Am. Dec. 416; Merklein *v.* Trapnell, 34 Pa. St. 42; 75 Am. Dec. 634; Cryer *v.* Andrews, 11 Tex. 170; Caperton *v.* Hall, 83 Ala. 171; Pierce *v.* Oliver, 13 Mass. 211; Pentz *v.* Kuester, 41 Mo. 450; Hancock *v.* Lopez, 53 Cal. 362; Dabney *v.* Manning, 3 Ohio 321; 17 Am. Dec. 597; Jenkins *v.* Fahey, 73 N. Y. 355; Whittemore *v.* Shaw, 8 N. H. 393.

2. Whittemore *v.* Shaw, 8 N. Y. 393; Doolittle *v.* Don Maus, 34 Ill. 457; Linehan *v.* Hathaway, 54 Cal. 251; Jenkins *v.* Fahey, 73 N. Y. 355.

3. Doolittle *v.* Don Maus, 34 Ill. 457; McClure *v.* McClure, 14 Pa. St. 134.

4. McCall *v.* Carpenter, 18 How. (U. S.) 302.

5. "Title to real estate may be put in

. . issue, tried and determined in partition proceedings, and when so put in issue, tried and determined, the judgment rendered is binding upon all the parties to the issue." Fleenor *v.* Driskill, 97 Ind. 27.

Where in a partition of a husband's estate the widow allows a tract to be set off to her, when she and her husband had owned it together, it having formerly belonged to her father, a balance above her share having been paid by the husband, unless in the proceedings she sets forth her previous claim to the premises, she is barred from claiming out of her husband's estate as much as her interest in the land amounted to, for it was a failure on her part to push an issue properly to be litigated at that time, and she had lost her day in court. Barnes *v.* Cunningham, 9 Rich. Eq. (S. Car.) 475.

Where a partition was made between two parties, and one received a tract of land with a spring thereon, it was clearly determined that they originally owned it as tenants in common. Edson *v.* Munsell, 12 Allen (Mass.) 600.

Every issue which might have been litigated is regarded as barred by the partition. Jordan *v.* Van Epps, 85 N. Y. 427.

A partition suit simply severs unity of possession, without changing or creating any new title. Fleenor *v.* Driskill, 97 Ind. 27; Christy *v.* Spring Valley Water Works, 68 Cal. 73.

If any new title is acquired during the pendency of the proceedings, the pleadings must be amended to cover it. Bobb *v.* Graham, 89 Mo. 207; Holladay *v.* Langford, 87 Mo. 577.

The title of the party to whom a portion of land is set off, or that of the purchaser is the same that all the parties previously had. James *v.* Brown, 48 Iowa 568; Oliver *v.* Montgomery, 39 Iowa 601; Crane *v.* Kimmer, 77 Ind. 215; Cooter *v.* Baston, 89 Ind. 185; Hart *v.* Steedman, 98 Mo. 452.

A partition of same land is a bar, but a partition as to part will not prevent the bringing of a petition for the partition of the whole. Colton *v.* Smith, 11 Pick. (Mass.) 311; 22 Am. Dec. 375.

"Unknown owners," and those not *in esse*, provided those entitled to the first estate are brought in, may be barred by the partition proceedings. Cook *v.* Allen, 2 Mass. 461; Croghan *v.* Livingston, 17 N. Y. 218; Foxcroft *v.* Barnes, 29 Me. 128; Kane *v.* Rock River Canal Co., 15 Wis. 179; Nodine *v.* Greenfield, 7 Paige (N. Y.) 544; 34 Am. Dec. 363; Brevoort *v.* Brevoort, 70 N. Y. 136; Nash *v.* Church, 10 Wis. 303; 78 Am. Dec. 678; McArthur *v.* Scott, 113 U. S. 340; Monarque *v.* Monarque, 80 N. Y. 320.

The judgment is conclusive without any partition deed, the decree is "final and conclusive as to the nature and extent of the rights of the respective parties to it. If the parties choose to stop with a decree ascertaining their rights, and not to proceed to partition in fact, it is not perceived why their neglect to take the latter should render the former step ineffectual." Allie *v.* Schmitz, 17 Wis. 169; Barney *v.* Chittenden, 2 Green (Iowa) 165.

In probate partition of decedents' estates, what persons should be made parties and how the petition should be drawn is shown in the following decisions: De Castro *v.* Barry, 18 Cal. 99; Rankin's Appeal, 95 Pa. St. 358; Thompson *v.* Stitt, 56 Pa. St. 156; Whitman *v.* Reese, 59 Ala. 532; Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218; Brown *v.* Sceggell, 22 N. H. 548; Cook *v.* Davenport, 17 Mass. 345. As to manner of making partition, see the statutes of the various States.

"To deprive the probate court of its jurisdiction in a matter of this kind in any particular case, it must be made to appear that there is a real doubt and uncertainty in relation to the legal rights of the parties. The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or propositions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal competent to decide it. If the facts in reference to which the alleged dispute or uncertainty arises are all known to and expressly admitted by the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is dispute and controversy concerning their relative shares and proportions of the

c. JUDGMENTS IN TORT.—These are to be considered as to their effect upon any subsequent real actions. It has been held that in an action of trespass *quare clausum fregit*, in which the defense pleaded was *liberum tenementum*, if judgment was rendered for the plaintiff, it is conclusive in any attempt of the defendant to maintain title.[1] This is assuming that the descriptions of the premises in question are exactly identical in the different actions. There are several States and numerous decisions where the judgment in tort is not held to be conclusive.[2]

d. EJECTMENT.—Actions in ejectment under the common law, and even now, except by statute, need not be regarded as entirely conclusive.[3]

estate." Dearborn *v.* Preston, 7 Allen (Mass.) 192; Potter *v.* Hazard, 11 Allen (Mass.) 187; Freeman *v.* Rahm, 58 Cal. 111; Richards *v.* Rote, 68 Pa. St. 248; Wood *v.* Myrick, 16 Minn. 494; Bresel *v.* Stiles, 22 Wis. 120; Brown *v.* Sceggell, 22 N. H. 548; Smith *v.* Rice, 11 Mass. 507.

"There is no reason why a decree of partition in the probate court should be any less conclusive upon the parties than a judgment in a real action. To permit one claiming under a party to such partition again to litigate the title would manifestly violate the maxim which declares that public interest requires an end to litigation." Carpenter *v.* Green, 11 Allen (Mass.) 28.

As to whether a partition can be impeached for fraud, see the rhetorical opinion of the court in Mitchell *v.* Kintzer, 5 Pa. St. 217; 47 Am. Dec. 408. See generally PARTITION, vol. 17, p. 660.

1. Hargus *v.* Goodman, 12 Ind. 629; Campbell *v.* Cross, 39 Ind. 155; Dunckle *v.* Wiles, 5 Den. (N. Y.) 302; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Howard *v.* Albro, 100 Mass. 236; McKnight *v.* Bell, 135 Pa. St. 358.

An action of trespass *quare clausum fregit* and judgment for plaintiff cannot be considered as conclusive of the title in *Massachusetts*. Morse *v.* Marshall, 97 Mass. 519; Arnold *v.* Arnold, 17 Pick. (Mass.) 4; Stokes *v.* Fraley, 5 Jones (N. Car.) 377; White *v.* Chase, 128; Mass. 158; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518; Johnson *v.* Morse, 11 Allen (Mass.) 540.

The trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury, or court, or a referee, the verdict or finding, and judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel." White *v.* Chase, 128 Mass. 158; Masten *v.* Olcott, 101 N. Y. 153; Hargus *v.* Goodman, 12 Ind. 629; Casler *v.* Shipman, 35 N. Y. 533; 1 Hilliard on Torts 498.

2. Stapleton *v.* Dee, 132 Mass. 279; White *v.* Chase, 128; Mass. 158; Hali *v.* Wooters, 54 Tex. 231; Geares *v.* Campbell, 74 Tex. 576; Moran *v.* Mansur, 63 N.H.377; Keyser *v.* Sutherland, 59 Mich. 455; Parker *v.* Leggett, 13 Rich. (S. Car.) 171; Rice *v.* Auditor-Gen'l, 30 Mich. 13; Dunckle *v.* Wiles, 5 Den. (N. Y.) 296.

3. Jones *v.* De Graffenreid, 60 Ala. 145; Mitchell *v.* Robertson, 15 Ala. 412; Smith *v.* Sherwood, 4 Conn. 276; 10 Am. Dec. 143; MacKenzie *v.* Renshaw, 55 Md. 299; Kummel *v.* Benna, 70 Mo. 62; Hinton *v.* McNeil, 5 Ohio 509; 24 Am. Dec. 315; Sutton *v.* Dameron, 100 Mo. 141; Minke *v.* McNamee, 30 Md. 294; 96 Am. Dec. 577; Britton *v.* Thornton, 112 U. S. 526; Boyle *v.* Wallace, 81 Ala. 352; Avery *v.* Fitzgerald, 94 Mo. 207.

"The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, not to the character of the subject-matter of the controversy. There is no charm about land, as land, which relieves it from the operation of the general rule that a judgment between same parties or their privies directly upon the same matter is the end of the controversy. That it is an estoppel against future litigation of the same question is evident from the fact that a fine, a common recovery, a simple judgment on a writ of right, and, indeed, judgments in any real action, have always been held con-

clusive." Stevens *v.* Hughes, 31 Pa. St. 381.

Where in an action of ejectment the plaintiff recovers damages for trespasses, and mesne profits, during an occupation, an action of trespass will not afterwards lie. Cunningham *v.* Morris, 19 Ga. 583; 65 Am. Dec. 611.

In an action of trespass where no final judgment had been rendered as to the title further than the issues of the case necessarily required, and it not arising in the case, an action was not barred by it. Hargus *v.* Goodman, 12 Ind. 629.

In an action similar to an ejectment, where damages, though nominal, were recovered, no suit can be maintained for rents accruing prior to the judgment. Stewart *v.* Dent, 24 Mo. 111.

In Stevens *v.* Hughes, 31 Pa. St. 381, it was said: "Originally, an ejectment was only an action of trespass by a lessee against one who had ousted him of his term. The plaintiff recovered damages, not possession. The freehold was not in controversy, certainly not directly. It was not until the reign of Edward IV that courts of law began to give judgment that the plaintiff should recover his term as well as damages. Still it was only a term which he recovered, for the action was always founded on the assertion of an exising lease. Indeed, the declaration negatived the ownership of the freehold by the plaintiff. Of course, the very structure of the record rendered it impossible to plead a former recovery in bar of a second ejectment. The plaintiff was only a fictitious person, and as the demise might be laid in any number of ways, it never could appear that the second ejectment supposed a new demise. For the same reason a verdict and judgment in trespass *quare clausum fregit*, upon any plea, could not operate as an estoppel in ejectment. Such having been the original nature of the action, any number of successive ejectments could be brought, and the tenant in possession could never protect himself by the result of a former trial."

Where, in an action of trespass, the title is actually in issue and that is a part of that upon which the judgment is based, and the plaintiff prevails, it is conclusive as against an action of ejectment. Shettlesworth *v.* Hughey, 9 Rich. (S. Car.) 387; Ekey *v.* Inge, 87 Mo. 493; Cecil *v.* Johnson, 11 B. Mon. (Ky.) 35; Secrist *v.* Zimmerman, 55 Pa. St. 446; Pacquette *v.* Pickness, 19 Wis. 219; Brewer *v.* Beckwith, 35 Miss. 467; Brothers *v.* Hurdle, 10 Ired. (N. Car.) 490; 51 Am. Dec. 400.

"We can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated and determined, whether it be title, right to prevent possession, or something else, should not be conclusive, as well as when it relates to personalty. No principle of the common law would be violated by such a result. Nor would it be contrary to any principle of public policy. The form of the complaint in an action to recover real estate may be adapted to the estate sought to be recovered, and the facts desired to be put in issue." Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187; Glover *v.* Stamps, 73 Ga. 209; 54 Am. Rep. 870; Allen *v.* Salinger, 103 N. Car. 14; Johnson *v.* Pate, 90 N. Car. 334; Barger *v.* Hobbs, 67 Ill. 592; Dawley *v.* Brown, 79 N. Y. 390.

"A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again." Hawley *v.* Simons, 102 Ill. 115; Dawley *v.* Broun, 79 N. Y. 390; Sims *v.* Sims, 19 Ga. 124; Sherman *v.* Dilley, 3 Nev. 21; Lamar *v.* Knott, 74 Ga. 379; Benton *v.* Benton, 95 N. Car. 559; Hodges *v.* Eddy, 52 Vt. 434; Hill *v.* Cooper, 8 Oregon 254; De Auresti *v.* Castro, 49 Cal. 325; Moring *v.* Ables, 62 Miss. 271; 52 Am. Rep. 186; Strayer *v.* Johnson, 110 Pa. St. 21; Britton *v.* Thornton, 112 U. S. 526.

If suit is brought for two pieces of land and only one recovered, the judgment is conclusive as to the whole. Thompson *v.* McKay, 41 Cal. 221; Woodin *v.* Clemons, 32 Iowa 280; Doak *v.* Wiswell, 33 Me. 355.

The tendency now is to consider a judgment as conclusive. Craig *v.* Watson, 68 Ga. 114; Preston *v.* Rickets, 91 Mo. 320; Marshall *v.* Shafter, 32 Cal. 176; Winpenny *v.* Winpenny, 92 Pa. St. 440; Foster *v.* Evans, 51 Mo. 39;

e. EQUITABLE TITLES.—Actions of ejectment which merely establish the legal title when pursued to judgment, do not necessarily affect equitable titles, and one may at any time seek relief in equity unless there is an adequate and sufficient remedy at law.[1]

f. SUBSEQUENT TITLE.—In the case of intervening circumstances a former judgment may not be conclusive, as where judgment is given against a demandant in a real action and he afterwards strengthens his title; he may then bring a new action to obtain the same real estate. He may show the difference between the points at issue in the former and latter suits. If one claims a title by inheritance and fails, and subsequently obtains title under a will, he will have received a new title, and a previous failure is no bar to a subsequent action. Generally, where some new title is acquired, a previous action under the old title is no bar to an action based upon the title subsequently acquired. The same issues are not in dispute; the former action tests the title as it then existed, the subsequent action considers the title as it ultimately becomes. If a failure arises in an action to foreclose a mortgage, on account of a defective assignment, a new and successful action may be brought when the defect in the assignment has been cured. The subsequent title is based upon new issues, and hence not barred by the former judgment.[2]

Sobey *v.* Beiler, 28 Iowa 323. See generally, EJECTMENT, vol. 6, p. 195; NEW TRIAL, vol. 16, p. 596.

1. Jordan *v.* Faircloth, 27 Ga. 372; McFerran *v.* Davis, 70 Ga. 661; Powell *v.* Knox, 16 Ala. 364; Maxwell *v.* Vaught, 96 Ind. 136; Dixon *v.* Dixon, 81 N. Car. 323; Freedman's Sav., etc., Co. *v.* Earle, 110 U. S. 710; Brandies *v.* Cochrane, 112 U. S. 344; Cook *v.* Dillon, 9 Iowa 407; 74 Am. Dec. 354; Trimble *v.* Hunter, 104 N. Car. 129; Nessler *v.* Neher, 18 Neb. 649; Roland *v.* Miler, 100 Pa. St. 47; Henderson *v.* Henderson, 133 Pa. St. 399.

"The lien of the judgment creates a preference over subsequently acquired rights, but in equity does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in third persons. Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered." Brown *v.* Pierce, 7 Wall. (U. S.) 205; Holden *v.* Garrett, 23 Kan. 98; Baker *v.* Morton, 12 Wall. (U. S.) 150; Gulich *v.* Gulich, 42 N. J. Eq. 323; Walke *v.* Moody, 65 N. Car. 599; Lumbard *v.* Abbey, 73 Ill. 177; Warren *v.* Hull, 123 Ind. 126; Apperson *v.* Burgett, 33 Ark. 328; Filley *v.* Duncan, 1 Neb. 134; 93 Am. Dec. 337; Blakenship *v.* Douglas, 26 Tex. 225; 82 Am. Dec. 608; Shirk *v.* Thomas, 121 Ind. 147.

2. Adams *v.* Gillespie, 2 Jones Eq. (N. Car.) 244; Perkins *v.* Parker, 19 Allen (Mass.) 22; Woodbridge *v.* Banning, 14 Ohio St. 330; Taylor *v.* M'Crackin, 2 Blackf. (Ind.) 261; McKissick *v.* McKissick, 6 Humph. (Tenn.) 75; Morse *v.* Marshall, 97 Mass. 519; Hawley *v.* Simons, 102 Ill. 115. In case of the assignee of a mortgage, "When he reappears with the bond and mortgage and the deed or deeds of assignment in his hands, perfect and complete, it cannot be said that the question which he proposes to litigate is *res judicata*." Mitchell *v.* Cook, 29 Barb. (N. Y.) 254; Biggins *v.* People, 106 Ill. 270; Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646; Dawley *v.* Brown, 79 N. Y. 390.

At common law an equitable estate is not bound by a judgment or subject to an execution, but the creditor may have relief in chancery. We have no court of chancery, and have, therefore, from necessity, established it as a principle that both judgments and

g. MATTERS OF WARRANTY.—Where a warranty of title is given with a conveyance of land, the grantor, having received due notice, is to come in and defend an action of ejectment, which defense, if unsuccessful, shows conclusively that the original grantor must yield to a superior title. There must be eviction in an action of ejectment before the warranty is broken, but the grantee may give up possession to the holder of a better title; but in such case it is necessary to prove that the latter party had a superior title.[1]

executions have an immediate operation upon equitable estates." Auwerter *v.* Mathiot, 9 S. & R. (Pa.) 402; Michaux *v.* Brown, 10 Gratt. (Va.) 612; Whitney *v.* Kimball, 4 Ind. 546; 58 Am. Dec. 638; Roach *v.* Bennett, 24 Miss. 98; Morsell *v.* First Nat. Bank, 91 U. S. 357; Kirkwood *v.* Koester, 11 Kan. 471; Cayce *v.* Stovall, 50 Miss. 396; Harrison *v.* Roberts, 6 Fla. 711; Barron *v.* Thompson, 54 Tex. 235; Breed *v.* Gorham, 108 Ill. 81; Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515; Dwyer *v.* Goran, 29 Iowa 126; Mound City Land, etc., Assoc. etc. *v.* Philip, 64 Cal. 493.

Even though matters would be *res judicata* if they continued the same, when new circumstances arise, new actions may follow. Jones *v.* Petaluma, 36 Cal. 230; Thrift *v.* Delaney, 69 Cal. 188; People *v.* Mercein, 3 Hill (N. Y.) 416; 38 Am. Dec. 644; Brown *v.* Roberts, 24 N. H. 131; Reed *v.* Calderwood, 32 Cal. 109; Reed *v.* Douglas, 74 Iowa 244; Hemmingway *v.* Drew, 47 Mich. 554; Byers *v.* Neal, 43 Cal. 210; McLane *v.* Bovee, 35 Wis. 27; Wales *v.* Bogue, 31 Ill. 464; Lisle *v.* Cheney, 36 Kan. 578; Ralston *v.* Field, 32 Ga. 453; Ross' Appeal, 106 Pa. St. 82; Leonard *v.* White Cloud Ferry Co., 11 Neb. 340; Moody *v.* Harper, 25 Miss. 484; Real Estate Bank *v.* Watson, 13 Ark. 74; Waters' Appeal, 35 Pa. St. 523; 78 Am. Dec. 354.

1. Boyd *v.* Whitfield, 19 Ark. 469; Graham *v.* Tankersley, 15 Ala. 634; Lord *v.* Cannon, 75 Ga. 300; Williamson *v.* Williamson, 71 Me. 442; Mason *v.* Kellogg, 38 Mich. 132; Cummings *v.* Harrison, 57 Miss. 275; Hinds *v.* Allen, 34 Conn. 195; Turner *v.* Goodrich, 26 Vt. 707; St. Louis *v.* Bissell, 46 Mo. 157; Andrews *v.* Davison, 17 N. H. 413; 43 Am. Dec. 606; Dalton *v.* Bowker, 8 Nev. 190.

Where a conveyance is made with warranty, a wife releasing dower, and the title proving defective, if a recovery is had upon the warranty, the wife does not lose her dower right by joining in the conveyance. Stinson *v.* Sumner, 9 Mass. 143; 6 Am. Dec. 49.

"The right of the plaintiff to give notice may be limited to cases where, in some form, a defense involving the title warranted has been set up. If he might give the notice upon the institution of his suit, without any knowledge whether the defense would involve the validity of the title warranted and the covenant of warranty, it would, in effect, be a notice to come in and prosecute the suit, which would not be a good notice." Andrews *v.* Denison, 16 N. H. 469; 43 Am. Dec. 565; Colburn *v.* Pomeroy, 44 N. H. 19; Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 221; Adams *v.* Conover, 22 Hun (N. Y.) 424; Monks *v.* McGrady, 71 Tex. 134.

A father conveyed real estate in fee to his daughter, reserving an interest for life. It was held that although the conveyance of a fee to take effect in the future was void, it would be good as a covenant to uses, the daughter receiving a vested remainder, and her title was not defeated by any subsequent action. Brewer *v.* Hardy, 22 Pick. (Mass.) 380; 33 Am. Dec. 747; Lebanon *v.* Mead, 64 N. H. 8; Vancourt *v.* Moore, 26 Mo. 92.

"The notice must be clear and explicit, and convey precise information, that unless the person to whom it is addressed establishes the validity of the title in the first action, he will be estopped by the judgment. But no case has decided that the notice should be in any particular form. In some it is suggested that it would be better if notice in writing were required, but most of the cases assume that if sufficient in substance it need not be in writing; and except for facility in proving it, and certainty as to its character, we see no reason why it should be written or formal. If it clearly apprise the person to whom it is given that an action involving the title has been commenced,

h. VALIDITY OF DEEDS—(1) *In General.*—A deed must be valid to have any effect, for a void deed resulting in nothing, works no bar. If a deed contains two or more pieces of real estate in its description of property conveyed, and only one of them is involved in a suit, any verdict and judgment having to do with a single piece will determine nothing as to the title of the others. For if any question is raised as to the remainder, it is not within the scope of the action and the warranty therein is not tested.

and that the defendant giving it looks to him to establish the title in that action, the object of the notice is accomplished." Hersey *v.* Long, 30 Minn. 114; Mason *v.* Kellogg, 38 Mich. 132; Ferrea *v.* Chabot, 63 Cal. 564; Cummings *v.* Harrison, 57 Miss. 275; Porter *v.* Hill, 9 Mass. 36; 6 Am. Dec. 22.

"If a party to a suit has the right to resort to another upon his failure in the action, whether upon covenants of warranty, or on the ground that he is indemnified by such third party, then it is clearly his duty to give full notice to his covenantor or indemnitor of the pendency of the suit what it is he requires him to do in the suit, and the consequences which may follow if he neglects to defend. Mere knowledge of the existence of such action is entirely insufficient to bind the party by the judgment. Unless he is notified to furnish testimony, or to defend the action or to aid in it, he may well suppose the party to be in need of no assistance, and he may well rely upon that supposition; for if the party desires his aid, it is his duty to give him full notice a reasonable time before the trial of the action, to enable him to prepare for it." Sampson *v.* Ohleyer, 22 Cal. 200; Heiser *v.* Hatch, 86 N. Y. 614; Portland *v.* Richardson, 54 Me. 46; 89 Am. Dec. 729; Davis *v.* Smith, 79 Me. 351; Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774; Boyd *v.* Whitfield, 19 Ark. 447; Axford *v.* Graham, 57 Mich. 422; Milford *v.* Holbrook, 9 Allen (Mass.) 17; 85 Am. Dec. 735; Port Jervis *v.* First Nat. Bank, 96 N. Y. 550.

"It is a well-settled rule of law that where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and an opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner." Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430; Konitzky *v.* Meyer, 49 N. Y. 571; Boynton *v.* Morrill, 111 Mass. 4; Stewart *v.* Thomas, 45 Mo. 44.

A warrantor must not only have notice, but an ample opportunity to defend the action. Axford *v.* Graham, 57 Mich. 422; Saveland *v.* Green, 36 Wis. 612; Eaton *v.* Lyman, 26 Wis. 61.

"Express notice is not required; nor was it necessary for the officers of the corporation to have notified him that they would look to him for indemnity. The conclusive effect of a judgment respecting the same causes of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation; that the same cause of action should not be brought twice to a final determination. Parties include all who are directly interested in the subject-matter, and who have the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights, substantially, are regarded as strangers to the cause; but all who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of these rights, are equally concluded by the proceedings." Robbins *v.* Chicago, 4 Wall. (U. S.) 658; Boston *v.* Worthington, 10 Gray (Mass.) 496; Milford *v.* Holbrook, 9 Allen (Mass.) 17; 85 Am. Dec. 735; Peabody *v.* Phelps, 9 Cal. 213; Marsh *v.* Smith, 73 Iowa 295; Littleton *v.* Richardson, 34 N. H. 187; 66 Am. Dec. 759; Daskam *v.* Ullman, 74 Wis. 474; Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217; Carpenter *v.* Pier, 30 Vt. 81; 73 Am. Dec. 288; Chamberlain *v.* Preble, 11 Allen (Mass.) 370; Hamilton *v.* Cutts, 4 Mass. 349; 3 Am. Dec. 222.

Even if such a question could have been tried and was not, the result would be the same.[1]

(2) *Fraudulent Conveyances.*—Where the charge of fraud is made, a conveyance may be wholly invalidated, and where the creditors of the grantor attack a deed as being fraudulent toward them, the doctrine of *res judicata* may apply.[2]

1. Shorman *v.* Eakin, 47 Ark. 351; Moses *v.* McClain, 82 Ala. 370; Andrews *v.* Denison, 16 N. H. 475; 43 Am. Dec. 565; Nourse *v.* Nourse, 116 Mass. 101; Mason *v.* Mason, 140 Mass. 63; Conant *v.* Newton, 126 Mass. 105; Flersheim *v.* Cary, 39 Kan. 178; Pells *v.* Webquish, 129 Mass. 469; Caffrey *v.* Dudgeon, 38 Ind. 512; 10 Am. Rep. 126; James *v.* Wilder, 25 Minn. 305; Sherlin *v.* Whelen, 41 Wis. 88.

2. **Frauduluent Conveyances.**—"Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits wherever fraud has taken them; to wrest them from the possession of his adversary wherever they may be found, and to prepare himself to show the refuge to which they have been taken is still the refuge of fraud. In many instances the aid of equity is invoked. But generally this is unnecessary, for a transfer made to hinder, delay or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all. And what is true of fraudulent transfers is equally true of fraudulent mortgages, liens, judgments, executions, and all similar devices for hindering, delaying or defrauding creditors. Property held under and by virtue of a fraudulent lien, execution, or transfer, is subject to execution precisely as if such transfer had not been made and such lien had not been given; and this whether it was wholly or partly fraudulent. For if, on account of fraud, it be void in part, it is at law void *in toto.*" Freeman on Executions § 136; Gormerly *v.* Chapman, 51 Ga. 425; Staples *v.* Bradley, 23 Conn. 167; 60 Am. Dec. 630; Pratt *v.* Wheeler, 6 Gray (Mass.) 520; Henderson *v.* Henderson, 133 Pa. St. 399; Hall *v.* Sands, 52 Me. 355; Eastman *v.* Schettler, 13 Wis. 324; Austin *v.* Bell, 20 Johns. (N. Y.) 442; 11 Am. Dec. 297; Foley *v.* Bitter, 34 Md. 646.

In re Estes, 3 Fed. Rep. 134, the court by Deady, J., said: "In my own opinion the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void;' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser. The operation of the lien of a judgment being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy of any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it." Rappley *v.* International Bank, 93 Ill. 396; Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 465; Mulford *v.* Peterson, 35 N. J. L. 127; Miller

i. QUESTIONS OF BOUNDARY.—Where the location of a boundary line is the direct issue in the case, the judgment rendered will be binding as between the parties. The same principle applies as to privies as in other cases. Changes in the ownership of the real

v. Sherry, 2 Wall. (U. S.) 249; Franklin *v.* Stagg, 22 Mo. 193.

Where a grantee in an ejectment suit gets judgment against the executor of his deceased grantor, the creditors or the executor may nevertheless seek to invalidate the deed upon which the ejectment was based, and which defrauded creditors, as such relief as is adequate thereto can only be obtained in equity. Hills *v.* Sherwood, 48 Cal. 386.

In Jackson *v.* Holbrook, 36 Minn. 494, the court said: "A judgment creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditor's bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied. In the first two classes, the creditor enforces his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such cases succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case no trust is created in respect to the property, but the creditor falls back upon his legal remedy, and instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title. Where the law gives priority, equity will not destroy it; and especially where legal assets are created by statute as judgment liens, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery." Smith *v.* Morse, 2 Cal. 524; Dunham *v.* Cox, 10 N. J. Eq. 437; 64 Am. Dec. 460; Slattery *v.* Jones, 96 Mo. 216; Chautauqua Co. Bank *v.* Risley, 19 N. Y. 369; 75 Am. Dec. 347; Mulford *v.* Peterson, 35 N. J. L. 127.

The creditor first seeking equitable relief obtains a priority. Howland *v.* Knox, 59 Iowa 46; Boyle *v.* Maroney, 73 Iowa 70; Lyon *v.* Robbins, 46 Ill. 277; Jacoby's Appeal, 67 Pa. St. 435.

Where a complaint was dismissed in which it was sought to set aside a mortgage, the mortgagor bringing it cannot afterwards set up in a suit for foreclosure the invalidity of the mortgage. Hamilton Bldg. Assoc. *v.* Reynolds, 5 Duer (N. Y.) 671.

If a deed is adjudged fraudulent as to creditors, the grantees are affected to the extent of the rights of such creditors, and creditors not parties must bring a new suit before they can benefit from any adjudication. Huntington *v.* Jewett, 25 Iowa 249; 95 Am. Dec. 78.

Quære, whether the deed of an insolvent intestate can be set aside by his administrator on the ground of fraud, where there has been no delivery of deed while the grantor lived, and an administrator is qualified before any possession is taken, the administrator claiming the property as assets of the estate. If he claims property through an invalid deed of his intestate, a prior judgment will bar, as the validity of the deed has been contested. Hunt *v.* Butterworth, 21 Tex. 133; 73 Am. Dec. 223; Wiswall *v.* Sampson, 14 How. (U. S.) 67; Codwise *v.* Gelston, 10 Johns. (N. Y.) 522.

Charges of fraud cannot be overcome by allowing, as against attaching creditors not parties, a defendant to use a prior judgment to deny the charges of fraud. Norcross *v.* Hudson, 32 Mo. 227; Benson *v.* Maxwell, (Pa. 1888) 14 Atl. Rep. 161; Erickson *v.* Quinn, 15 Abb. Pr. N. S. (N. Y.) 168. See FRAUDULENT CONVEYANCES, vol. 8, p. 748.

estate, and knowledge or ignorance of parties that the line is contested or is claimed to be in wrong place, may vary the result of the application of the general principle. Questions of boundary are not conclusive on matters of title.[1]

1. Pitman *v.* Albany, 34 N. H. 577; Millcreek Tp. *v.* Reed, 29 Pa. St. 195; McNamee *v.* Moreland, 26 Iowa 113; Curtis *v.* Francis, 9 Cush. (Mass.) 464; White *v.* Purnell, 14 La. Ann. 228; Stinchcomb *v.* Marsh, 15 Gratt. (Va.) 202; Parker *v.* Smith, 17 Mass. 413; 9 Am. Dec. 157; Tobey *v.* Taunton, 119 Mass. 404; Fox *v.* Union Sugar Refinery, 109 Mass. 292; Bartlett *v.* Bangor, 67 Me. 460; Bell *v.* Todd, 51 Mich. 21; White *v.* Smith, 37 Mich. 291; Donohoo *v.* Murray, 62 Wis. 100; Murdock *v.* Chapman, 9 Gray (Mass.) 156.

Where an owner had looked on and seen an adjoining owner encroaching upon his land, the former not being aware of the exact location of the line, could afterwards, upon learning the true facts in the case, maintain an action, the court in Brewer *v.* Boston, etc., R. Co., 5 Met. (Mass.) 478; 39 Am. Dec. 694, by Wilde, J., saying: "We must consider the declarations and admissions of the demandant as having been made in good faith and by mere mistake. And admissions thus made, do not, we think, by law operate by way of an estoppel. . . . Now, it does not expressly appear by the case stated, that the declarations of the demandant were made to the tenant's agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. Nor does it appear that the tenants will be injured by the recovery of the flats; for if they purchased with warranty, they may be indemnified. We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly under a mistake, and that he has made no declaration contrary to his honest belief at the time or with any intention to deceive the tenants. And we think it clear that declarations thus made do not operate in the nature of an estoppel. A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective, for he may require a warranty, and it would be most unjust that a party should forfeit his estate by a mere mistake." Chicago, etc., R. Co. *v.* Auditor Genl., 53 Mich. 79; Van Ness *v.* Hadsell, 54 Mich. 560; Proctor *v.* Putnam Mach. Co., 137 Mass. 159; Schraeder Min., etc., Co. *v.* Packer, 129 U. S. 688.

In the case of Liverpool Wharf *v.* Prescott, 7 Allen (Mass.) 494, the court by Hoar, J., said: "We are of opinion that it was rightly held at the trial that there is no estoppel under such circumstances. There is nothing in the case to show that there was any 'standing by' and permitting the expenses to be incurred without notice, which was the case put in Thayer *v.* Bacon, 3 Allen (Mass.) 163; 80 Am. Dec. 59. The parties did not even undertake to fix a doubtful line by agreement, but only to point the true boundary as fixed by the deed. The authority of Tolman *v.* Sparhawk, 5 Met. (Mass.) 469, is therefore, direct and decisive. The case relied on by the tenants (Kellogg *v.* Smith, 7 Cush. (Mass.) 375), is wholly different. There the line in question had been referred to as a fixed boundary and adopted as such for more than a hundred years; and the decision did not rest on the point of estoppel." Spring *v.* Hewston, 52 Cal. 442; Lindell *v.* McLaughlin, 30 Mo. 28; 77 Am. Dec. 593; Davis *v.* Henry, 121 Mass. 150; State *v.* Wertzel, 62 Wis. 184; Strosser *v.* Fort Wayne, 100 Ind. 443; Kerr *v.* Hitt, 75 Ill. 51; Bradbury *v.* Cony, 59 Me. 494; Lemmon *v.* Hartsook, 80 Mo. 13; Bazemore *v.* Freeman, 58 Ga. 276; McLain *v.* Bulmer, 49 Ark. 218; Hale *v.* Skinner, 117 Mass. 474; Hughes *v.* Wheeler, 76 Cal. 230; Evans *v.* Miller, 58 Miss. 120; 38 Am. Rep. 313; Kirchner *v.* Miller, 39 N. J. Eq. 355; Pitcher *v.* Dove, 99 Ind. 175; Halloran *v.* Whitcomb, 43 Vt. 306; Brown *v.* Tucker, 47 Ga. 485; Louks *v.* Kenniston, 50 Vt. 116; Greene *v.* Smith, 57 Vt. 268; Acton *v.* Dooley, 74 Mo. 63; Hass *v.* Plantz, 56 Wis. 105; Bauer *v.* Gottmanhausen, 65 Ill. 499; Brackenridge *v.* Howth, 64 Tex. 190; Donaldson *v.* Hibner, 50 Mo. 492; Joyce *v.* Williams, 26 Mich. 332; Co-

j. ACTIONS OF A HIGHER NATURE.—An action is no bar to another unless the bar arises from an action as high in its nature as the one in which the question arises. A merely possessory action will not bar one based upon real right. A writ of entry which does not prevail will not prevent an action for damages for injury to possession. A judgment in a possessory action may bar an action for damages for breach of an agreement in a lease. The greater will comprehend the less, but the inferior action cannot interfere with or affect the greater, and the general doctrine will be applied in accordance therewith.[1]

k. LIMITATION OF GENERAL DOCTRINE.—Where a general judgment for only nominal damages is given for several breaches of terms in a lease of real estate, it is not conclusive as to any particular breach unless it clearly appears that the question of that particular breach was directly adjudicated in the first action, in which case such adjudication is a bar. This is seemingly a modification of the general rule, but is really only a closer and more delicate application of it, for the issue had not actually been decided in the original action.[2]

l. WATER COURSES.—An action for damages for an overflow of land as a result of the erection of a dam, will bar any subsequent action for the continuance of the nuisance, but where an action is for an obstruction of the water right for a mill, nevertheless a bill in equity may be brought for the same obstruction under certain circumstances.[3]

m. JUDICIAL DETERMINATION OF A FACT.—Where any fact has been directly in issue and judicially passed upon, it is *res judicata*, no matter what the nature of it, and cannot be subsequently adjudicated.[4]

lumbet *v.* Pacheco, 48 Cal. 395; Stockman *v.* Riverside Land, etc., Co., 64 Cal. 57; Dolde *v.* Vodicka, 49 Mo. 98.

1. Stevens *v.* Taft, 8 Gray (Mass.) 420; Sobey *v.* Beiler, 28 Iowa 323; Mallett *v.* Foxcroft, 1 Story (U. S.) 476.

Where a town leased land and the tenant was evicted, and then brought action against the town for a breach of the covenant for peaceable and quiet enjoyment, the plaintiff lessee was allowed to introduce such evidence as he offered, free from any bar by the judgment in the eviction suit, as in the latter the town was not a party, in consequence of which the eviction did not conclude the town, it having no knowledge of the action. Knapp *v.* Marlboro, 31 Vt. 677.

2. Sawyer *v.* Woodbury, 7 Gray (Mass.) 499; 66 Am. Dec. 518.

3. Miles *v.* Wingate, 6 Ind. 459; Jones *v.* Weathersbee; 4 Strobh. (S. Car.) 50; 51 Am. Dec. 653; McDowell *v.* Langdon, 3 Gray (Mass.) 513; Goodale *v.* Tuttle, 29 N. Y. 459.

4. If any new rights are acquired, a new action will be open, for the issues having been changed in consequence, the action is different in its scope, and the second action is one which there would not have been ground for at the time of the previous suit. Mahoney *v.* Van Winkle, 33 Cal. 458; Jackson *v.* Lodge, 36 Cal. 31.

It has been held where a judgment is obtained by a grantee against an original warrantor, that, as against any intermediate grantees, this is a bar. No allegation as to them is necessary in the original action, the final holder being the only person injured. If the rights and liabilities of the intermediate parties were questioned and passed upon, the decision might bind them. Brady *v.* Spruck, 27 Ill. 481.

It has been held that a fence is a part

n. CHANCERY CAUSE AS A TITLE LINK.—A title which requires certain connecting links to make it perfect, may have the chain of title perfected by showing decrees in proceedings in equity which furnish evidence of the missing links. These proceedings are conclusive as to the title owner, though a plaintiff in a subsequent action was not a party thereto, on the ground that a decree is evidence of the proceedings, of the effect and legality of the facts as shown, and that a decree was actually made, regardless of who were parties to the same. If the title under a deed requires a certain decree to make it good, the existence of the decree must be shown. The record of such decree is frequently admitted in evidence to show that such decrees have been made and to complete the necessary chain of title.[1]

of the realty, and, as such, a question relating to it comes necessarily under the head of real actions, and the case would not come within the jurisdiction of an inferior justice. Murray *v.* Van Derlyn, 24 Wis. 67.

If an executor or administrator, or any person acting in similar capacity, succeeds in maintaining ejectment as to devisees or heirs, the result determines his right to possession and his title thereto. And even a judgment by default will prevent the defendant from suing for a recovery of the premises. If any statute provision should specially apply to such a case, the rights of parties would be controlled and determined by that. Doyle *v.* Hallam, 21 Minn. 515; Hunt *v.* Payne, 29 Vt. 174.

A title under a writ of entry for the recovery of land is not concluded by the judgment rendered for the conversion of a tree standing upon the premises, even though it appears that the right of title was in issue; the possessory title or any other could not enter into the first action which was to determine the taking or a seisin of the tree. Further, any action for trespass *quare clausum fregit* joining issue as to soil, etc., does not bar a writ of entry. Johnson *v.* Morse, 11 Allen (Mass.) 541.

Where real estate passes from one to another and so along to others by a number of conveyances, and one of the grantees sues his grantor for a breach of covenant in his deed, that decision will not affect a subsequent grantee, where the judgment was not obtained until the last grantee referred to has received his deed. Such a grantee is neither a party nor a privy to the proceedings, and consequently can be neither injured nor benefited by the result of the suit. Winslow *v.* Grindal, 2 Me. 64.

Where a question of standing wood involves a question of title to the land, the purchaser having a certain interest in the latter, though the title to the land does not pass, the purchaser is barred by a previous judgment which also had to do with the same title to which the owner was a party. Warner *v.* Trow, 36 Wis. 200; Strasson *v.* Montgomery, 32 Wis. 56.

In an action by a creditor of the grantor against two defendant grantees to set aside the conveyance to them on the ground that it was a fraud against him, a prior judgment for the plaintiff against the said grantor was admitted and considered final to determine the amount due from the grantor at the time the suit was instituted. It was also *prima facie* as to facts provable in the action. The validity of the deed, however, was in no way considered, and in no way affected under a variety of circumstances. The parties to the deed are different, and the suit would not affect the deed even if its validity was in question. New York, etc., R. Co. *v.* Kyle, 5 Bosw. (N. Y.) 587.

1. Barr *v.* Gratz, 4 Wheat. (U. S.) 213; Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152; Lathrop *v.* Brown, 23 Iowa 40; Brandies *v.* Cochrane, 112 U. S. 344; Morsell *v.* First Nat. Bank, 91 U. S. 357; Powell *v.* Knox, 16 Ala. 364; Nessler *v.* Neher, 18 Neb. 649; Kirkwood *v.* Koester, 11 Kan. 471; Jeffries *v.* Sherburn, 21 Ind. 112; Dixon *v.* Dixon, 81 N. Car. 323; Trask *v.* Green, 9 Mich. 358; Roach *v.* Bennett, 24 Miss. 98; 1 Greenl. Ev., § 538; 1 Stark. Ev. 18; Bloomfield *v.* Humason, 11 Oregon 229; McFerran *v.* Davis, 70 Ga. 661; Fuller *v.* Nelson, 35 Minn.

o. TITLES TO PERSONAL PROPERTY—(1) *In General.*—There is some difference of opinion as to whether the doctrine of title by estoppel is applicable to a simple sale of personal property. An action on an implied warranty may be supported by evidence of a former action, if there was sufficient notice that it was pending.[1]

(2) *Relation of Buyer and Seller.*—If any action is brought by a vendee to try the title, any previous vendor is liable, if there is a defect proven in it, provided he has reasonable notice of the action and ample opportunity to come in and defend it. If the title is the only issue in the case, it does not matter how many conveyances there have been, or that the action is among the recent owners—the defect will come home to the first one who sold without a proper title.[2]

213; Terrell *v.* Prestel, 68 Ind. 86; Cushing *v.* Edwards, 68 Iowa 145; Trimble *v.* Hunter, 104 N. Car. 129; Maxwell *v.* Vaught, 96 Ind. 136; Cook *v.* Dillon, 9 Iowa 407; 74 Am. Dec. 354; Landes *v.* Brant, 10 How. (U. S.) 348; Roland *v.* Miller, 100 Pa. St. 47.

Where a mortgage against husband and wife was foreclosed, and a purchaser seeks to obtain possession, unless fraud is shown, the wife can set up and prove that she held the mortgaged property as a homestead. Lee *v.* Kingsbury, 13 Tex. 70; 62 Am. Dec. 546.

A party to a foreclosure cannot afterwards set up a title adjudged against him in that suit, as a defense to an action of ejectment. Clark *v.* Boyreau, 14 Cal. 635.

If a mortgage is not only tainted with fraud but actually void, the decree against it may bar all the interested parties. Butterfield's Appeal, 77 Pa. St. 197.

If in the process of foreclosing a mortgage any one has a mortgage to indemnify against the other and fails to set it up at the proper time, he may lose his rights under it and be forever barred from taking any advantage of it. Briscoe *v.* Lloyd, 64 Ill. 33.

Where one had made an oral agreement for the purchase of land from one claiming to be a *bona fide* owner of the same, and had taken possession of it, in proceedings to foreclose a mortgage on the premises, notice was served on the tenant and not on the record owner. The owner still had a right to overthrow the mortgage for fraud. Warren *v.* Cochran, 27 N. H. 339.

In an ejectment suit for premises foreclosed under mortgage, evidence of the obtaining of the mortgage by false and fraudulent representations cannot be admitted, where the same evidence has been used in former proceedings without avail, though it might have been successfully maintained as a defense in any of the actions brought. Lewis *v.* Nenzel, 38 Pa. St. 225.

1. Littlefield *v.* Perry, 21 Wall. (U. S.) 205; Gottfried *v.* Miller, 104 U. S. 521; Marlatt *v.* Clary, 20 Ark. 251; Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334; Faulks *v.* Kamp, 17 Blatchf. (U. S.) 432.

Where there has been an attachment of personal property as belonging to the supposed owner, and a bond given by him for the purpose of releasing the same, in an action between other parties to test the ownership of the property, the record of the action in which the attachment was made is not admissible as evidence of ownership. A judgment may determine and even change the ownership of the property, and may be admissible as documentary evidence, even though it was not in a suit between the same parties. Where creditors of a vendor seize the property, and the title, in a suit to which vendee is a party, is proven fraudulent, the judgment will determine the vendee's claim to the title adversely to him. Other claims on the property may still be sustained, even to recovering part of the purchase price in some way. Wilson *v.* Curtis, 13 La. Ann. 601; Snapp *v.* Potterfield, 14 La. Ann. 407.

On a question of use or purchase, see Rider *v.* Union India Rubber Co., 4 Bosw. (N. Y.) 176.

2. Where suit is brought for the use of personal property and the question of title is raised as a defense, a former judgment against the defendants, and an officer for attaching the property as

(3) *Replevin.*—In replevin, a verdict and judgment against the plaintiff, where the defendant has put in issue the allegations of the complaint, is not necessarily conclusive on the question of title to the property, as the judgment may import merely that the defendant did not take or detain it; but if it be shown in the second action that the question of title was actually litigated, the judgment in the first action may be a bar. If a verdict and judgment apply to a part of the property only, the title to all being litigated, the judgment is a bar. If the plaintiff fails to maintain his action, or if the suit is dismissed without a trial, and the order of court is that the property be returned, the plaintiff, in a subsequent suit on the replevin bond, may show that the defendant did not own the property, or that he had a contingent interest in it only. If, however, the court, on issue joined, determines the whole controversy including the question of ownership, such judgment is conclusive; nor does it matter that no evidence was introduced on the question of ownership.[1]

belonging to another person, cannot be pleaded or put in evidence, because of the difference in parties in the two suits. Wing *v.* Bishop, 3 Allen (Mass.) 457; Marlatt *v.* Clary, 20 Ark. 251; Buchanan *v.* Kauffman, 65 Tex. 235; Barney *v.* Dewey, 13 Johns. (N. Y.) 224; 7 Am. Dec. 372; Salle *v.* Light, 4 Ala. 700; 39 Am. Dec. 317; Walker *v.* Ferrin, 4 Vt. 523; Boyd *v.* Whitfield, 19 Ark. 447.

Where horses were traded, and the plaintiff sold the horse received by him from the defendant, and the horse was sold several times more, and was finally replevied from the last vendee, who notified his vendor and notice was passed along back to all the vendors, the judgment concluded the defendant. Yet in such a case any vendor may come in and show that the defect in the title occurred after the sale by him, and that he is in no way liable. Thurston *v.* Spratt, 52 Me. 205, in which case the court said: "The vendor in possession of personal property impliedly warrants the title to the thing sold. He is therefore bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. . . . It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the individuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice."

A judgment for breach of implied warranty of soundness, is not evidence which will allow recovery upon a like warranty, though vendor had notice. Smith *v.* Moore, 7 S. Car. 209; 24 Am. Rep. 479.

1. See Thurston *v.* Spratt, 52 Me. 205, referred to at length under the last preceding head.

"While it is true that in the action of replevin, ordinarily the only question is the right of possession, yet, if the party interested in the subject-matter of the controversy interposes and sets up special matter to defeat the claim, that matter is concluded by that litigation." Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501; Allen *v.* Butman, 138 Mass. 586. See also Wing *v.* Bishop, 3 Allen (Mass.) 457, referred to above.

Where a plaintiff in replevin is defeated, a levy having been made which it is claimed was illegal, the legality will be considered as having been settled, and the question is in fact concluded. McDaniel *v.* Fox, 77 Ill. 343; Hayden *v.* Anderson, 17 Iowa 158; Angel *v.* Hollister, 38 N. Y. 378.

If one fails in replevin he cannot afterwards maintain trespass for the taking of the same goods. Ewald *v.* Waterhout, 37 Mo. 602.

A judgment against a defendant in

7. Criminal Actions.—There is in criminal cases quite a difference in the application of the general doctrine, for of necessity the question of parties and privies is quite unlike the same question in civil actions. The public is always a party in criminal actions, and cannot plead a former conviction or acquittal as the defendant can. The parties do not stand upon an equal and similar footing as is the case in civil actions. It is true, that the issue or issues must be the same to create a bar, and the test of whether they are the same or not is to see if the same evidence will maintain and support both actions.[1] The general rules already laid down for civil actions, so far as they are applicable at all, apply with much more strictness to criminal suits.[2] Identity is not destroyed by calling a charge by some other name. If the identity is apparent the form of action may vary. Neither the allegation nor the language need be the same.[3] Criminal

replevin for the return of a deed, does not conclude him from laying claim to certain real estate described therein. Daggett *v.* Daggett, 143 Mass. 516; McFadden *v.* Ross, 108 Ind. 512. A nonsuit in replevin is no bar to a second replevin. Daggett *v.* Robins, 2 Blackf. (Ind.) 415; 21 Am. Dec. 752.

It must appear that the question of ownership was directly considered in order to render a judgment in this class of cases conclusive. Emmons *v.* Dowe, 2 Wis. 322.

A judgment for plaintiff, where he replevies goods from an officer who has attached them, proves that the plaintiff has the superior title, as against the attaching party or any one who subsequently makes an attachment. Carlton *v.* Davis, 8 Allen (Mass.) 94.

An action on a replevin bond cannot raise issues already determined by the principal action. Denny *v.* Reynolds, 24 Ind. 248; McFadden *v.* Fritz, 110 Ind. 1.

A finding that the plaintiff is entitled to the possession of the goods is not conclusive of his ownership of them. Henry *v.* Ferguson, 55 Mich. 399; Buck *v.* Rhodes, 11 Iowa 348; Hawley *v.* Warner, 12 Iowa 42.

A judgment is as binding upon intervening claimants as upon any of the interested parties. Witter *v.* Fisher, 27 Iowa 9; Frank *v.* Jenkins, 22 Ohio St. 597.

There are cases where it is held that trespass will lie even after a judgment in replevin. Robinson *v.* Kruse, 29 Ark. 575; Briggs *v.* Milburn, 40 Mich. 512.

Neither trover nor trespass will, as a general rule, lie after a judgment in replevin. Hardin *v.* Palmerlee, 28 Minn. 450; Ernst *v.* Hogue, 86 Ala. 502; Claflin *v.* Fletcher, 10 Biss. (U. S.) 281; Wells *v.* McClenning, 23 Ill. 409; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36.

See generally REPLEVIN, vol. 20, p. 1041.

1. Price *v.* State, 19 Ohio 425; Roberts *v.* State, 14 Ga. 11; 58 Am. Dec. 528.

2. A charge of doing an act with criminal intent is not considered the same as committing the same act without the intent. Com. *v.* Bakeman, 105 Mass. 53.

One allegation of an indictment for burning a barn owned by one party is not the same as an allegation of burning a barn owned by another. Com. *v.* Wade, 17 Pick. (Mass.) 398.

The theft of a horse is not the same as the theft of a gelding, nor is larceny of money from one the same as the larceny of the same money from another. Swindel *v.* State, 32 Tex. 102; Morgan *v.* State, 34 Tex. 677.

3. Wilson *v.* State, 24 Conn. 63; Holt *v.* State, 38 Ga. 189.

In Com. *v.* Roby, 12 Pick. (Mass.) 503, the court by Shaw, C. J., thus explained the doctrine: "It must appear to depend upon facts so combined as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts where there is a substantial legal difference in the nature of the crime; and, on the contrary, there may be considerable diversity of circumstances where the legal character of the offense

actions are no barrier to a civil action relating to the same matters, as both the substance and parties are different.[1] Circumstances must determine whether a series of acts constitute only one or a series of crimes.[2] Criminal sentences are not evidence in the

is the same; as where most of the facts are identical, but by adding, withdrawing or changing some one fact, the nature of the crime is changed, as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with intent to steal. These are distinct offenses. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offenses are to be regarded as the same. In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact; as, if one is charged as accessory before the fact and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus, an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and, in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarged into murder." State *v.* Wister, 62 Mo. 592.

Where there had been a conviction for a breach of the peace, it would bar a prosecution for assault and battery, where the two were committed together. Com. *v.* Hawkins, 11 Bush. (Ky.) 603.

1. A rearrest is unlawful where one has been discharged on *habeas corpus*. *Ex parte* Jilz, 64 Mo. 205; 27 Am. Rep. 218.

Though the issue be the same a judgment in a criminal case is not admissible in a civil one. Betts *v.* New Hartford, 25 Conn. 184; Hutchinson *v.* Bank of Wheeling, 41 Pa. St. 44; 80 Am. Dec. 596.

Where a husband having deserted his wife sought to obtain curtesy, a decree for separate maintenance obtained by her determined nothing as to the cause of separation, the parties being different, and the actions different. Hahn *v.* Bealor, 132 Pa. St. 242.

2. Where the language of the statute is "buying, receiving, or aiding in the concealment of stolen goods" and the allegation contains all these charges, it embraces but one crime. State *v.* Nelson, 29 Me. 329.

Where several acts are included in a single crime, as where one stole two horses at once, and was prosecuted for taking only one, any further action either upon the theft of the other horse or both is barred. Jackson *v.* State, 14 Ind. 327.

A prosecution in the proper court will not be barred by an attempted prosecution in a court having no jurisdiction in the case; neither will it, by a conviction procured at the instigation and through the fraud of the defendant himself. State *v.* Little, 1 N. H. 258; Reich *v.* State, 53 Ga. 74; 21 Am. Rep. 265.

If by the same act and at the same time several checks are forged, it is only one crime that is committed. State *v.* Egglesht, 41 Iowa 578; 20 Am. Rep. 612, in which case the court said: "It seems impossible to maintain the doctrine of such cases on principle. If the stealing of various articles owned by different individuals constitutes as many distinct offenses as there are owners, then they cannot be united as one offense in the indictment. If one should at the same time and as one act steal two watches, each of the value of fifteen dollars and owned by different persons, and another person should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of two hundred dollars, or imprisonment in the county jail for sixty days,

trial of civil issues, although as the reasons for the rule do not appear in all cases the rule itself will not always apply.[1] Neither is evidence in a civil case admissible in a criminal suit, yet in some instances evidence in each class of cases is allowed in the other as an admission, as it were, rather than as evidence strictly speaking.[2] The questions raised here are treated so much in detail under special titles that any lengthy consideration would be merely a repetition.[3]

V. **How Made Available.**—The original method of taking advantage of a judgment was to set it forth in the pleadings, for it would not be conclusive in any other way. Subsequently, if no opportunity was given for pleading it, under the general issue it was allowed in evidence. It now is not material whether the judgment is set forth in the pleadings or introduced by way of evidence. This is the general rule as adopted in the Duchess of Kingston's case and in subsequent actions involving the same question. The only requirement now is, that the judgment must be pleaded or proven, or both. If the merits of the case were not adjudicated in the first action, the evidence will override all else. If the issues are set up by special pleading the latitude of parol evidence is much more limited than in cases where the general issue is pleaded.* Where some special matter is set out as the cause of action, it cannot be shown by parol evidence that other issues were contested and decided, for the record shows the issues in the case, and if such parol evidence were admissible it might

whilst the other should be sent to the penitentiary for five years. If A should at one time and as one act hand to a merchant four counterfeit bills, each of the denomination of five dollars, and have the amount passed to his credit, and B should, in like manner, pass one bill of the denomination of twenty dollars, we would much doubt whether the 'perfection of reason' would be evinced in sending B to the penitentiary ten years for one crime and A forty years for four crimes."

On the other hand, a single act may embrace two independent crimes, one committing an assault may also be guilty of disturbing the peace. In liquor cases several different actions may arise from the same act. An assault in court may, when punished as such, give rise to a contempt. State *v.* Inness, 53 Me. 537.

1. Coffey *v.* U. S., 116 U. S. 436; U. S. *v.* Schneider, 35 Fed. Rep. 107; Cooke *v.* Sholl, 5 T. R. 255.

2. Green *v.* Bedell, 48 N. H. 546; Britton *v.* State, 77 Ala. 202; Woodruff *v.* Woodruff, 11 Me. 475; Com. *v.* Horton, 9 Pick. (Mass.) 206; Clark *v.* Irvin, 9 Ohio 131; Com. *v.* Feldman, 131 Mass. 588; Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646; Dorrell *v.* State, 83 Ind. 357.

3. See Wharton on Evidence, § 777; Corbley *v.* Wilson, 71 Ill. 209; 22 Am. Rep. 98; Cottingham *v.* Weeks, 54 Ga. 275; Betts *v.* New Hartford, 25 Conn. 185; Cluff *v.* Mut'l Ben. L. Ins. Co., 99 Mass. 317; Anderson *v.* Anderson, 4 Me. 100; 16 Am. Dec. 237; Maybee *v.* Avery, 18 Johns. (N. Y.) 352; Dennehey *v.* Woodsum, 100 Mass. 197; Whitney *v.* Peckham, 15 Mass. 243; Kaye *v.* Kean, 18 B. Mon. (Ky.) 839; Goodrich *v.* Warner, 21 Conn. 432; Womack *v.* Circle, 29 Gratt. (Va.) 192; Cloon *v.* Gerry, 13 Gray (Mass.) 203; Parker *v.* Huntington, 7 Gray (Mass.) 36; 66 Am. Dec. 455; Com. *v.* Evans, 101 Mass. 25; Dorrell *v.* State, 83 Ind. 357; Spring *v.* Besore, 12 B. Mon. (Ky.) 555; Skidmore *v.* Bricker, 77 Ill. 164.

See Criminal Procedure, vol. 4, p. 729; Jeopardy, vol. 11, p. 926; Jury and Jury Trial, vol. 12, p. 318; New Trial, vol. 16, p. 601; Nolle Prosequi, vol. 16, p. 709.

contradict the record. The question of the admissibility of parol evidence to set out the issues adjudicated in the first action depends upon the strictness and narrowness of the pleadings in describing the issues. In cases where, before inferior tribunals, there are no technical pleadings, or where the pleadings fail to limit and circumscribe the issues within necessary and practicable bounds, a different principle may apply.[1]

VI. COURTS—1. In General.—It is an elementary principle that a judgment, to be a valid bar to a subsequent action, must be given in a court of competent jurisdiction. Whether it be a judgment at law or in equity is quite immaterial, as a judgment in either is a bar to an action of the other kind, so far as there is concurrent jurisdiction of the subject-matter. And the same principle is equally applicable to those matters which have been and to those which might have been adjudicated.[2]

1. An investigation on the merits is not barred in an action in equity unless there is a special plea of *res judicata.* Baxter *v.* Aubrey, 41 Mich. 13; Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230; Phillips *v.* Berick, 16 Johns. (N. Y.) 140; 8 Am. Dec. 229; Wood *v.* Jackson, 8 Wend. (N. Y.) 45; 22 Am. Dec. 603; Jourolmon *v.* Massengill, 86 Tenn. 81; Squires *v.* Whipple, 2 Vt. 114; Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 345; Campbell *v.* Rankin, 99 U. S. 263.

In some States, parol evidence was formerly inadmissible, on the question of what issues had been previously litigated. Kennedy *v.* Scovil, 14 Conn. 61.

But we may say that the balance of authority is in favor of the admissibility of parol evidence to show what issues have been adjudicated, and the grounds upon which the judgments there rendered were rested. Chase *v.* Walker, 26 Me. 559; Sturtevant *v.* Randall, 53 Me. 150; Howard *v.* Mitchell, 14 Mass. 243; Adams *v.* Barnes, 17 Mass. 368; Campbell *v.* Butts, 3 N. Y. 174; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Wood *v.* Jackson, 8 Wend. (N. Y.) 37; 22 Am. Dec. 603; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 127; 15 Am. Dec. 256; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 562; 15 Am. Dec. 402; Kilhefer *v.* Kerr, 17 S. & R. (Pa.) 319; 17 Am. Dec. 658; Marsh *v.* Pier, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; Young *v.* Black, 7 Cranch (U. S.) 567. See, generally, JURISDICTION, vol. 12, p. 244.

2. "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that, on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction." U. S. *v.* Arredondo, 6 Pet. (U. S.) 709.

"Wherever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Windsor *v.* McVeigh, 93 U. S. 277, and Field, J., in the same case said: "It was not within the power of the jurisdiction of the district court to proceed with the case so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation thus denied. For jurisdiction is the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction." Duchess of Kingston's Case, 2 Smith's Lead. Cas. (6th Am. ed.) 663; Miles *v.* Caldwell, 2 Wall. (U. S.) 39; Hopkins *v.* Lee, 6 Wheat. (U. S.) 113; Babcock *v.* Camp, 12 Ohio St. 36; Dunham *v.* Downer, 31 Vt. 256; Stickney *v.* Goudy, 132 Ill. 213; Phil-

ips *v.* Pullen, 45 N. J. Eq. 830; Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 139; Lane *v.* Lane, 80 Me. 570. For cases where there is a conflicting concurrent jurisdiction, see Sharon *v.* Sharon, 79 Cal. 633; Hines *v.* Rawson, 40 Ga. 356; 2 Am. Rep. 581; Brooks *v.* Delaplaine, 1 Md. Ch. 354; Union Mut. L. Ins. Co. *v.* Chicago University, 10 Biss. (U. S.) 191; Chapin *v.* James, 11 R. I. 86; 23 Am. Rep. 412; Griffin *v.* Birkhead, 84 Va. 612; Bank of Bellows Falls *v.* Rutland, etc., R. Co., 28 Vt. 470; Keating *v.* Spink, 3 Ohio St. 105; 62 Am. Dec. 214; Home Ins. Co. *v.* Howell, 24 N. J. Eq. 239.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers." Elliott *v.* Peirsol, 1 Pet. (U. S.) 328; Linn *v.* Carson, 32 Gratt.(Va.) 170; Holland *v.* Johnson, 80 Mo. 34; Bowers *v.* Chaney, 21 Tex. 363; Richards *v.* Rote, 68 Pa. St. 248; Lane *v.* Nelson, 79 Pa. St. 407; Pryor *v.* Downey, 50 Cal. 388; 19 Am. Rep. 656.

"All the parties interested may lawfully agree to confirm an invalid transcript, or nugatory judgment, provided the confirmation is to be efficacious, and give a lien only from the time of the agreement properly appearing." Ramsey *v.* Linn, 2 Rawle (Pa.) 229.

It is not possible to go into a certain court for the purpose of raising questions adjudicated and so cannot be raised anywhere else. Hudson *v.* Judge of Superior Ct., 42 Mich. 239; Com. *v.* Blood, 97 Mass. 538; Dodd *v.* Una, 40 N. J. Eq. 672; Walling *v.* Beers, 120 Mass. 548; Gunn *v.* Howell, 35 Ala. 144; 73 Am. Dec. 484; Lockhart *v.* Locke, 42 Ark. 17; School Dist. No. 28 *v.* Stocker, 42 N. J. L. 116.

In courts of exclusive jurisdiction incidental issues are barred, while only those actually adjudicated are barred when the proceedings are in a court of concurrent jurisdiction. Mackentosh *v.* Smith, 4 Macq. H. L. Cas. 913.

In the matter of jurisdiction of the subject-matter, see Broughton *v.* Bradley, 34 Ala. 694; 73 Am. Dec. 474; Varner *v.* Bevil, 17 Ala. 286; Brock *v.* Frank, 51 Ala. 85; Blair *v.* Cummings, 39 Cal. 667; Ponce *v.* Underwood, 55 Ga. 601; Wight *v.* Wallbaum, 39 Ill. 554; Fleischman *v.* Walker, 91 Ill. 318; St. Louis, etc., Coal, etc., Co. *v.* Sandoval Colo., etc., Co., 111 Ill. 32; Jordan *v.* Brown, 71 Iowa 421; Moore *v.* Philbrick, 32 Me. 102; 52 Am. Dec. 642; Stantom *v.* Ballard, 133 Mass. 465; Koepke *v.* Dyer, 80 Mich. 311; Eaton *v.* Badger, 33 N. H. 228; Roderigas *v.* East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555; Reed *v.* Reed, 107 N. Y. 545; Withers *v.* Patterson, 27 Tex. 496; 86 Am. Dec. 643; Dunlap *v.* Southerlin, 63 Tex. 38; Abbott *v.* Coburn, 28 Vt. 663; 67 Am. Dec. 735; Wimer *v.* Wimer, 82 Va. 890; Andrews *v.* Avory, 14 Gratt. (Va.) 236; 73 Am. Dec. 355; Dow *v.* Johnson, 100 U. S. 158.

In Stewart *v.* Anderson, 70 Tex. 588, the court said: "It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while, in the other, this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final jurisdiction. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact

that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal."

As to jurisdiction over the person, see Arthur *v.* Israel, 15 Colo. 147; Davidson *v.* Knox, 67 Cal. 143; Easterly *v.* Goodwin, 35 Conn. 279; 95 Am. Dec. 237; Fagan *v.* Barnes, 14 Fla. 53; Cloyd *v.* Trotter, 118 Ill. 391; Williams *v.* Westcott, 77 Iowa 332; Eastman *v.* Wadleigh, 65 Me. 251; 20 Am. Rep. 695; Alley *v.* Caspari, 80 Me. 234; Folger *v.* Columbian Ins. Co., 99 Mass. 267; 96 Am. Dec. 747; Felch *v.* Hooper, 119 Mass. 52; Eliot *v.* McCormick, 144 Mass. 10; McEwan *v.* Zimmer, 38 Mich. 765; 31 Am. Rep. 332; Landsberg *v.* Bullock, 79 Mich. 278; Barber *v.* Morris, 37 Minn. 194; Duncan *v.* Gerdine, 59 Miss. 550; Tabler *v.* Mitchell, 62 Miss. 437; Adams *v.* Cowles; 95 Mo. 501; Winters *v.* Means, 25 Neb. 241; Eastman *v.* Dearborn, 63 N. H. 364; Shepard *v.* Wright, 113 N. Y. 582; De Meli *v.* De Meli, 120 N. Y. 485; Martin *v.* Cobb, 77 Tex. 544; Letney *v.* Marshall, 79 Tex. 513; Pennoyer *v.* Neff, 95 U. S. 714; Hart *v.* Sansom, 110 U. S. 151; Bors *v.* Preston, 111 U. S. 256; Freeman *v.* Alderson, 119 U. S. 185; Sugg *v.* Thornton, 132 U. S. 524.

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged." Voorhees *v.* Jackson, 10 Pet. (U. S.) 449; Kenney *v.* Greer, 13 Ill. 432; 54 Am. Dec. 439; Hilton *v.* Bachman, 24 Neb. 490.

Superior courts are presumed to have jurisdiction whenever they act, but the inferior courts are not. Hendrick *v.* Whittemore, 105 Mass. 23; Blaisdell *v.* Pray, 68 Me. 269; Hill *v.* Woodward, 78 Va. 765; Newcomb *v.* Newcomb, 13 Bush (Ky.) 544; 26 Am. Rep. 222; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; Drake *v.* Duvenick, 45 Cal. 455; Jackson *v.* State, 104 Ind. 516; Henry *v.* Estes, 127 Mass. 474; Newman *v.* Manning, 89 Ind. 422; State *v.* Ely, 43 Ala. 568; Moffitt *v.* Moffitt, 69 Ill. 641; Anderson *v.* Binford, 58 Tenn. 310.

In Munday *v.* Vail, 34 N. J. L. 418, the court said: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be in substance and effect within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that upon general principles, such a defect must avoid a judgment. . . . A judgment upon a matter outside of the issue must, of necessity, be altogther arbitrary and unjust, as it concludes a point upon which the parties have not been heard; and it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated." St. Clair *v.* Cox, 106 U. S. 350; *Ex parte* Schollenberger, 96 U. S. 369; Little *v.* Evans, 41 Kan. 578; Anthony *v.* Kasey, 83 Va. 338; Reynolds *v.* Stockton, 43 N. J. Eq. 211; Chaffee *v.* Hooper, 54 Vt. 513.

In Falkner *v.* Guild, 10 Wis. 563, the court, by Paine, J., said: "The general rule in respect to such courts (superior courts) is, at all events where jurisdiction appears, that though the record does not show everything necessary to regularity, it is to be presumed, unless the contrary expressly appears. And even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. It is true that proceedings under special statutes have sometimes been made an exception to this general rule as to presumption, even in courts of general jurisdiction. But without entering into the inextricable labyrinth of cases on the sebject, we will only say that we can see upon principle no reason for the distinction. The general presumption in favor of the regularity of the proceedings of

2. State and Federal Courts.—See JURISDICTION, vol. 12, p. 295; UNITED STATES COURTS.

3. Probate Courts.—The decree of a surrogate's or a probate court is as binding as that of any court, even on a court of equity. All the matters naturally coming within the jurisdiction of a probate court are concluded, such as the probate of a will, appointing executors and administrators, guardians and trustees, granting a widow's allowance, distribution of the estate of the decedent, and the allowance of the accounts of those acting in any fiduciary capacity.[1]

such courts is founded on the character of the court itself. And the character is the same whether it act under a special statute or under the common law. I cannot see that a difference in the source of its authority to act can make any rational distinction as to the presumption in favor of the regularity of its action." And see generally, JURISDICTION, vol. 12, p. 244.

"The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of those courts, there is no more necessity for showing the facts which confer jurisdiction than in a plea of a judgment of the highest tribunal known to the law. Their judgments cannot be impeached for irregularity or error in a collateral proceeding; they can only be vacated on motion in the courts in which they are rendered, or reversed for error in an appellate jurisdiction." Reed *v.* Vaughan, 15 Mo. 137; 55 Am. Dec. 133.

1. In Cecil *v.* Cecil, 19 Md. 72; 81 Am. Dec. 626, the court said: "In regard to the decrees and sentences of courts exercising any branches of ecclesiastical jurisdiction, the same general principles govern which we have already stated. The principal branch of this jurisdiction in existence in the United States is that which relates to matters of probate and administration. And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court and whether a decree or judgment has directly been passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignments of dower and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law." McPherson *v.* Cunliff, 11 S. & R. (Pa.) 422; 14 Am. Dec. 642; Morrow *v.* Allison, 39 Ala. 70; Harris *v.* Colquit, 44 Ga. 663; Reynolds *v.* Brumagim, 54 Cal. 254; Ward *v.* State, 40 Miss. 108; Cummings *v.* Cummings, 123 Mass. 270; Johnson *v.* Beazley, 65 Mo. 250; 27 Am. Rep. 276; Kellogg *v.* Johnson, 38 Conn. 269; Chipman *v.* Montgomery, 63 N. Y. 236; Turner *v.* Malone, 24 S. Car. 398.

No defense can be made to the payment of a widow's allowance after it has been granted by the court. Leaverton *v.* Leaverton, 40 Tex. 218.

Where a probate decree is claimed to be void for want of jurisdiction, an order for the sale of land will bar a bill in equity to set aside the sale on the ground of fraud. Yet after the accounts have been submitted, errors both of law and of fact may be corrected. After there has been a settlement and distribution, a decree will be a bar to any further action seeking settlement. Tarver *v.* Tankersley, 51 Ala. 310; Monnin *v.* Beronjon, 51 Ala. 197; Cecil *v.* Cecil, 19 Md. 79; 81 Am. Dec. 626; Hyland *v.* Baxter, 98 N. Y. 610; Steen *v.* Bennett, 24 Vt. 303; Farrar *v.* Olmstead, 24 Vt. 123; Post *v.* Mason, 91 N. Y. 539; 43 Am. Rep. 689; Loring *v.* Steineman, 1 Met (Mass.) 204.

Probate of a will concludes that it "was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. But the probate decides nothing beyond this. The legal effect of the will or of

4. Special Statutory Courts.—The same application of the general principle is made here as elsewhere. It is necessary to show that the court was acting within its jurisdiction and then its judgments are conclusive.[1]

its various provisions, its construction and operation, do not come in question, and cannot be passed upon on an application to admit the will to probate. It makes no difference that there is but one devise in it. The probate does not assume to determine the validity of such devise, but only that the instrument presented for probate was executed as his last will and testament by the testator, in the manner prescribed by statute, and that he was legally competent to make a will." Greenwood *v.* Murray, 26 Minn. 259; Brock *v.* Frank, 51 Ala. 85; Hegarty's Appeal, 75 Pa. St. 503; Woodruff *v.* Taylor, 20 Vt. 65; Steele *v.* Renn, 50 Tex. 467; 32 Am. Rep. 605; Moore *v.* Tanner, 5 T. B. Mon. (Ky.) 42; 27 Am. Dec. 35; Cutter *v.* Butler, 25 N. H. 343; 57 Am. Dec. 330; Robertson *v.* Pickrell, 109 U. S. 608; Folmar's Appeal, 68 Pa. St. 482.

Where the question upon a petition for administration was allowed and must have required that a certain child was born alive, it would be ever after held that such was the case. Garwood *v.* Garwood, 29 Cal. 515; Bogardus *v.* Clark, 4 Paige (N. Y.) 623; Dickinson *v.* Hayes, 31 Conn. 427; Cailleteau *v.* Ingouf, 14 La. Ann. 634.

"Where a will has been propounded by a party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence, therefore, against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments *in rem*, which, being adjudications upon the subject-matter, are regarded as final and conclusive, not only in the courts in which they are pronounced, but in all others in which the same question arises." Schultz *v.* Schultz, 10 Gratt. (Va.) 358; 60 Am. Dec. 335; Wall *v.* Wall, 30 Miss. 91; 64 Am. Dec. 147; O'Dell *v.* Rogers, 44 Wis. 136; Brigham *v.* Fayerweather, 140 Mass. 411; Anderson *v.* Green, 46 Ga. 361.

As to decrees for distribution, see Torrey *v.* Pond, 102 Mass. 355; Kline's Appeal, 86 Pa. St. 363; Exton *v.* Zule, 14 N. J. Eq. 501; Chever *v.* Ching Hong Poy, 82 Cal. 68. As to settling accounts, see Holden *v.* Lathrop, 65 Mich. 652; Hatcher *v.* Dillard, 70 Ala. 343; Shoemaker *v.* Brown, 10 Kan. 383; Durham *v.* Williams, 32 La. Ann. 968; Deck *v.* Gerke, 12 Cal. 433; 73 Am. Dec. 555; Abbott *v.* Foote, 146 Mass. 333; Ritchey *v.* Withers, 72 Mo. 556; Com. *v.* Gracey, 96 Pa. St. 70; Butterfield *v.* Smith, 101 U. S. 570; and see generally Barclift *v.* Treece, 77 Ala., 528; Pryor *v.* Downey, 50 Cal. 399; 19 Am. Rep. 656; Brodrib *v.* Brodrib, 56 Cal. 563; *In re* Griffith, 84 Cal. 107; Clement's Appeal, 49 Conn. 535; Poullain *v.* Poullain, 72 Ga. 412; Gardner *v.* Maroney, 95 Ill. 552; Crosley *v.* Calhoon, 45 Iowa 557; Dublin *v.* Chadbourn, 16 Mass. 433; Folger *v.* Heidel, 60 Mo. 288; Wilkerson *v.* Allen, 67 Mo. 502; Merrill *v.* Harris, 26 N. H. 143; 57 Am. Dec. 359; Trumble *v.* Williams, 18 Neb. 144; Fross' Appeal, 105 Pa. St. 258; Spencer *v.* Jennings, 114 Pa. St. 618; Thornton *v.* Baker, 15 R. I. 553; Vermont Baptist State Convention *v.* Ladd, 59 Vt. 5; Ruth *v.* Oberbrunner, 40 Wis. 238; Montgomery *v.* Samory, 99 U. S. 482; Davis *v.* Gaines, 104 U. S. 386.

1. "When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record." Pulaski Co. *v.* Stuart,

5. Inferior Courts in General.—The same rule applies as to the conclusiveness of judgments, if the jurisdiction of the court, in the particular case, clearly appears upon the face of the proceedings, and the inferiority of the court in no way affects the conclusiveness of its judgments. The power given to such courts comes from the same high authority as that given to the highest tribunal, and its decisions must be directly attacked, if at all. The difficulty is to be sure that these courts are acting within their limited jurisdiction, but no court properly established is so insignificant that its judgments need not be recognized as barring other proceedings upon the general principle of *res judicata.*[1]

28 Gratt. (Va.) 872; Bush *v.* Hanson, 70 Ill. 480; Brown *v.* Walker, 85 Mo. 262; Sears *v.* Terry, 26 Conn. 273; Graham *v.* Reynolds, 45 Ala. 578; Carleton *v.* Washington Ins. Co., 35 N. H. 162.

Unless the jurisdictional facts appear, the judgment of the court will be no more binding than the judgment of an inferior court; indeed, the judgment would be void. Goodwin *v.* Sims, 86 Ala. 102; Gunn *v.* Howell, 27 Ala. 663; 62 Am. Dec. 785; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; McCahill *v.* Equitable L. Assur. Soc., 26 N. J. Eq. 531; Falkner *v.* Guild, 10 Wis. 572; Galpin *v.* Page, 18 Wall. (U. S.) 350; Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. (U. S.) 108.

Where a matter is left to the discretion of an officer, and he pursues a certain course, having proper authority for disposing of a matter directly, see Lownsberry *v.* Rakestraw, 14 Kan. 152.

1. Stone *v.* Augusta, 46 Me. 127; Shaver *v.* Shell, 24 Ark. 122; Hallock *v.* Dominy, 69 N. Y. 238; De Bernal *v.* Lynch, 36 Cal. 135; Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162; 10 Am. Dec. 213; Spaulding *v.* Chamberlin, 12 Vt. 538; 36 Am. Dec. 358.

'What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the supreme court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called specific and inferior, is that which extends only to certain specified causes." State *v.* Daniels, 66 Mo. 200; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; Cunningham *v.* Squires, 2 W. Va. 422; 98 Am. Dec. 770; Stahl *v.* Mitchell, 41 Minn. 325; Harrison *v.* Columbus, 44 Tex. 420; Cumberland Coal, etc., *v.* Jeffries, 27 Md. 534; Burke *v.* Elliott, 4 Ired. (N. Car.) 357; 42 Am. Dec. 142; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 536.

In Farr *v.* Ladd, 37 Vt. 158, the court, by Poland, C. J., says: "The conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgment of justices of the peace as well as to any others. The argument, that as justices have no clerks or seals, and cannot authenticate records in the mode prescribed in the act of Congress, therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court is organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end of litigation."

In Grignon *v.* Astor, 2 How. (U. S.) 319, the court by Baldwin, J., says: "The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities, if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, with-

6. Questions by a Divided Court.—It is not material as to the conclusiveness of a judgment, that the court, if several judges are sitting in a case, is divided in opinion on it. The decision stands as the decision of the court, as much a bar to future actions as if the opinion had been unanimous. The division is not understood to affect the rendering of a decision, but simply raises a doubt as to what the decision shall be, having carefully considered all the legal questions involved in the action. A decision as a precedent, perhaps, would not receive as much weight from the courts in the finding of judgments in subsequent cases as if the court had passed upon it with unanimity.[1]

VII. JUDGMENTS—1. Judgment Without Verdict—*a.* FINDINGS IMPLIED.—It is possible to assume from the nature of the case and the character of the judgment that certain issues have been directly before the court, and it is also safe to say that the findings of the court in many instances may be implied. If an injunction, where damages are claimed, is dissolved, nothing being said as to damages, the inference is that no damage has been found. Where a verdict is given on some counts of an indictment and nothing said about the remainder, the omission to pass upon such counts is equivalent to an acquittal, whatever may have been found regarding the other counts. Where one plea goes to the merits and the other not, the disposition of the case will be considered as resting upon the latter, the merits of the case remaining unadjudicated, and the issues have not become *res judicata* unless the findings have been upon the merits. If several issues are raised and upon one only there is a finding for the defendant, there is an implication that all the issues have been adjudicated and concluded. Where there is some irregularity or technical defect in the pleadings, the merits are not touched, and there is no bar created. If an action is prematurely brought, or if there is any inability of the plaintiff to sue at the time, the same is true; the issues must be submitted upon their merits and decided either directly or by implication.[2]

out setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." Hauley *v.* Donoghue, 116 U. S. 1; McFeely *v.* Scott, 128 Mass. 16; Wilcher *v.* Robertson, 78 Va. 602; Montgomery *v.* Wasem, 116 Ind. 343; Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556; 73 Am. Dec. 688; Knowles *v.* Logansport Gaslight, etc., Co., 19 Wall. (U. S.) 58; Anderson *v.* Wilson, 100 Ind. 402; Lazarus *v.* Freidheim, 51 Ark. 371; Keys *v.* Grannis, 3 Nev. 548; Bridge *v.* Ford, 4 Mass. 641.

1. Durant *v.* Essex Co., 7 Wall. (U. S.) 107; Morse *v.* Goold, 11 N. Y. 285; 62 Am. Dec. 103; Bridge *v.* Johnson, 5 Wend. (N. Y.) 342; Durant *v.* Essex Co., 8 Allen (Mass.) 108; 85 Am. Dec. 685. See also STARE DECISIS.

2. Tankersly *v.* Pettis, 71 Ala. 179; Strang *v.* Moog, 72 Ala. 460; Gray *v.*

b. JUDGMENT NOT ON MERITS.—A judgment not based upon the merits is not final and conclusive, in the sense that a plea of *res judicata* may be founded on it.[1]

c. JUDGMENT MUST BE FINAL.—A judgment has no effect upon any subsequent action unless it has been actually rendered and is final. A judgment, if appealed from, is not final until the appeal has been determined. If a new trial is granted, or a case referred back, and a reversal of the judgment ordered, it may not conclude a subsequent action. The pendency of a suit is of no consequence unless it has been determined.[2]

Dougherty, 25 Cal. 272; Morrell *v.* Morgan, 65 Cal. 575; Best *v.* Hoppie, 3 Colo. 137; Smith *v.* Hornsby, 70 Ga. 552; Smalley *v.* Edey, 19 Ill. 211; Gage *v.* Ewing, 114 Ill. 15; Brackett *v.* People, 115 Ill. 29; Bell *v.* State, 7 Blackf. (Ind.) 33; Shaw *v.* Barnhart, 17 Ind. 185; Roberts *v.* Norris, 67 Ind. 386; Griffin *v.* Seymour, 15 Iowa 30; 83 Am. Dec. 396; Krapp *v.* Eldridge, 33 Kan. 106; Birch *v.* Funk, 2 Metc. (Ky.) 544; Spencer *v.* Banister, 12 La. Ann. 766; Rice *v.* Garrett, 12 La. Ann. 755; Tracy *v.* Merrill, 103 Mass. 280; Maxwell *v.* Clarke, 139 Mass. 112; Wood *v.* Faut, 55 Mich. 185; Sessions *v.* Sherwood, 78 Mich. 234; Conn *v.* Bernheimer, 67 Miss. 498; Dillinger *v.* Kelley, 84 Mo. 561; Garrett *v.* Greenwell, 92 Mo. 120; Brigham *v.* McDowell, 19 Neb. 407; Brackett *v.* Hoitt, 20 N. H. 260; Spelman *v.* Terry, 74 N. Y. 449; People *v.* Dowling, 84 N. Y. 478; Dixon *v.* Zadek, 59 Tex. 529; Beere *v.* Fleming, 13 Ir. C. L. R. 506; Langmead *v.* Maple, 18 C. B. N. S. 255; 114 E. C. L. 255.

1. "If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Hughes *v.* U. S., 4 Wall. (U. S.) 232; Jordan *v.* Siefert, 126 Mass. 25; Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Verhein *v.* Schultz, 57 Mo. 326; Pepper *v.* Donnelly, 87 Ky. 259; Detroit *v.* Houghton, 42 Mich. 459; Brackett *v.* Hoitt, 20 N. H. 257; Rogers *v.* Higgins, 57 Ill. 244.

On a question of mandamus the court in Reg. *v.* Yorkshire, 1 Ad. & E. N. S. 625, said: "We think we have no power to issue this mandamus to the justices to hear and decide upon the allowance of accounts, they having already done so, though under a mistaken notion that an appeal lay to the sessions, and though they are now anxious to enter on the merits of the case. To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it would be extremely dangerous; but many authorities prove that it is beyond our own competency, and there is none to the opposite effect." Morton *v.* Sweetser, 12 Allen (Mass.) 134; Boyer *v.* Austin, 54 Iowa 402; Doctor *v.* Furch, 76 Wis. 153; Atkins *v.* Anderson, 63 Iowa 739; Waddle *v.* Ishe, 12 Ala. 308; Horton *v.* Hamilton, 20 Tex. 612; Hayden *v.* State, 40 Ga. 477; Taylor *v.* Larkin, 12 Mo. 103; 49 Am. Dec. 119; Stingley *v.* Kirkpatrick, 8 Blackf. (Ind.) 186; Vaughan *v.* O'Brien, 57 Barb. (N. Y.) 491.

In Carmony *v.* Hoober, 5 Pa. St. 305, the court by Bell, J., said: "It has been held an acknowledged principle that when it can be gathered from the record that the merits of the controversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit. A contrary rule would be founded in such rank injustice as to be insupportable, and had such an one been ever entertained in the earlier ages of the law, when reason and truth were but too often made to give way before the fancied force to technical subtleties and hair-drawn distinctions, it must long since have succumbed to the enlightened wisdom which tolerates litigation only as a means of administering uniform justice." Wells *v.* Moore, 49 Mo. 230; Foster *v.* The Richard Busteed, 100 Mass. 412; 1 Am. Rep. 125; Buck *v.* Spofford, 35 Me. 526; Johnson *v.* White, 13 Smed. & M. (Miss.) 584.

2. Aurora City *v.* West, 7 Wall. (U.

d. JUDGMENT BY CONFESSION OR CONSENT.—Judgments by confession or consent, if given intelligently and voluntarily without collusion or fraud, are conclusive. They may be more carefully examined than judgments resulting from a trial, as the latter are decisions on the merits, while the former are given only as the parties can manage without contest. It is not material whether this judgment is had in the first instance, or only after litigation which is not finally terminated; and after judgment, by agreement, it can be reopened and reversed, and still have the same binding force. If a case is dismissed by agreement, it is apparent that a mutual understanding has been reached and that the entry made is simply to prevent any other suit upon the same matter. There should be a full understanding of the facts and sufficient consideration to lead to a judgment of this kind. A confession of judgment in ejectment is just as effective as it is in any other class of cases; it concludes the issues and waives all rights and defenses. The intention of the parties as to the finality of the judgment may be a matter of some importance. Any judgment of this kind granted or obtained to defraud creditors or for any other illegal purpose may be promptly set aside.[1]

S.) 82; Tippecanoe Co. *v.* Lucas, 93 U. S. 113; Humphreys *v.* Browne, 19 La. Ann. 159; Sherman *v.* Dilley, 3 Nev. 22; Tucker *v.* Rohrback, 13 Mich. 75; Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. (N. Y.) 164; Casebeer *v.* Moury, 55 Pa. St. 422; 93 Am. Dec. 766; Whitaker *v.* Bramson, 2 Paine (U. S.) 220; Foss *v.* Brentel, 14 La. Ann. 810; Trescott *v.* Lewis, 12 La. Ann. 197; Board of Education *v.* Fowler, 19 Cal. 13; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 342; Webb *v.* Buckelew, 82 N. Y. 555; Cromwell *v.* Sac Co., 94 U. S. 351; Collins *v.* Jennings, 42 Iowa 447; Morey *v.* King, 49 Vt. 304; Proctor *v.* Cole, 104 Ind. 373.

1. Haldeman *v.* U. S., 91 U. S. 584; Bank of Commonwealth, *v.* Hopkins, 2 Dana (Ky.) 395; U. S. *v.* Parker, 120 U. S. 89. It has been held that the record of "dismissed agreed" is not enough for *res judicata*. It must be known that it was done with a knowledge of the facts, and that it was intended by both parties that the entry was to finally terminate the case. Donnell *v.* Hamilton, 77 Ala. 610; Jarboe *v.* Smith, 10 B. Mon. (Ky.) 257; 52 Am. Dec. 541; McCreery *v.* Fuller, 63 Cal. 30; Chamberlain *v.* Preble, 11 Allen (Mass.) 370; Dunn *v.* Pipes, 20 La. Ann. 276; but see Wohlford *v.* Compton, 79 Va. 333; Hoover *v.* Mitchell, 25 Gratt. (Va.) 387; Philpotts *v.* Blasdel, 10 Nev. 19.

It is generally held in the United States, the English rule inclining the other way, that such a judgment, if certain, is conclusive. Nashville R. Co. *v.* U. S., 113 U. S. 261; Secrist *v.* Zimmerman, 55 Pa. St. 446; Twogood *v.* Pence, 22 Iowa 543; Alabama G. S. R. Co. *v.* South, etc., Alabama R. Co., 84 Ala. 570; Cothran *v.* Brower, 75 Ga. 494; Jordan *v.* Siefert, 126 Mass. 25; Plummer *v.* Douglas, 14 Iowa 72; 81 Am. Dec. 456; Maghee *v.* Collins, 27 Ind. 84; Ellis *v.* Mills, 28 Tex. 585.

If a judgment is entered by agreement its conclusiveness is not affected by the fact that the result of a contest would probably have been different. The defendant may waive any of his rights and the entry is for future protection. Fletcher *v.* Holmes, 25 Ind. 463.

Where a town consented to a judgment against it, it could not bring a cross-action bearing upon the same matter. Hilsborough *v.* Nichols, 46 N. H. 385; Hanscom *v.* Hewes, 12 Gray (Mass.) 334; Moore *v.* Barclay, 23 Ala. 740; King *v.* Ohio Valley R. Co., (Ky. 1889) 10 S. W. Rep. 631.

Where a judgment was based upon an agreed statement of facts in which there was an error sufficient to change the result, nevertheless the judgment was final, there being no lack of good faith in the making up of the statement. Wohlford *v.* Compton, 79 Va. 233;

e. JUDGMENT BY DEFAULT.—A judgment by default is not as conclusive as a judgment resulting from a trial upon the merits of the case. It is neither so broad nor so effective, and the decisions are more or less at variance as to the scope and value of such a judgment.[1]

Chamberlain *v.* Preble, 11 Allen (Mass.) 370; Kirby *v.* Fitzgerald, 31 N. Y. 424; Dean *v.* Thatcher, 32 N. J. L. 473.

In some cases an immediate execution of the agreement seems necessary to make it binding. This relates rather to decrees than to judgments. Dunn *v.* Pipes, 20 La. Ann. 276; Greenwood *v.* New Orleans, 12 La. Ann. 431.

By confession or consent all the defenses which might have been offered and perhaps been sufficient ones, are overridden, and the judgment stands upon merits if at all, only by chance. Gates *v.* Preston, 41 N. Y. 113.

An informal confession may be ample unless attacked for the benefit of creditors, in which case it may be voidable. Sheldon *v.* Stryker, 34 Barb. (N. Y.) 120. It is valid between the parties even if it does not comply with any statute requirements relating to it. Neusbaum *v.* Keim, 24 N. Y. 325; Wadhams *v.* Gay, 73 Ill. 415.

"The conclusiveness of the judgment upon the rights of the parties does in no wise depend upon its form or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon demurrer or verdict." Gifford *v.* Thorn, 9 N. J. Eq. 702; Allison *v.* Hess, 28 Iowa 388; Crossman *v.* Davis, 79 Cal. 603; Cunningham *v.* Schley, 68 Ga. 105; Harris *v.* Preston, 10 Ark. 201.

A confession by one partner is only binding as against him. North *v.* Mudge, 13 Iowa 496; 81 Am. Dec. 441. On the other hand, the confession by one will prove a bar to a subsequent action against the other partners, as the cause of action being indivisible must include as a party the partner who had confessed judgment, although several suits have been allowed upon a joint and several note. Sherman *v.* Christy, 17 Iowa 326.

A confession of a joint debtor may be supplementary to that of the other. Where a judgment had been obtained for a definite sum against the joint debtors, and where, after a *scire facias* both confessed judgment, one for the amount named in the judgment and the other for the "sum due," it was held that the latter was, in the discretion of the court, to be considered as for the same amount as the definite sum named. The liquidating of the sum could be determined by the court, but the confession was not reversible for error. Weikel *v.* Long, 55 Pa. St. 238.

Thomas *v.* Mueller, 106 Ill. 36; Edwards *v.* Edwards, 29 La. Ann. 597; Shallcross *v.* Smith, 81 Pa. St. 132; Moore *v.* Trimmier, 32 S. Car. 511; Travis *v.* Willis, 55 Miss. 557; Tripp *v.* Saunders, 59 How. Pr. (N. Y.) 379; McCleery *v.* Thompson, 130 Pa. St. 443; Huntt *v.* Townshend, 31 Md. 336; 100 Am. Dec. 63; McDonald *v.* Chisholm, 131 Ill. 273; Morris *v.* Bank of Commerce, 67 Tex. 602; Mechanics' Bank *v.* Mayer, 93 Mo. 417; Reid *v.* Southworth, 71 Wis. 288; Hulse *v.* Mershon, 125 Ill. 52; Sayre *v.* Hewes, 32 N. J. Eq. 652; Black *v.* Pattison, 61 Miss. 599. See JUDGMENTS, vol. 12 p. 149 q; WARRANT OF ATTORNEY.

1. **Default.**—"The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint." Barton *v.* Anderson, 104 Ind. 578; Minor *v.* Walter, 17 Mass. 237; Kittridge *v.* Stevens, 16 Cal. 381; Ligon *v.* Triplett, 12 B. Mon. (Ky.) 283; McCalley *v.* Wilburn, 77 Ala. 549; Brown *v.* Mayor, etc., of N. Y., 66 N. Y. 385; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; McCurdy *v.* Baughman, 43 Ohio St. 78; Jarvis *v.* Driggs, 69 N. Y. 143; Welch *v.* Wadsworth, 30 Conn. 149; Ellis *v.* Mills, 28 Tex. 584; Gaskill *v.* Dudley, 6 Met. (Mass.) 546; 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. (Mass.) 391; 20 Am. Dec. 526; Hanham *v.* Sherman, 114 Mass. 19; Argall *v.* Pitts, 78 N. Y. 239; Cromwell *v.* Sac Co., 94 U. S. 351; Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308; Sherland *v.* Union Nat. Bank, 65 Iowa 96; Greenabaum *v.* Elliott, 60 Mo. 25; Fuller *v.* Shattuck, 13 Gray (Mass.) 70; 74 Am. Dec. 622.

"The law cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the

f. DEMURRER.—The effect of a demurrer, so far as conclusiveness is concerned, turns upon what points it is intended to affect. If it be to questions of form and only to such matters as are susceptible to remedy, it is no bar; if, on the other hand, it goes to the merits of the action, and all that is contained in the complaint or declaration, it is as complete a bar as a direct judgment. The same general principle underlies demurrer as all other pleadings. If a matter is incidental or unconsidered, no bar is raised, but always when the merits are touched the questions brought up are concluded.[1]

summons or complaint he had expressly notified this plaintiff he would do, namely, take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his confidence had been betrayed." Binck *v.* Wood, 43 Barb. (N. Y.) 315.

A judgment by default concludes what it apparently decides as shown by the pleadings. If facts are at variance with the judgment on the pleadings, they are not subject of further consideration. Barton *v.* Anderson, 104 Ind. 578; State *v.* McBride, 76 Ala. 51; Engstrom *v.* Sherburne, 137 Mass. 153; Nemetty *v.* Naylor, 100 N. Y. 562; Unfried *v.* Huberer, 63 Ind. 67; Grace *v.* Martin, 47 Ala. 135; Mason *v.* Patterson, 74 Ill. 191; Gage *v.* Pumpelly, 115 U. S. 454; Gatling *v.* House, 66 N. Car. 374; Loney *v.* Bailey, 43 Md. 10. And see DEFAULT, vol. 5, p. 460.

1. **Demurrer.**—"A general demurrer admits the facts alleged in the petition, and there is no good reason why a final judgment sustaining it should not be as conclusive of the same cause of action as if the plaintiff had proved these facts, and a judgment had been then rendered against him." Bomar *v.* Parker, 68 Tex. 435; Carlin *v.* Brackett, 38 Minn. 307; Brown *v.* Kirkbride, 19 Kan. 588; Perkins *v.* Moore, 16 Ala. 9; Wilson *v.* Ray, 24 Ind. 159; Estep *v.* Larsh, 21 Ind. 197; Gray *v.* Gray, 34 Ga. 502.

In Gould *v.* Evansville, etc., R. Co., 91 U. S. 533, the court by Clifford, J., laid down the following rules, from the authorities: "*First.* A judgment rendered upon demurrer to the declaration, or to a material pleading setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case as well as in the latter by matter of record, and the rule is that facts thus established can never after be contested between the same parties or those in privity with them. *Second.* If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Third.* Support to these propositions is found everywhere. But it is equally settled that if the plaintiff fails on demurrer in the first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action." Wells *v.* Moore, 49 Mo. 229; Nickelson *v.* Ingram, 24 Tex. 630; Robinson *v.* Howard, 5 Cal. 428; Gilman *v.* Rives, 10 Pet. (U. S.) 302. And see Aurora City *v.* West, 7 Wall. (U. S.) 99; Goodrich *v.* Chicago, 5 Wall. (U. S.) 573; Clearwater *v.* Meredith, 1 Wall. (U. S.) 43; Bouchnad *v.* Dias, 3 Den. (N. Y.) 244; Stevens *v.* Dunbar, 1 Blackf. (Ind.) 56; Birch *v.* Funk, 2 Metc. (Ky.) 544; Kimbro *v.* Virginia, etc., R. Co., 56 Ga. 187; Jordan *v.* Faircloth, 34 Ga. 47.

Where in a case a decree recited "and it appearing that there is no equity in complainant's bill, the same is therefore dismissed," it is a decree on the merits and a bar to any further

proceedings in the premises. Williams *v.* Hollingsworth, 5 Lea (Tenn.) 358.

Overruling a demurrer is not necessarily a bar to all proceedings. Jourolman *v.* Massengill, 86 Tenn. 81.

All facts which are well pleaded become *res judicata* upon demurrer, for these are facts which a demurrer admits. Aurora City *v.* West, 7 Wall. (U. S.) 99.

In Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. Rep. 277, the court, by Deady, J., said: "On a demurrer to a complaint, every material matter well pleaded therein is confessed, and if judgment is given thereon, the same is as conclusive and binding on the parties to the action as though it was given on an issue arising on a denial of the allegations of the complaint; and if a final judgment is given for the plaintiff, on a demurrer to the answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the truth of the material allegations in the complaint, and may be pleaded as an estoppel in any other action between them."

In an action against a married woman for services, a demurrer set up that the pleadings did not allege that the services were rendered solely to the defendant, and although it was sustained, it proved no bar to a declaration which contained the material allegations in this particular. Terry *v.* Hammonds, 47 Cal. 32.

Where a devisee or legatee brought suit against the executor, a decree on a demurrer filed could not be used in the same way by other devisees or legatees. Nichols *v.* Allen, 87 Tenn. 131.

Where a suit was brought against indorsers on a note and the declaration did not show that their liability had been fixed by giving them the required notice, a demurrer was sustained, and in deciding the case, the court, by Wright, C. J., said: "This judgment, however, cannot be pleaded in bar of a good declaration for the same cause of action. Such a judgment is not on the merits within the meaning of the rule." Keater *v.* Hock, 16 Iowa 24. If the declaration had been a good one, the demurrer would be on the merits. Kimbro *v.* Virginia, etc., R. Co., 56 Ga. 187. Los Angeles *v.* Mellus, 59 Cal. 444; Smith *v.* Hornsby, 70 Ga. 552; Halcombe *v.* Haywood Co., 89 N. Car. 346; Lamb *v.* McConkey, 76 Iowa 47; Rodman *v.* Michigan Cent. R. Co., 59 Mich. 395; Woolley *v.* Louisville Banking Co., 81 Ky. 527; Parker *v.* Spencer, 61 Tex. 155; McLaughlin *v.* Doane, 40 Kan. 392; Bissell *v.* Spring Valley Tp., 124 U. S. 225; Nispel *v.* Laparle, 74 Ill. 306; Wells *v.* Moore, 49 Mo. 229; Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Felt *v.* Turnure, 48 Iowa 397; Stowell *v.* Chamberlain, 60 N. Y. 272.

When a new declaration by new averments would not be demurrable, the second suit is not barred, as the issues are changed. Post *v.* Pearson, 108 U. S. 418; Detrick *v.* Sharrar, 95 Pa. St. 521; Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

In Alley *v.* Nott, 111 U. S. 472, the court said: "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case, as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

Again, as to a former action, the court in Birch *v.* Funk, 2 Metc. (Ky.) 544, said: "That judgment merely pronounced the former petition insufficient. It decided that the case presented by that petition was without merit, and to that extent only can it be said to have been a decision upon the merits. But the facts set out in the subsequent case have never been litigated or passed upon in any way, and it is therefore illogical and an abuse of terms to say that the judgment relied upon is a judgment upon the merits of the present case, and for that reason must operate as a bar to any relief." Reynolds *v.* Lincoln, 71 Cal. 183; Kilpatrick *v.* Strozier, 67 Ga. 247; Griffin *v.* Seymour, 15 Iowa 30; Seckler *v.* Delfs, 25 Kan. 159; Smith *v.* McNeal, 109 U. S. 426; Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; Cauhape *v.* Parke, 46 Hun (N. Y.) 306; Baker *v.* Frellson, 32 La. Ann. 822; Roberts *v.* Hamilton,

g. NONSUIT.—A nonsuit is merely a withdrawal or abandonment of a case before either verdict or judgment. The matter upon which it was brought stands just the same after nonsuit as it did before the writ was issued, and it is therefore plain to be seen that a nonsuit is in no sense a bar to an action, and this is true whether it be a voluntary or involuntary one.[1]

h. RETRAXIT.—A retraxit is stronger than a nonsuit, for the plaintiff voluntarily and deliberately admits of record that he has no cause of action. Such being the case, a retraxit is always held conclusive, and prevents a subsequent action.[2]

56 Iowa 683; Chapin *v.* Curtis, 23 Conn. 388; McLaughlin *v.* Doane, 40 Kan. 392; Perkins *v.* Moore, 16 Ala. 9; Johnson *v.* Pate, 90 N. Car. 334; Campbell *v.* Hunt, 104 Ind. 210; Gray *v.* Gray, 34 Ga. 499.

Complainant in equity is not barred on demurrer by his allegations of law. Thompson *v.* National Bank, 106 Mass. 128. See generally, DEMURRER, vol. 5, p. 549.

1. Nonsuit.—"Nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter." Derby *v.* Jacques, 1 Cliff. (U. S.) 425; Horner *v.* Brown, 16 How. (U. S.) 354; Jay *v.* Carthage, 48 Me. 353; Morgan *v.* Bliss, 2 Mass. 111; Dexter *v.* Clark, 35 Barb. (N. Y.) 271; Bucher *v.* Cheshire R. Co., 125 U. S. 555; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121; Loeb *v.* Willis, 100 N. Y. 231.

"A defendant conceiving that the plaintiff has failed to prove his case, may waive a motion for a nonsuit, and proceed to prove his own case, and have judgment on the merits. But if he move for a nonsuit, and the nonsuit be granted, he cannot proceed and have judgment on the merits, because, by reason of the nonsuit, the plaintiff is virtually out of court. A nonsuit granted on the motion of the defendant is equivalent, in its operation on the action, to a dismissal with the consent of the defendant." Wood *v.* Raimond, 42 Cal. 644.

In Gummer *v.* Omro, 50 Wis. 247, the court by Orton, J., said: "We conclude that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same cause. This rule in respect to involuntary nonsuits is not only sustained by the authorities but by reason, and is evidently recognized generally, by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect in barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of the jury, or of the court, if the jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court on the plaintiff's case, and if he fails in his motion, to then to go a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision on the motion, the plaintiff should not be; and if the rule is adopted that a nonsuit granted upon the motion of the defendant is a bar to another action, then the correlative rule should be adopted also, that a decision against the motion operates as a judgment for the plaintiff." Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121; Pendergrass *v.* York Mfg. Co., 76 Me. 509; Moreland Tp. *v.* Gordner, 109 Pa. St. 116; Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439; Fleming *v.* Hawley, 65 Cal. 492; Beadle *v.* Graham, 66 Ala. 99; Vought *v.* Sober, 73 Pa. St. 49; Haynes *v.* Jackson, 66 Me. 93; Marsh *v.* Hammond, 11 Allen (Mass.) 483; Eaton *v.* George, 40 N. H. 258; National Water Works Co. *v.* School Dist., 23 Mo. App. 227; Van Vliet *v.* Olin, 11 Nev. 495; Clapp *v.* Thomas, 5 Allen (Mass.) 158. See generally NONSUIT, vol. 16, p. 720.

2. Retraxit.—"A retraxit is the open, public and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered

i. NOLLE PROSEQUI.—This in a criminal case is very similar to a nonsuit in a civil action. It is no bar to new proceedings for the same cause of action. The government declines or fails to push a complaint or indictment—in fact, drops it. The defendant has never been tried, nor even put in jeopardy, and all parties are in the same position after as before.[1]

j. PREMATURE ACTION.—An action brought before there is any claim, or anything due, or before anything can be done in the way of remedy, has no effect on a subsequent action brought when the cause of action has actually matured. If a required demand has not been made, or if the plaintiff is suffering from some temporary disability, or if, through some statutory provision, an action will not yet lie, an attempt to recover will be unprejudicial when these circumstances are changed.[2]

k. DISMISSAL IN EQUITY.—A dismissal of a bill in equity upon the merits is as effectual a bar to a subsequent suit for the same cause of action, as a similar disposition of an action at law would be. A dismissal may be either voluntary or involuntary. It may be either upon the merits, or upon informality or technicality. If upon the merits it is conclusive, otherwise not. There may be a presumption of an adjudication upon the merits unless the dismissal is "without prejudice." It is pretty clearly determined that if there is a misjoinder or nonjoinder of parties, a lack of jurisdiction, a defect in the pleadings, or a mistake in the form or nature of the bill, the dismissal will not bar another bill avoiding these objectionable points. If several defenses are offered to a bill and the decree is one of general dismissal, so that it cannot be determined which defense was held valid, the dismissal may not prove a bar, as some of the defenses are technical, even though some of them extend to the merits. Where it appears

thereon by the defendant, the plaintiff's right of action is forever gone." Cunningham *v.* Schley, 68 Ga. 105; Thomason *v.* Odum, 31 Ala. 108; 68 Am. Dec. 159; U. S. *v.* Parker, 120 U. S. 89; Crawford *v.* Glass, 11 Ired. (N. Car.) 118; Merritt *v.* Campbell, 47 Cal. 542; Wohlford *v.* Compton, 79 Va. 333; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 74; Coffman *v.* Brown, 7 Smed. & M. (Miss.) 128; 45 Am. Dec. 299. See generally RETRAXIT, vol. 21.

1. Nol. Pros.—Lambert *v.* Sanford, 2 Blackf. (Ind.) 137; 18 Am. Dec. 149. In Howes *v.* Austin, 35 Ill. 396, "the plaintiff was called and defaulted for want of a replication to the defendant's plea to the first and second counts of the declaration. The plaintiff had failed to reply within the time required by a rule of court. A judgment was entered that the defendant, as to those counts, go hence without day. This presents the question as to the effect of this judgment. It is contended by plaintiff in error that this judgment is a bar to a future recovery on the cause of action described in those counts, whether in the same or a different action." Bacon *v.* Towne, 4 Cush. (Mass.) 235. See NOLLE PROSEQUI, vol. 16, p. 709.

2. Premature Action. — Gray *v.* Dougherty, 25 Cal. 266; Brackett *v.* People, 115 Ill. 29; Krapp *v.* Eldridge, 33 Kan. 106; Pepper *v.* Donnelly, 87 Ky. 259; Crosby *v.* Baker, 6 Allen (Mass.) 295; Tracy *v.* Merrill, 103 Mass. 280; Maxwell *v.* Clarke, 139 Mass. 112; Conn *v.* Bernheimer, 67 Miss. 498; Dillinger *v.* Kelley, 84 Mo. 561; Garrett *v.* Greenwell, 92 Mo. 120; Sheldon *v.* Edwards, 35 N. Y. 279; Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 473; McFarlane *v.* Cushman, 21 Wis. 401; Oleson *v.* Merrihew, 45 Wis. 396.

that the complainant had a complete and adequate remedy at law, and the decree of dismissal is based upon that, it is the usual practice to dismiss without prejudice, and an action at law will then lie. The Federal courts incline rather more strongly than others to consider a dismissal an absolute bar to future proceedings.[1]

1. Dismissal of Bill in Equity. — "The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court." 2 Smith's Lead. Cases, 667; Moss *v.* Ashbrooks, 12 Ark. 369; Scully *v.* Chicago, etc., R. Co., 46 Iowa 528; Blackinton *v.* Blackinton, 113 Mass. 231; Lewis *v.* Lewis, 106 Mass. 309; Durant *v.* Essex Co., 7 Wall. (U. S.) 107; Knowlton *v.* Hanbury, 117 Ill. 471; Case *v.* Beauregard, 101 U. S. 688; Taylor *v.* Yarborough, 13 Gratt. (Va.) 183; Strang *v.* Moog, 72 Ala. 460.

Where the pleadings were all filed, evidence prepared, and the case ready for hearing, but none was had, the court said it would be "very difficult and would be rather mischievous to treat such conduct merely as a nonsuit at law." Bigelow *v.* Winsor, 1 Gray (Mass.) 301.

Where there are two parties defendant and the dismissal is without prejudice as to one, and because of a plea of bankruptcy of the other, it is no bar. Jackson *v.* Elliott, 49 Tex. 62.

Where there are two trustees a dismissal as to one bars the other. Zorn *v.* Lamar, 71 Ga. 85; Bledsoe *v.* Erwin, 33 La. Ann. 615; Tilley *v.* Bridges, 105 Ill. 336; Goodenow *v.* Litchfield, 59 Iowa 226.

In Tankersley *v.* Pettis, 71 Ala. 179, the court said: "The decree of a court of chancery, dismissing a bill absolutely and unconditionally, on a hearing or pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any future litigation of the same matters between the parties or their privies. A decree of that kind, not made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude future suit, such as that the dismissal is *without prejudice*. . . . When, however, the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties." Adams *v.* Cameron, 40 Mich. 506; Thompson *v.* Clay, 3 T. B. Mon. (Ky.) 359; 16 Am. Dec. 108; Pelton *v.* Mott, 11 Vt. 148; 34 Am. Dec. 678; Stickney *v.* Goudy, 132 Ill. 213; Kelsey *v.* Murphy, 26 Pa. St. 78; Foote *v.* Gibbs, 1 Gray (Mass.) 412; Thurston *v.* Thurston, 99 Mass. 39; Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698; Hicks *v.* Aylsworth, 13 R. I. 562; Gove *v.* Lyford, 44 N. H. 525; Foster *v.* The Richard Busteed, 100 Mass. 412; 1 Am. Rep. 125.

Where a bill in equity to redeem from mortgage and an answer under oath is filed, the plaintiff, without the knowledge of the defendant, makes a motion to dismiss, after the time for replication and time for taking testimony has elapsed, the decree in favor of the defendant, will bar the plaintiff or any one claiming under him on another action. Borrowscal *v.* Tuttle, 5 Allen (Mass.) 377.

Where there was an ante-nuptial agreement by which the woman was to waive any claim to the estate of her future husband, the executors, after she became a widow, brought a bill in equity to enjoin her from interfering with the estate, which was dismissed, upon its appearing that the husband had not fulfilled his part of the contract. The dismissal in equity was a bar to an action by the executors against the widow. Blackinton *v.* Blackinton, 113 Mass. 231; Nevitt *v.* Bacon, 32 Miss. 212; 66 Am. Dec. 609; Gage *v.* Ewing, 114 Ill. 15; Magill *v.* Mercantile Trust Co., 81 Ky. 129; Lang *v.* Waring, 25 Ala. 625; 60 Am. Dec. 533.

Where a bill was brought against three defendants, and was sustained as to one and dismissed as to the other two, the dismissal was not regarded as conclusive. Hamm *v.* Arnold, 23 Cal. 373; Phelps *v.* Harris, 101 U. S. 370;

2. Judgments In Rem—*a.* NATURE AND REQUISITES.—A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is in form as well as substance between the parties claiming the right, and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted not against the person, as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be.[1] Any one having any interest in the property

Hughes *v.* U. S., 4 Wall. (U. S.) 237; Mobile Co. *v.* Kimball, 102 U. S. 691.

In another case where there were two defendants, one held, and bill dismissed as to the other, a supplemental bill in a subsequent action was allowed taking advantage of the decree. Ely *v.* Wilcox, 26 Wis. 91.

A claim against one of two joint plaintiffs was set off and a disallowance did not bar a future action on the same claim. Fifield *v.* Edwards, 39 Mich. 264; Jourolmon *v.* Massengill, 86 Tenn. 81; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 137 Mass. 186; Walden *v.* Bodley, 14 Pet. (U. S.) 160; Emory *v.* Keighan, 88 Ill. 516; Porter *v.* Vaughn, 26 Vt. 624; Baird *v.* Bardwell, 60 Miss. 164; Kempton *v.* Burgess, 136 Mass. 192; Edgar *v.* Buck, 65 Mich. 356; Phillips *v.* Wormley, 58 Miss. 398; Black *v.* Black, 27 Ga. 40; Wilcox *v.* Balger, 6 Ohio 406.

It is not material that the court is divided upon the decree as passed. Durant *v.* Essex Co., 8 Allen (Mass.) 103; 85 Am. Dec. 685.

A decree dismissing an amended bill is conclusive on the original bill. Bradish *v.* Grant, 119 Ill. 606.

As to dismissal without prejudice, see Gunn *v.* Peakes, 36 Minn. 177; Nevitt *v.* Bacon, 32 Miss. 212; 66 Am. Dec. 609; Magill *v.* Mercantile Trust Co., 81 Ky. 129; English *v.* English, 27 N. J. Eq. 579; Wanzer *v.* Self, 30 Ohio St. 378. See generally Russell *v.* Place, 94 U. S. 606; Mey *v.* Gulliman, 105 Ill. 272; Cook *v.* Burnley, 45 Tex. 97; Trueman *v.* Lore, 14 Ohio St. 144; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180; Adams Co. *v.* Graves, 75 Iowa 642; Smith *v.* Auld, 31 Kan. 262; Pendleton *v.* Dalton, 92 N. Car. 185; Porter *v.* Wagner, 36 Ohio St. 471; Bigelow *v.* Winsor, 1 Gray (Mass.) 301.

1. **Judgments In Rem.**—This definition is from the language of the court in Woodruff *v.* Taylor, 20 Vt. 73.

In 2 Smith's Lead. Cas. *810, it is said: "A judgment *in rem* I conceive to be an adjudication pronounced (as indeed its name denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication being a most solemn declaration from the proper and accredited quarter, that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication."

"Actions *in rem*, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*,

may make a claim or prosecute an appeal, so that while the action is against the property anybody may become a party to the suit.[1]

but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are the actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties." Field, J., in Freeman *v.* Alderson, 119 U. S. 187. See also The Sabine, 101 U. S. 388; Freeman on Judgments, § 606; Black on Judgments, § 792; Windsor *v.* McVeigh, 93 U. S. 279; Pennoyer *v.* Neff, 95 U. S. 734; Lord *v.* Chadbourne, 42 Me. 429; 66 Am. Dec. 290; Cross *v.* Armstrong, 44 Ohio St. 623; Childs *v.* Hayman, 72 Ga. 791; Eppright *v.* Kauffman, 90 Mo. 25; Pillsbury *v.* Dugan, 9 Ohio 117; 34 Am. Dec. 427; Consolidated Roller Mill Co. *v.* Smith Middlings Purifier Co., 40 Fed. Rep. 305; *In re* Brooklyn, etc., R. Co., 19 Hun (N. Y.) 314.

See Mankin *v.* Chandler, 2 Brock. (U. S.) 127, for a comprehensive definition of proceedings strictly *in rem* by Marshall, C. J.

See Bradstreet *v.* Neptune Ins. Co., 3 Sumn. (U. S.) 607, for a discussion on the subject of notice in proceedings *in rem* by Story, J.

An action of replevin is not *in rem*, for the judgment is in effect *in personam*. *In re* Certain Lodge of Mahogany, 2 Sumn. (U. S.) 592.

As to attachments, see further, Anderson *v.* Goff, 72 Cal. 65; Maxwell *v.* Stewart, 22 Wall. (U. S.) 77; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308.

1. Croudson *v.* Leonard, 4 Cranch (U. S.) 437.

"Where the subject-matter of the suit, the *res*, is within the territorial dominion of the sovereign power under the authority of which the court acts, it is within the jurisdiction of such court. The presence or the domicile of the parties proceeded against has no importance in such case in determining the question of jurisdiction; it would, on the other hand, be all-important if the proceeding were purely *in personam*. . . . Having jurisdiction of the subject-matter *in rem*, the local regulations and laws of the country in which the court proceeds must determine what service of process or form of notice shall suffice to give to the defenders an opportunity of being heard in their defense." Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 182.

Proceedings by attachment are not, strictly speaking, *in rem*, but rather against the interests of the defendant in the property. Megee *v.* Beirne, 39 Pa. St. 62.

Where a vessel belonging to citizens of the United States, for an alleged breach of a blockade was condemned by an admiralty court in Hayti, it was held invalid because no libel was filed, no notice given, and no judicial forms observed. The court by Parker, C. J., in Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291, said: "The decree offered in this case as conclusive evidence of a violation of the blockade by the vessel insured cannot be held so to operate. Indeed, it may be doubtful whether it ought to have been admitted at all. Waiving all questions as to the character of the government under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance. For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us the forfeiture was decreed by mere arbitrary power, without any trial, and some of the forms of the justice used in civilized countries had been assumed without any regard to the substantial requisites of a judicial inquiry."

While the weight of the better authorities requires that notice should be given, still some courts hold it to be unnecessary as the action is dependent upon the presence of the property in

question within the jurisdiction of the court. McCahill *v.* Equitable, L. Assur. Soc., 62 N. J. Eq. 535.

Jurisdiction is determined by the presence of the property in the jurisdiction. Martin *v.* Darling, 78 Me. 78; Heidritter *v.* Elizabeth Oil-Cloth Co., 112 U. S. 294; The Globe, 2 Blatchf. (U. S.) 427; Hassall *v.* Wilcox, 130 U. S. 493; Windsor *v.* McVeigh, 93 U. S. 279; Risley *v.* Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421; Day *v.* Micou, 18 Wall. (U. S.) 156.

A judgment *in rem* is binding upon all interested persons. Toby *v.* Brown, 11 Ark. 308; Noble *v.* Thompson Oil Co., 79 Pa. St. 354; 21 Am. Rep. 66; Durant *v.* Abendroth, 97 N. Y. 132; Street *v.* Augusta Ins., etc., Co., 12 Rich. (S. Car.) 13; 75 Am. Dec. 714; Steamer Rio Grande *v.* Otis, 23 Wall. (U. S.) 458; State *v.* Central Pac. R. Co., 10 Nev. 80.

Decrees in Admiralty.—These come under judgments *in rem*. Andrews *v.* Brown, 3 Cush. (Mass.) 130; The Propeller Commerce, 1 Black (U. S.) 580; Averill *v.* Smith, 17 Wall. (U. S.) 95; Providence Washington Ins. Co. *v.* Morse, 35 Fed. Rep. 363.

"The sentence of a court of admiralty or of appeal, in questions of prize, binds all the world as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive as to all persons." Penhallow *v.* Doane, 3 Dall. (U. S.) 54; Bradstreet *v.* Neptune Ins. Co., 3 Sumn. (U. S.) 600.

As to the question of jurisdiction in these cases, Marshall, C. J., in Rose *v.* Himely, 4 Cranch (U. S.) 241, said: "Can this court examine the jurisdiction of a foreign tribunal? The court pronouncing sentence, of necessity decided in favor of its jurisdiction, and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted to its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject which it had decided, could have no legal effect whatever. The power of the court, then, is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes its jurisdiction, of necessity, must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that the condemnation operated as a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

"The difference between proceedings by attachment and proceedings *in rem*, properly so called, arises from the fact that while the latter are directed primarily against things themselves, and only operate incidentally on the rights of parties, the former use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies

b. CONCLUSIVENESS.—Judgments *in rem* are conclusive not only upon the facts involved in the case but as to the property in question and the title to the same. It must appear that the court has jurisdiction in order to make the judgment binding, and the jurisdiction is ever an open question. The property to which the action relates must actually be within the limits of the jurisdiction of the court passing upon it. If it is thus subject to the jurisdiction at the time suit is brought, its subsequent removal without the jurisdiction will not interfere with the progress of the case. This is true both in the State and federal courts and also applies in cases of admiralty, which are in the nature of actions *in rem*, and judgments therein are as conclusive as judgments in any case would be under like circumstances. Such actions, indeed, form a large part of the cases coming under this head, the titles to vessels being frequently in question. If any facts are involved in a decision, which were irrelevant, unnecessary and not essential to it, they are not concluded from consideration in a subsequent action. Judgments *in rem* are impeachable for fraud or

to replevin." 2 Smith's Lead. Cas. 690. And the same are also proceedings *in personam*. Sale *v.* French, 61 Miss. 170.

As to effect as *res judicata*, see Baxter *v.* New England Marine Ins. Co., 6 Mass. 277; 4 Am. Dec. 125; Andrews *v.* Brown, 3 Cush. (Mass.) 130; Gelston *v.* Hoyt, 13 Johns. (N. Y.) 561; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch (U. S.) 185; Cushing *v.* Laird, 107 U. S. 69; Bingham *v.* Fayerweather, 140 Mass. 411; Litchfield *v.* Goodnow, 123 U. S. 549; Chapman *v.* Goodnow, 123 U. S. 540; Coffey *v.* U. S., 116 U. S. 436; Smith *v.* Smith, 13 Gray (Mass.) 209; Hood *v.* Hood, 110 Mass. 463; Kearney *v.* Denn, 15 Wall. (U. S.) 51; Gill *v.* Read, 5 R. I. 343; 73 Am. Dec. 73; Williams *v.* Williams, 63 Wis. 58; 53 Am. Rep. 253; Butterfield *v.* Smith, 101 U. S. 570; Ritchey *v.* Withers, 72 Mo. 656; Hatcher *v.* Dillard, 70 Ala. 343; Vaughan *v.* Suggs, 82 Ala. 357; Plume *v.* Howard Sav. Inst., 46 N. J. L. 211; Renovo *v.* Halfmoon, 78 Pa. St. 301; Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176.

In Loring *v.* Steineman, 1 Met. (Mass.) 204, the court, by Shaw, C. J., said: "In many cases courts of peculiar jurisdiction have jurisdiction of the subject-matter absolutely, and persons are concerned incidentally only, according to their respective rights and interests; as in a question of prize the jurisdiction of the court of admiralty extends to the question whether prize or not, and by adjudicating upon that question settles it definitely in regard to all persons interested in that question, whether they have notice or not. And we think the distribution of an intestate estate is analogous. The subject-matter, the property, is within the jurisdiction of the court, and the judgment, by determining who are entitled to distributive shares, and extending to the entire estate, determines that no other persons are entitled, and is necessarily conclusive because nothing further remains to be distributed."

For decisions in proceedings of various kinds, see Mayo *v.* Ah Loy, 32 Cal. 477; 91 Am. Dec. 595; Mayo *v.* Foley, 40 Cal. 281; Bethlehem *v.* Watertown, 47 Conn. 237; People *v.* Brislin, 80 Ill. 423; Belleville Nail Co. *v.* People, 98 Ill. 399; Gage *v.* Bailey, 102 Ill. 11; Verneuil *v.* Harper, 28 La. Ann. 893; Brown *v.* Smart, 69 Md. 320; Burlen *v.* Shannon, 3 Gray (Mass.) 387; Thornton *v.* Hogan, 63 Mo. 143; Mount *v.* Manhattan Co., 41 N. J. Eq. 211; Pitman *v.* Albany, 34 N. H. 577; Van Deusen *v.* Sweet, 51 N. Y. 378; Lewis *v.* Sloan, 68 N. Car. 557; Millcreek Tp. *v.* Reed, 29 Pa. St. 195; Waters *v.* Spofford, 58 Tex. 115; Cabot *v.* Washington, 41 Vt. 168; Pittsford *v.* Chittenden, 58 Vt. 49; State *v.* Hoeflinger, 35 Wis. 393; Rork *v.* Smith, 55 Wis. 67; Montgomery *v.* Samory, 99 U. S. 482; Gage *v.* Pumpelly, 115 U. S. 454.

collusion, but the burden is upon the party alleging the same to furnish clear and convincing proof of the truth of his allegations.[1]

3. Foreign Judgments—*a.* FOREIGN COUNTRIES—(1) *In Rem.*—A judgment *in rem* rendered by the court of another country is entitled to the same effect as a bar as is a similar domestic judgment. It may be attacked on the ground that it was procured by fraud, or that it is void on its face, or by the local law; but not on the ground of want of notice, unless it appears that the notice

1. Bradstreet *v.* Neptune Ins. Co., 3 Sumn. (U. S.) 605; Croudson *v.* Leonard, 4 Cranch (U. S.) 434; Rose *v.* Himely, 4 Cranch (U. S.) 241; Hudson *v.* Guestier, 4 Cranch (U. S.) 293; The Mary, 9 Cranch (U. S.) 142; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246. The Rio Grande, 23 Wall. (U. S.) 463; Jennings *v.* Carson, 4 Cranch (U. S.) 23; Taylor *v.* Carryl, 20 How. (U. S.) 599; Cooper *v.* Reynolds, 10 Wall. (U. S.) 317; The Brig Ann, 9 Cranch (U. S.) 291; Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 182; Rose *v.* Himely, 4 Cranch (U. S.) 267; Maley *v.* Shattuck, 3 Cranch (U. S.) 488; Denison *v.* Hyde, 6 Conn. 517; Schooner Tilton, 5 Mason (U. S.) 468.

A debtor may be conclusively adjudged a bankrupt. Mount *v.* Manhattan Co., 41 N. J. Eq. 211; Baker *v.* Kunkel, 70 Md. 392; Brown *v.* Smart, 69 Md. 320; Lewis *v.* Sloan, 68 N. Car. 557; Lamp Chimney *v.* Brass Co., 91 U. S. 661.

A judgment for taxes is of the same nature. Childs *v.* Hayman, 72 Ga. 791; Mayo *v.* Ah Loy, 32 Cal. 477; 91 Am. Dec. 595. Also in partition. Nash *v.* Church, 10 Wis. 303; 78 Am. Dec. 678.

A judgment *in rem* may be barred by an acquittal in a criminal action. Coffey *v.* U. S., 116 U. S. 436.

Where a foreign admiralty court has condemned a prize, which is conclusive as to a change of title, the facts have been only *prima facie* proven and may be collaterally attacked. Durant *v.* Abendroth, 97 N. Y. 133; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 68; 19 Am. Dec. 549; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 451; 1 Am. Dec. 180; Radcliff *v.* United Ins. Co., 9 Johns. (N. Y.) 281.

Where a sale of a vessel is made by proper proceedings in admiralty the sale is irrevocable, even though the vessel had previously fallen into the hands of pirates. Grant *v.* M'Lachlin, 4 Johns. (N. Y.) 39.

Where a vessel has been condemned by some foreign court as a blockade runner, such a judgment bars a claim for the insurance. If the crew take either side, though the vessel was neutral, and it is rescued by the crew, the rescue is conclusive in a suit against the plaintiff on a policy. Baxter *v.* New England Marine Ins. Co., 6 Mass. 299; 4 Am. Dec. 125; Robinson *v.* Jones, 8 Mass. 537; 5 Am. Dec. 114; Croudson *v.* Leonard, 4 Cranch (U. S.) 434.

The jurisdiction and competency of a foreign tribunal which has condemned a vessel must be shown by the person claiming it if there is any question raised about it. The presumption is that any tribunal acting in a case is a legal one. If there is any investigation, however, and the doubt is raised, the court must show its authority. The establishment is a sovereign act abroad, a legislative one at home. Snell *v.* Faussatt, 1 Wash. (U. S.) 271.

Even though a vessel is condemned as belonging to an enemy, the owner of the cargo, so far as it affects him, may dispute that the vessel had become the property of the enemy, as the latter having no interest in the vessel could not appear as a claimant against the vessel. The Mary, 9 Cranch (U. S.) 146.

Where there is a condemnation for a breach which actually did not occur, the decision will not be final. Municipal laws of foreign countries are not subjects of judicial notice, and so must be proven. Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 68; 19 Am. Dec. 549; Cross *v.* Armstrong, 44 Ohio St. 613; Anderson *v.* Goff, 72 Cal. 65; Brown *v.* Brown, 86 Tenn. 277; Miller *v.* Foster, 76 Tex. 479; Hassall *v.* Wilcox, 130 U. S. 493; Windsor *v.* McVeigh, 93 U. S. 278; The Sabine, 101 U. S. 388; Lord *v.* Chadbourne, 42 Me. 443; 66 Am. Dec. 290; Risley *v.* Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421.

See also as to proceedings *in rem* JUDGMENTS, vol. 12, p. 1497, and the

prescribed by the local law was not given. If on its face it appears regular, the burden of showing its invalidity rests upon him who attacks it.[1]

various substantive titles, such as ADMIRALTY, vol. 1, p. 193; ATTACHMENT, vol. 1, p. 894; DIVORCE, vol. 5, p. 745; PARTITION, vol. 17, p. 660; WILLS.

1. Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126; Cammell *v.* Sewell, 5 H. & N. 728; General Steam Nav. Co. *v.* Guillon, 11 M. & W. 874; Douglas *v.* Forrest, 4 Bing. 686; Smith *v.* Grady, 68 Wis. 215; Shepard *v.* Wright, 113 N. Y. 582; Rankin *v.* Goddard, 54 Me. 28; 89 Am. Dec. 718; McEwan *v.* Zimmer, 38 Mich. 765; 31 Am. Rep. 332; Thorn *v.* Salmonson, 37 Kan. 441; Foster *v.* Glazener, 27 Ala. 391; Bissell *v.* Briggs, 9 Mass. 462; 6 Am. Dec. 88.

Jurisdiction.—The jurisdiction of foreign courts will be presumed. Dore *v.* Thornburgh, 90 Cal. 64; Gunn *v.* Peakes, 36 Minn. 177; Bruckman *v.* Taussig, 7 Colo. 561.

In Bradstreet *v.* Neptune Ins. Co., 3 Sumn. (U. S.) 600, the court by Story, J., said: "There is another element which, it seems to me, constitutes an essential ingredient in every case where the sentence of a foreign court *in rem* is sought to be held conclusive, as to the title to the property and as to the facts upon which it professes to be founded. That element is, that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offense, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, may know what is the offense with which they are charged, and may have an opportunity to defend themselves and to disprove the charge. It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate and clear.

"If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—*castigatque, auditque.* It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offense is charged for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem* and attaching to the thing so that the parties in interest may appear and make defense, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs." Sawyer *v.* Marine F. & M. Ins. Co., 12 Mass. 291; Rose *v.* Himely, 4 Cranch (U. S.) 241; Wheelwright *v.* Depeyster, 1 Johns. (N. Y. 471; 3 Am. Dec. 345; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733.

In Story's Conflict of Laws, § 607, it is said: "It is, indeed, very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit

upon a foreign judgment. Some of the witnesses may be since dead, some of the vouchers may be lost or destroyed."

The German jurist, Bar, says: "The parties in such new suit could then try the case on new facts and new laws, and even, keeping out of view the fact that, in independent states, distinct systems of law prevail, it is probable that in many cases opposite results would be reached even on the same legal basis. A domestic court, for instance, in a particulur case, decides an issue for the plaintiff in face of a foreign judgment to the contrary.

"Either the plaintiff's property or person subsequently coming into the defendant's court, the defendant sues the plaintiff on the same cause of action and there recovers; and so on, as long as either party has anything in the other's country which could be attached.

"In this view, just so far as the principle is applied, is business intercourse between the countries suspended, and the shock is one which affects the subject equally with the foreigner. Each suffers equally from the failure to recognize as authoritative the judicial action of a foreign state." Wharton's Conflict of Laws, § 817. Gunn *v.* Howell, 35 Ala. 144; 73 Am. Dec. 484; Walling *v.* Beers, 120 Mass. 548; Lockhart *v.* Locke, 42 Ark. 17; Dodd *v.* Una, 40 N. J. Eq. 672.

Admiralty.—Decrees in admiralty are binding and conclusive all over the world. Williams *v.* Armroyd, 7 Cranch (U. S.) 423; Croudson *v.* Leonard, 4 Cranch (U. S.) 434; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64; 19 Am. Dec. 549; Magoun *v.* New England Marine Ins. Co., 1 Story (U. S.) 157; Cushing *v.* Laird, 107 U. S. 69; Brigham *v.* Fayerweather, 140 Mass. 411; Street *v.* Augusta Ins., etc., Co., 12 Rich. (S. Car.) 13; 75 Am. Dec. 714; Stryker *v.* Goodnow, 123 U. S. 527; Levi *v.* New Orleans Mut. Ins. Assoc., 2 Woods (U. S.) 63. In Brown *v.* Union Ins. Co., 4 Day (Conn.) 179; 4 Am. Dec. 204, the court by Swift, J., said: "I apprehend our acknowledgment of the authority of the law of nations, and our adoption of the marine law have established principles decisive of this question. The law of nations is a rule of conduct obligatory on sovereign independent states, and the right of capture on the high seas by nations at war is clearly a part of that law. The decrees of judicial tribunals proceeding according to the law of nations, must be conclusive, as far as that law is recognized, for the same reason that judgments of courts proceeding according to municipal law are conclusive, as far as that law extends. In all civilized states, courts are constituted that have jurisdiction of questions of prize, and are to decide according to the law of nations. In these cases the proceedings are *in rem*, and every person interested is supposed to be a party to them. Whenever, then, a court of admiralty in one country, acting as a prize court, decides on the question of prize and condemns captured property, such sentence or decree must be conclusive evidence, when the same question shall arise in any other country recognizing the law of nations, on the same principle that the judgment of a municipal court is conclusive between the same parties and their representatives, whenever the same question shall arise in another court in the same country where the judgment was rendered.

"As we have adopted the law of nations, we must take it with all its consequences; and we can have no more right to deny the conclusiveness of the sentence of a foreign court of admiralty, acting as a prize court according to the law of nations, when the same question arises before us, than we have to deny the conclusiveness of a judgment of a court in this State, when the same question arises between the same parties in another court, or than we have to deny any other principle of the law of nations. I should therefore deem the decree of the court of admiralty to be conclusive in this case, not on the authority of the decisions in Great Britain, but on the authority of the law of nations, which is a part of the common law of the land. At the same time, it is not improper to observe that the courts of Westminster Hall have uniformly paid such a sacred regard to principle in their decisions that they may be deemed good evidence, not only of national law, but of common law, and are entitled to the highest respect in all countries governed by the same general rules of jurisprudence." Radcliff *v.* United Ins. Co., 9 Johns. (N. Y.) 277; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch (U. S.) 185; Maley *v.* Shattuck, 3 Cranch (U. S.) 458.

"Where it does not appear by the decree itself on what particular ground the condemnation was had, the case is to be open to evidence as to all the

(2) *In Personam.*—The earlier English and also American decisions were inclined to hold that foreign judgments *in personam* were only *prima facie* evidence of debt; but the recent cases are tending toward the position, and, in fact, have decided that such judgments are conclusive upon the merits.[1]

points which it may be necessary for the parties in interest here to establish, execept the fact of condemnation." Robinson *v.* Jones, 8 Mass. 536; 5 Am. Dec. 114; Steamer Rio Grande *v.* Otis, 23 Wall. (U. S.) 465; Gelston *v.* Hoyt, 3 Wheat (U. S.) 246; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; 3 Am. Dec. 345; Whitney *v.* Walsh, 1 Cush. (Mass.) 29; 48 Am. Dec. 590; Andrews *v.* Brown, 3 Cush. (Mass.) 130; The Mary, 9 Cranch (U. S.) 126; Robinson *v.* Jones, 8 Mass. 536; 5 Am. Dec. 114; Stewart *v.* Warner, 1 Day. (Conn.) 142; Am. Dec. 61.

In order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country." Dalgleish *v.* Hodgson, 7 Bing. 495; 20 E. C. L. 216; Baxter *v.* New England Marine Ins. Co., 6 Mass. 277; 4 Am. Dec. 125; Sawyer *v.* Marine F. & M. Ins. Co., 12 Mass. 291; Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 180; Carrington *v.* Merchants' Ins. Co., 8 Pet. (U. S.) 495; Coffey *v.* U. S., 116 U. S. 436; Snell *v.* Faussatt, 1 Wash. (U. S.) 271; Bank of N. A. *v.* McCall, 4 Binn. (Pa.) 371.

Fraud or Error.—"The question in this case is whether a sentence of condemnation of a foreign court of competent jurisdiction can be avoided on the ground of fraud practiced in obtaining it, when thus called in question collaterally in this country; and the court are of opinion that such sentence cannot thus be called in question, but must remain in full force until avoided in some regular mode in the country where it was passed." Stewart *v.* Warner, 1 Day (Conn.) 142; 2 Am. Dec. 61.

"It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly either as to their own course of procedure or their own law, not whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship." Castrique *v.* Imrie, L. R., 4 H. L. 414.

Divorce.—The decisions are variable in *England*, but the American courts hold divorce decrees to be conclusive. Burlen *v.* Shannon, 115 Mass. 438; Pennoyer *v.* Neff, 95 U. S. 714; Harding *v.* Alden, 9 Me. 140; 23 Am. Dec. 549; Roth *v.* Roth, 104 Ill. 35; 44 Am. Rep. 81; Hood *v.* Hood, 110 Mass. 463; Kearney *v.* Denn, 15 Wall. (U. S.) 51; Smith *v.* Smith, 13 Gray (Mass.) 209; Williams *v.* Williams, 63 Wis. 58; 53 Am. Rep. 253; De Meli *v.* De Meli, 120 N. Y. 485; Hanover *v.* Turner, 14 Mass. 227; 7 Am. Dec. 203; Sewall *v.* Sewall, 122 Mass. 156; Prosser *v.* Warner, 47 Vt. 667; 19 Am. Dec. 132.

Probate and Bankruptcy.— Foreign adjudications are regarded as conclusive. Tompkins *v.* Tompkins, 1 Story (U. S.) 547; Williams *v.* Saunders, 5 Coldw. (Tenn.) 60; Marsh *v.* Putnam, 3 Gray (Mass.) 551; Blanchard *v.* Russell, 13 Mass. 1; 7 Am. Dec. 106; Peck *v.* Hibbard, 26 Vt. 702; 62 Am. Dec. 605; Butterfield *v.* Smith, 101 U. S. 570; Ritchey *v.* Withers, 72 Mo. 556; Carver *v.* Lewis, 104 Ind. 438; Hatcher *v.* Dillard, 70 Ala. 343; Brigham *v.* Fayerweather, 140 Mass. 411; Murphy *v.* Manning, 134 Mass. 488; Very *v.* McHenry, 29 Me. 206; Whitney *v.* Whiting, 35 N. H. 457; Ackerman *v.* Cross, 40 Barb. (N. Y.) 486; Anderson *v.* Wheeler, 25 Conn. 612; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460; 22 Am. Dec. 41; Osgood *v.* Maguire, 61 N. Y. 529; Holmes *v.* Remsen, 4 Johns. Ch. (N. Y.) 460; 8 Am. Dec. 581; Dawes *v.* Boylston, 9 Mass. 337; 6 Am. Dec. 72.

1. The rule of the civil law, as given by the German jurist, Bar, is substan-

tially the same as the rule prevailing in *England* and the *United States*, and is thus stated: Judgments are binding; "*First.* When rendered by the courts of the State in which the defendant is domiciled, in all suits *in personam* and in all possessory actions which concern movables and of which the former *rei sitæ* has not jurisdiction. *Second.* When rendered by the courts of a State by whose laws a contract is to be adjudicated in those cases in which the debtor personally resides in such State, or has in it property not merely illusory, provided that, in such cases, the judgment is based on the contract, whether for its execution or its rescission. *Third.* When rendered by the courts of a State in which a tort or *delict* has been committed in a suit for damages against the wrongdoer, provided such damages are compensatory and not vindictive. *Fourth.* When rendered by the courts of a State in which are situated either goods or claims, when such goods or claims are attached, the judgment in such case being effective up to the value of such goods or claims, when it is entered on the cause of action for which the attachment is laid, the court having jurisdiction of the action. *Fifth.* When rendered by the courts of a State in all proceedings *in rem* as to things situate in such State, whether movable or immovable, provided such things have a continuous abiding place." Castrique *v.* Imrie, L. R., 4 H. L. 414; Paul *v.* Roy, 14 Beav. 433; Martin *v.* Nicolls, 3 Sim. 458; Ricardo *v.* Garcias, 12 Cl. & Fin. 368; Tarleton *v.* Tarleton, 4 M. & S. 20; Godard *v.* Gray, L. R., 6 Q. B. 139; Bank of Australasia *v.* Nias, 16 Q. B. 717; Patrick *v.* Shedden, 2 E. & B. 14; 75 E. C. L. 13; Guinness *v.* Carroll, 1 B. & Ad. 459; 20 E. C. L. 429; Middlesex Bank *v.* Butman, 29 Me. 19; Rankin *v.* Goddard, 54 Me. 28; 89 Am. Dec. 718; Taylor *v.* Barron, 30 N. H. 79; 64 Am. Dec. 281.

In Lazier *v.* Westcott, 26 N. Y. 146; 82 Am. Dec. 404, the court said: "We think the rule adopted in *England*, holding the same doctrines as to foreign judgments and recognized in this State, should be adopted and adhered to here in respect to such foreign judgments, and that the same principles and decisions which we have made, as to judgments from the courts of other States of the Union should be applied to foreign judgments." Cummings *v.* Banks, 2 Barb. (N. Y.) 602; Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126; Taylor *v.* Bryden, 8 Johns. (N. Y.) 173; Baker *v.* Palmer, 83 Ill. 568; McEwan *v.* Zimmer, 38 Mich. 765; 31 Am. Rep. 332; Hilton *v.* Guyott, 42 Fed. Rep. 249.

In Harrison *v.* Lowrie, 49 How. Pr. (N. Y.) 124, the court said: "The court in which the trial was had and judgment entered having acquired jurisdiction of the person of the defendant, its adjudication upon the issues formed by the pleadings is conclusive in an action upon the judgment in the courts of this country, and the defendant is precluded from inquiring into, questioning, or defending upon the merits." Konitzky *v.* Meyer, 49 (N. Y.) 571; Shepard *v.* Wright, 59 How. Pr. (N. Y.) 512; Jones *v.* Jamison, 15 La. Ann. 35.

In Glass *v.* Blackwell, 48 Ark. 50, the court said: "A judgment, whether foreign or domestic, raises a binding obligation to pay the sum awarded by it, and the presumption as to its conclusiveness should follow the law of the forum in which the proceedings were had. . . . It is not the policy of the law to encourage litigation, and where a court of competent jurisdiction, having the parties legally before it, has adjudicated the merits of their case, every reason favors holding them bound by the adjudication, wherever the judgment may be called in question, if there has been no fraud practiced in obtaining it. This is now the accepted rule."

Again in McMullen *v.* Richie, 41 Fed. Rep. 502, the court by Ricks, J., said: "I think the doctrine as maintained by the later English and American cases to which reference has been made, has advanced the courts one stage in the process of simplifying the administration of justice. It is important that there should be a limitation to litigation, and that parties, as to matters upon which they had a full hearing in the court of original and competent jurisdiction, should not be permitted to open and re-try issues once fairly determined, whenever and wherever they have an opportunity to do so, by defending against judgments rendered in a foreign country to which they were properly made parties."

The jurisdiction of foreign courts which have rendered judgments may be questioned. Folger *v.* Columbian Ins. Co., 99 Mass. 267; 96 Am. Dec.

b. OTHER STATES OF THE UNION.—Judgments of sister States shall have the same credit and are just as conclusive as the same judgments in the States where they are rendered.[1]

4. Impeachment of Judgments.—See JUDGMENTS, vol. 12, p. 58.

5. Enjoining Judgments.—See INJUNCTIONS, vol. 10, p. 884.

747; Long *v.* Hammond, 40 Me. 204; Carleton *v.* Bickford, 13 Gray (Mass.) 591; 74 Am. Dec. 652; Horton *v.* Critchfield, 18 Ill. 133; 65 Am. Dec. 701; Gunn *v.* Peakes, 36 Minn. 177; Kerr *v.* Kerr, 41 N. Y. 272.

A foreign judgment rendered without jurisdiction may be assailed in either a direct or collateral proceeding. Although the recitals contained in the judgment, that service was made, raise a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff may show by extrinsic evidence, if he can, that no service was actually made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but if it is clearly shown that the defendant was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no value. Thorn *v.* Salmonson, 37 Kan. 441; Bruckman *v.* Taussig, 7 Colo. 561; Smith *v.* Grady, 68 Wis. 215; The Antelope, 10 Wheat (U. S.) 66; Godard *v.* Gray, L. R., 6 Q. B. 139; Ward *v.* Quinlivin, 57 Mo. 425; Rankin *v.* Goddard, 54 Me. 28; 89 Am. Dec. 718; Barrow *v.* West, 23 Pick. (Mass.) 270; Forbes *v.* Scannell, 13 Cal. 242; Capling *v.* Herman, 17 Mich. 524.

"A foreign judgment, when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action." Eastern Townships Bank *v.* Beebe, 53 Vt. 177; 38 Am. Rep. 665.

1. U. S. Const., art. 4, § 1. See Jones *v.* Drewry, 72 Ala. 311; Nunn *v.* Sturges, 22 Ark. 389; Weir *v.* Vail, 65 Cal. 466; Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Stanton *v.* Embry, 46 Conn. 65; Braswell *v.* Downs, 11 Fla. 62; Powell *v.* Davis, 60 Ga. 70; Zepp *v.* Hager, 70 Ill. 223; State *v.* Helmer, 21 Iowa 370; Cleunner *v.* Cooper, 24 Iowa 185; 95 Am. Dec. 720; David *v.* Porter, 51 Iowa 254; Ritter *v.* Hoffman, 35 Kan. 215; Sweet *v.* Brackley, 53 Me. 346; Zimmerman *v.* Helser, 32 Md. 274; Com. *v.* Green, 17 Mass. 515; Brainard *v.* Fowler, 119 Mass. 265; Cone *v.* Hooper, 18 Minn. 531; Harness *v.* Green, 20 Mo. 316; Barney *v.* White, 46 Mo. 137; Phelps *v.* Duffy, 11 Nev. 80; Wilbur *v.* Abbot, 60 N. H. 40; Davis *v.* Headley, 22 N. J. Eq. 115; Brinkley *v.* Brinkley, 50 N. Y. 184; 10 Am. Rep. 460; McLure *v.* Benceni, 2 Ired. Eq. (N. Car.) 513; 40 Am. Dec. 437; Swift *v.* Stark, 2 Oregon 97; 88 Am. Dec. 463; Wetherill *v.* Stillman, 65 Pa. St. 105; Cook *v.* Thornhill, 13 Tex. 293; 65 Am. Dec. 63; Kellam *v.* Toms, 38 Wis. 592; Renaud *v.* Abbott, 46 U. S. 277; Nations *v.* Johnson, 24 How. (U. S.) 195; Hampton *v.* M'Connel, 3 Wheat. (U. S.) 234; Mills *v.* Duryee, 7 Cranch (U. S.) 481.

"No greater effect is to be given to it (the judgment) than it would have in the State where it was rendered. It has no higher dignity in any other State than in the one where it was pronounced; and hence if, in the courts of the State where the judgment was rendered, it is inconclusive, or if it is inquirable into there during a particular period or on certain conditions, it will be open to investigation, to the same extent, everywhere else. So if a judgment operates in the State where it was rendered only *in rem*, it will not elsewhere be enforced *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment, in the State where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to

it in any other State where it is endeavored to be enforced. It derives its obligation only from the laws of the State in which it is pronounced." Wood *v.* Watkinson, 17 Conn. 500; 44 Am. Dec. 562; Suydam *v.* Barber, 18 N. Y. 468; 75 Am. Dec. 254.

In Brown *v.* Birdsall, 29 Barb. (N. Y.) 549, Roosevelt, J., said: "Where joint debtors reside in different States they may be sued separately in the respective States having jurisdiction of their respective persons or property, and a judgment in such case against one in one State is no bar to a recovery against the others in another State." McLendon *v.* Dodge, 32 Ala. 491; Taylor *v.* Kilgore, 33 Ala. 214; Bailey *v.* Martin, 119 Ind. 103; Dodge *v.* Coffin, 15 Kan. 277; Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Short *v.* Galway, 83 Ky. 501; Folger *v.* Columbian Ins. Co., 99 Mass. 267; 96 Am. Dec. 747; Mowry *v.* Chase, 100 Mass. 79; Cook *v.* Brown, 125 Mass. 503; 28 Am. Rep. 259; Richards *v.* Barlow, 140 Mass. 218; Barringer *v.* Boyd, 27 Miss. 473; Davis *v.* Headley, 22 N. J. Eq. 115; Bartlett *v.* Spicer, 75 N. Y. 528; Mink *v.* Shaffer, 124 Pa. St. 280; Morris *v.* Hand, 70 Tex. 481; Price *v.* Hickok, 39 Vt. 292; Pennoyer *v.* Neff, 95 U. S. 714; Mutual L. Ins. Co. *v.* Harris, 97 U. S. 331; Hart *v.* Sansom, 110 U. S. 151; Hanley *v.* Donoghue, 116 U. S. 1; Landes *v.* Brant, 10 How. (U. S.) 348; Harris *v.* Hardeman, 14 How. (U. S.) 334; Thompson *v.* Whitman, 18 Wall. (U. S.) 457.

In Hall *v.* Winchell, 38 Vt. 588, the court by Wilson, J., said: "It appears to be well settled in this State that a judgment rendered in one State by a court having jurisdiction of the suit, will operate as a merger of the cause of action, and be a bar to the future prosecution of a suit in another State between the same parties and upon the same claim. But whether such is the effect of the plaintiff's judgment upon his original claim it is not necessary to decide; for whether it was the judgment, or the claim on which the judgment is founded, that was due to the plaintiff at the time of the institution of proceedings in insolvency, is of no importance. Either of them was a debt due to the plaintiff, within the meaning of the statute." Denny *v.* Bennett, 128 U. S. 489; Bailey *v.* O'Connor, 19 N. H. 202.

In Remer *v.* Mackay, 35 Fed. Rep. 86, Blodgett, J., said: "This court has no jurisdiction to adjudicate upon the title to property in another State, and especially has no jurisdiction to set aside or interfere with the judicial proceedings of the courts of a State. This is a proceeding in equity, and equity, as a rule, operates wholly *in personam*. It operates upon the conscience of the defendant by decreeing him to do or refrain from doing some special act; and the general effect and scope of a decree in a court of equity is aimed at the volition or conscience of the defendant. This court, having personal jurisdiction of the defendant in this case, can direct its decree upon him, and compel him to do what is equitable and right under the circumstances and facts in the case." Rose *v.* Gibson, 71 Ala. 35; Pringle *v.* Woolworth, 90 N. Y. 502.

Jurisdiction.—The judgment or decree of a sister State is, as a general rule, conclusive as to the rights of the parties, unless there be a want of jurisdiction in the court pronouncing it, or fraud has been practiced in its procurement, or there has not been any, or only constructive, service of process upon the defendant, and the proceedings have been carried on without his appearance."

Nunn *v.* Sturges, 22 Ark. 389; Coit *v.* Haven, 30 Conn. 190; Zepp *v.* Hager, 70 Ill. 223; Frew *v.* Taylor, 106 Ill. 159; Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 66 Md. 511; Bodurtha *v.* Goodrich, 3 Gray (Mass.) 508; Gillespie *v.* Commercial Mut. M. Ins. Co., 12 Gray (Mass.) 201; 71 Am. Dec. 743; Carleton *v.* Bickford, 13 Gray (Mass.) 591; 74 Am. Dec. 652; Hall *v.* Williams, 6 Pick. (Mass.) 232; 17 Am. Dec. 356; Com. *v.* Blood, 97 Mass. 538; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733; McDermott *v.* Clary, 107 Mass. 501; Stockwell *v.* McCracken, 109 Mass. 86; Sears *v.* Dacey, 122 Mass. 388; Wright *v.* Andrews, 130 Mass. 149; Barlow *v.* Steel, 65 Mo. 611; Downer *v.* Shaw, 22 N. H. 277; Wright *v.* Boynton, 37 N. H. 9; 72 Am. Dec. 319; Elasser *v.* Haines, 52 N. J. L. 10; Durant *v.* Abendroth, 97 N. Y. 132; Guthrie *v.* Lowry, 84 Pa. St. 533; Menlove *v.* Oakes, 2 McMull. (S. Car.) 162; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308.

Fraud.—This defense can only be set up when it would be admissible in the courts where the judgment was rendered. Maxwell *v.* Stewart, 22 Wall.

(U. S.) 77; McDonald *v.* Drew, 64 N. H. 547; Granger *v.* Clark, 22 Me. 128.

"Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Peel *v.* January, 35 Ark. 331; 37 Am. Rep. 27; Weir *v.* Vail, 65 Cal. 466; Brown *v.* Eaton, 98 Ind. 591; Corey *v.* Ripley, 57 Me. 69; 2 Am. Rep. 19; Burpee *v.* Sparhawk, 108 Mass. 111; 11 Am. Rep. 320; Engstrom *v.* Sherburne, 137 Mass. 153; Ward *v.* Quinlivin, 57 Mo. 425; Payne *v.* O'Shea, 84 Mo. 129; Metcalf *v.* Gilmore, 59 N. H. 417; 47 Am. Rep. 217; Kinnier *v.* Kinnier, 45 N. Y. 535; 6 Am. Rep. 132; Black *v.* Smith, 13 W. Va. 794; Nougue *v.* Clapp, 101 U. S. 551; White *v.* Crow, 110 U. S. 183; Hanley *v.* Donoghue, 116 U. S. 1; Graham *v.* Boston, etc., R. Co., 118 U. S. 161; Christmas *v.* Russell, 5 Wall. (U. S.) 290.

Probate Proceedings.—See Thomas *v.* Morrisett, 76 Ga. 384; Dalrymple *v.* Gamble, 68 Md. 523; Lewis *v.* Adams, 70 Cal. 403; 59 Am. Rep. 423; Olney *v.* Angell, 5 R. I. 198; 73 Am. Dec. 62; Cherry *v.* Speight, 28 Tex. 503.

Garnishment or Trustee Process.—See Kimball *v.* Gay, 16 Vt. 131; Hull *v.* Blake, 13 Mass. 153; Morgan *v.* Neville, 74 Pa. St. 52; East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462.

Divorce.—Beard *v.* Beard, 21 Ind. 321; Neff *v.* Beauchamp, 74 Iowa 92; Gregory *v.* Gregory, 76 Me. 535; Garner *v.* Garner, 56 Md. 127; Com. *v.* Blood, 97 Mass. 538; Shaw *v.* Shaw, 98 Mass. 158; Hood *v.* Hood, 110 Mass. 463; Burlen *v.* Shannon, 115 Mass. 438; Sewall *v.* Sewall, 122 Mass. 156; Gould *v.* Crow, 57 Mo. 200; Payson *v.* Payson, 34 N. H. 518; Hunt *v.* Hunt, 72 N. Y. 217; 28 Am. Rep. 129; People *v.* Baker, 76 N. Y. 78; 32 Am. Rep. 274; Prosser *v.* Warner, 47 Vt. 667; 19 Am. Rep. 132; Cook *v.* Cook, 56 Wis. 195; 43 Am. Rep. 706; Pennoyer *v.* Neff, 95 U. S. 714.

Inferior Courts.—In Taylor *v.* Barron, 30 N. H. 78; 64 Am. Dec. 281, the court by Bell, J., said: "It was natural that the national legislature should be of the opinion that there might be tribunals in some of the States of such limited powers that it would be proper to leave their decisions to be dealt with at common law. And the fair construction of the act of Congress seems to us to make precisely that exception. It prescribes a mode of proof which implies that there must be a clerk and a judge, chief justice or presiding magistrate, while it must have been well known that justices of the peace and many other inferior tribunals have no officer that can, with any propriety, be denomiated a judge or presiding magistrate. The omission to provide for cases of these classes, it seems, must have been intentional. And when the act provides that the records and judicial proceedings, authenticated as aforesaid, shall have faith, etc., it evidently designs to omit and leave unprovided for the proceedings of such courts as do not admit of such authentication." Foster *v.* Glazner, 27 Ala. 391; Glass *v.* Blackwell, 48 Ark. 50; Forbes *v.* Scannell, 13 Cal. 242; Shufeldt *v.* Buckley, 45 Ill. 223; Danforth *v.* Thompson, 34 Iowa 243; Case *v.* Huey, 26 Kan. 553; Wood *v.* Wood, 78 Ky. 624; Warren *v.* Flagg, 2 Pick. (Mass.) 448; Rowley *v.* Carron, 117 Pa. St. 52; Grant *v.* Bledsoe, 20 Tex. 456; Carpenter *v.* Pier, 30 Vt. 81; 73 Am. Dec. 288; Archer *v.* Romaine, 14 Wis. 375.

Federal Courts.—These are not regarded as foreign to each other or to any State court. Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449; Thomson *v.* Lee Co., 22 Iowa 206; Dudley *v.* Lindsey, 9 B. Mon. (Ky.) 486; 50 Am. Dec. 522; Gibson *v.* Manufacturers' Fire, etc., Ins. Co., 144 Mass. 81; Bullitt *v.* Taylor, 34 Miss. 708; 69 Am. Dec. 412; St. Albans *v.* Bush, 4 Vt. 58; 23 Am. Dec. 246; Caldwell *v.* Carrington, 9 Pet. (U. S.) 86; Crescent City Live Stock Co. *v.* Butchers' Union, etc., Co., 120 U. S. 141.

See JUDGMENTS, vol. 12, p. 184*k*.

RESORT.—See note 1.

RESOURCES.—Money or any property that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth, or to supply necessary wants; available means or capability of any kind.[2]

RESPECT.—See note 3.

1. Resort Implies Frequent Visits.—A *Michigan* statute prohibits the keeping of houses of ill-fame "resorted" to for purposes of lewdness and prostitution. It has been held that the word "resorted," as used in this connection, implies that the house must be visited frequently for such purposes. A single act of illicit intercourse committed at a house does not bring the owner within the statute. "In O'Brien *v.* People, 28 Mich. 213, it was held that the language of this statute refers to persons of bad character, and the word 'resorted' implies that the house was visited frequently by that class of persons; and hence it is argued that, as the testimony in this case shows only a single instance of a person being found in the house, in the absence of testimony that men were seen resorting there, the offense was not made out. It has been held that a single act of prostitution, or habitual acts by one person, does not constitute the house bawdy. Com. *v.* Lambert, 12 Allen (Mass.) 177; State *v.* Evans, 5 Ired. (N. Car.) 603; State *v.* Garing, 75 Me. 591;" People *v.* Gastro, 75 Mich. 133. See also O'Brien *v.* People, 28 Mich. 213; People *v.* Pinkerton, 79 Mich. 110.

And so of a similar statute in *Massachusetts* the court said: "The permission by the keeper of a house of a single act of illicit intercourse within it does not itself constitute the offense described in *Massachusetts* Gen. Sts., ch. 165, § 13 or in ch. 87, § 6. To hold that it did would be to leave wholly out of view the meaning of the phrase 'resorted to,' as used in those sections of the statute. In the language of Chief Justice Bigelow, in Com. *v.* Stahl, 7 Allen (Mass.) 305, 'the prohibition is against keeping or maintaining a house which persons are permitted to frequent for the purpose' of unlawful sexual intercourse." Com. *v.* Lambert, 12 Allen (Mass.) 179.

Contra.—But in State *v.* Ah Sam, 15 Nev. 27; 37 Am. Rep. 457, where the statute forbade any person to "resort" to any house or other place for the purpose of using opium, it was held that to go once was an infraction of the law. The court by Beatty, C. J., said: "The appellant also contends that the district judge erred in instructing the jury to the effect, that going once to a place kept for opium-smoking, for the purpose of smoking, is an infraction of the law. What the statute forbids all persons to do is to 'resort' to such places, and it is argued that resort means, not to go merely once, but to go and go again—in other words, to make a practice of going. The etymology of the word resort lends some support to this argument, but the definitions given in the lexicon shows that whatever may have been its original meaning, it no longer means anything more in the connection in which it is employed in the statute than to go once."

Court of Last Resort.—The court from whose decision of a particular case there is no appeal is, in respect to that case, a court of last resort. See also FINAL JUDGMENTS, vol. 7, p. 966; UNITED STATES COURTS.

2. Webst. Dict. *followed* in Ming *v.* Woolfolk, 3 Mont. 386. That case arose upon the construction of a written contract in which the respondent had agreed to apply in payment of a certain debt, any sums that he might receive from "any resources whatever of the Park Ditch Company." It was held in conformity with the above definition that a sum of money received by the respondent from the sale of the water of the Park Ditch Company, was obtained from the "resources" of the company.

"Resources" does not mean money in hand. A debtor may have ample resources to pay his debts as they become due, and yet have no money in his pocket or in bank. Such a debtor is not insolvent. Sacry *v.* Lobree, 84 Cal. 41.

3. In Respect to.—A statute of *New York* provided that when any crime should be committed "in respect to any portion of the freight of any railroad train making a trip on a railroad in this State, an indictment for the

RESPECTABLE.—See note 1.

RESPECTIVE.—See WILLS.

RESPITE—(See also REPRIEVE and references there given).—A temporary suspension of the execution of a sentence; a delay, forbearance, or continuance of time.[2]

RESPONDEAT SUPERIOR—(See generally, AGENCY, vol. 1, p. 410; MASTER AND SERVANT, vol. 14, p. 804).—Let the principal answer. A maxim expressing the rule of law that a principal or master is responsible for the acts of his agent or servant.

RESPONDENT—(See also PARTIES TO ACTIONS).—The party who answers an appeal from the judgment of an inferior court is called the respondent, the appellee. And the party who answers a petition, bill, or libel in chancery or admiralty proceedings is also called the respondent.

CO-RESPONDENT.—One of several respondents in a cause. In *English* divorce proceedings, when the cause assigned is the adultery of the wife, the paramour may be joined with the wife in the defense, and is called the co-respondent.[3]

RESPONDENTIA.—(See also BOTTOMRY, vol. 2, p. 483; SALVAGE; SHIPPING.)

I. Definition, 287.
II. General Nature, 288.
III. Construction of Contract, 289.
IV. Validity of Contract, 290.

I. **DEFINITION.**—A respondentia bond is a mercantile contract, generally defined to be a loan of money upon the pledge of the cargo of a ship, to be paid with maritime interest upon the safe arrival of the cargo at the destined port.[4] If the ship is pledged, or both the cargo and the ship, the contract is called a bottomry bond.[5] Although the etymology of "bottomry" and "respondentia" seem to suggest a somewhat different definition, bottomry being a loan on the security of the vessel's hull or bottom,

same may be found in any county" through which the train passed. In People *v.* Dowling, 84 N. Y. 487, the court, by Folger, C. J., said: "The language of the statute is not technical nor precise. The word 'respect' in it is not used with a clear notion of its primary or acquired meaning. Yet it is plain that the legislature meant any offense, which in the doing of it, acted upon the freight as the subject of the commission of the offense. To receive the freight, after it had been stolen, with guilty knowledge, was such an offense." See generally, RECEIVERS OF STOLEN GOODS; VENUE.

1. A *Missouri* act required the truth of the allegations contained in a petition for a change of venue to be supported by the affidavits of two "respectable witnesses." Previously the law had required the affidavit of some "credible disinterested person." It was held that the terms "credible disinterested," and "respectable," as thus used, were equivalent expressions, and synonymous with the word "competent." Freleigh *v.* State, 8 Mo. 610.

2. Mishler *v.* Com., 62 Pa. St. 55.

3. DIVORCE, vol. 5, p. 771.

4. Maitland *v.* The Atlantic, Newb. Adm. 514; 3 Am. L. Reg. 477. See Abb. L. Dict.; Bouv. L. Dict.

5. See BOTTOMRY, vol. 2, p. 483.

and respondentia a loan made on the personal security of the borrower, on the lender's confidence that the borrower will answer or respond to the obligation of repayment at maturity, yet the result is practically the same,[1] and the tendency in modern books is to use the term bottomry for a contract for a loan of money, whether upon the hull or cargo, and to discontinue the use of the term respondentia.[2]

II. **General Nature.**—It is of the essence of the contract of respondentia that the lender runs the marine risk to be entitled to the marine interest. The rate of interest, and the manner of securing the payment of what may become due upon such a contract, are to be regulated by the parties.[3] The condition of a respondentia bond is the safe arrival of the cargo hypothecated, and the entire principal as well as the interest is at the risk of the lender during the voyage. The money is loaned to the borrower upon condition that, if the cargo pledged be lost by a peril of the sea, the lender shall not be repaid except to the extent of what remains;[4] and if the cargo arrives safe, or if it shall not have been injured except by its own defect or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on.[5] The holder of such a bond, in case of shipwreck to the vessel not amounting to an utter loss within the meaning of the bond, is entitled to the proceeds of the cargo saved, as against insurers of the cargo who have accepted abandonment and paid the owners as for a total loss.[6]

1. Abb. L. Dict. See 3 Kent's Com. 354.

2. Abb. L. Dict.; Black's L. Dict.

3. Thorndike *v.* Stone, 11 Pick. (Mass.) 187.

4. 3 Kent's Com. 355.

Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportional part of the money secured by the bond, namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given. The Sultan, Swabey, 504; 5 Jur., N. S. 1069.

Money was loaned at Philadelphia on respondentia, by the ship J, at and from Liverpool to Canton, and thence to Philadelphia. A bond was not then executed, as it was not known whether shipment would be in specie or goods, but was to be given subsequently; in the mean time the parties agreed that bills of lading outward at Liverpool for $17,000, if specie should be shipped, or for $20,000 value of goods at par, if specie should not be shipped ("in which case the lenders should only be liable for average and entitled to salvage, as if it had been a specie shipment"), and also bills of lading of the returns at Canton, should be assigned to the lenders, as collateral security for the bonds to be given. The vessel sailed with 700 pieces of goods, worth $20,000, and was lost, and 45 pieces of the goods were lost, and the remainder saved, but damaged. *Held*, that the lenders were liable only for the goods lost. Delaware Ins. Co. *v.* Archer, 3 Rawle (Pa.) 216.

5. 3 Kent's Com. 355.

6. Delaware Mut. Safety Co. *v.* Gossler, 1 Holmes (U. S.) 475.

It was said in Insurance Co. of Pa. *v.* Duval, 8 S. & R. (Pa.) 138, that, according to the form of respondentia bonds used in Philadelphia, payment of the debt and marine interest depended on the safe return of the goods and not on that of the ship, and that the borrower, therefore, was obliged to pay if he received his goods safely though by another ship, and that,

A respondentia bond is a mere personal contract,[1] and does not pass the right of property in the goods.[2] It is, however, binding, though given for an old debt,[3] and the owner of the vessel is bound to pay the owner of the cargo all which the latter is compelled to pay under the contract.[4]

III. CONSTRUCTION OF CONTRACT.—The words "an utter loss of the ship" in a respondentia bond mean an actual total loss and not a constructive one.[5] A respondentia bond conditioned to be void in case of "utter loss" of the vessel during a certain voyage, is not discharged by the stranding of the vessel during the voyage and abandonment to insurers as a total loss and sale by them at the place of stranding, as not worth repairing, if the vessel exists in specie at the time of the sale.[6] A loan "upon the goods to the amount of the loan, laden or to be laden on board, or which may be laden on board at any time during the voyage," gives the lender only a lien on the homeward cargo.[7]

although the lender's liability extended to perils by fire, enemies, men-of-war, or any other casualties, yet he was entitled to the benefits of salvage.

1. U. S. *v.* Delaware Ins. Co., 4 Wash. (U. S.) 418.

In a respondentia bond, the condition, after reciting that the money was lent upon the goods laden and to be laden on board a ship on her voyages out and home, was that if the ship should proceed on her voyage, and return within thirty-six months (the dangers of the seas excepted), and if the borrower within thirty days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within thirty-six months the ship should be lost by fire, enemies or other casualties, the borrower should within six months after such loss pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void. *Held*, that this was merely a personal obligation from the borrower to the lender, and did not give the latter any specific pledge or lien on the home cargo, or its proceeds. Busk *v.* Fearon, 4 East 319; 1 Smith 103.

2. U. S. *v.* Delaware Ins. Co., 4 Wash. (U. S.) 518.

3. Greely *v.* Smith, 3 Wood. & M. (U. S.) 236; Hurry *v.* Hurry, 2 Wash. (U. S.) 148.

4. Duncan *v.* Benson, 1 Exch. 537.

5. Insurance Co. of Pa. *v.* Duval, 8 S. & R. (Pa.) 138.

6. Delaware Mut. Safety Co. *v.* Gossler, 1 Holmes (U. S.) 475.

7. Atlantic Ins. Co. *v.* Conard, 4 Wash. (U. S.) 662.

Subsequent Agreement Changing the Terms of the Bond.—The plaintiffs loaned to the defendants a sum of money upon the goods on board a vessel and received a respondentia bond as security for that loan. By the conditions of the bond the vessel was to proceed with all convenient speed on her voyage, which was to terminate within eighteen months. She was to have on board during the whole voyage, the stipulated amount of property, the voyage was to be performed without deviation, and by a further condition, the defendants were to pay $15,000 on the return of the vessel, or at the expiration of eighteen months from the date of the bond, whichsoever should first happen. The time stipulated in the bond being expired and the vessel not having returned, the plaintiffs brought an action of debt on the bond, to which the defendants pleaded that after the vessel sailed on her voyage, the plaintiffs, in consideration of an additional premium of $300, agreed with the defendants that the vessel should have liberty to proceed on a different route. Upon demurrer, it was held that the new agreement made with the defendants did not vary or alter the terms of the original contract any further than to preclude the plaintiffs from taking any advantage of a deviation from the voyage prescribed in the condition of the bond. It authorized a change in the course of the voyage, but did not extend the time for its performance,

IV. VALIDITY OF CONTRACT.—It is not necessary that a respondentia loan should be made before the departure of the ship on the voyage, or that the money lent should be employed in the outfit of the vessel or invested in the goods on which the risk is run. It matters not at what time the loan is made or upon what goods the risk is taken. If the risk of the voyage be substantially and really taken, and the transaction be not a device to cover usury, gaming, or fraud, and the advance be made in good faith for a maritime premium, it is no objection to it that it was made after the voyage was commenced, or that the money was appropriated to a purpose wholly unconnected with the voyage.[1] But the master, before he hypothecates the cargo, ought, if he has the means of doing so, to communicate with the owner.[2] If a vessel carrying a cargo is stranded on a foreign coast and unable to proceed, and communication with the owners of the cargo would be attended with great delay and difficulty, the master, in order to tranship and send on, may, on his own authority, give a respondentia bond to release the cargo lying under arrest for salvage.[3] But in such case it would seem that he cannot pledge the cargo unless authorized to hypothecate the ship and freightage,[4] because the general power on behalf of the owner to hypothecate the cargo is limited to the interest in the freight.[5]

If the necessity of the case does not require the hypothecation of the whole cargo, part of it may be pledged.[6] But a respondentia bond cannot be given to include a cargo not actually on board.[7]

RESPONSIBLE—(*Compare* LIABILITY, vol. 13, p. 287).—Liable. Able to respond or to answer in accordance with what is expected or demanded.[8]

and the plaintiffs had judgment on the demurrer. Niagara Ins. Co. *v.* Searle, 2 Hall (N. Y.) 22.

1. Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 437; U. S. *v.* Delaware Ins. Co., 4 Wash. (U. S.) 418.

2. The Lizzie, 19 L. T. N. S. 71; 2 L. R. Adm. 254; The Olivier, Lush. 484; 31 L. J. Adm. 137.

A master cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner is practicable. Such communication must state not merely the necessity for hypothecation. Kleinwort *v.* Cassa Marittima of Genoa, L. R., 2 App. Cas. 156; 25 W. R. 608; 36 L. T. N. S. 118.

3. The Sultan, Swabey 504; 5 Jur. N. S. 1069.

4. Searle *v.* Scovell, 4 Johns. Ch. (N. Y.) 222; U. S. Ins. Co. *v.* Scott, 1 Johns. (N. Y.) 106; American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323; The Active, 2 Wash. (U. S.) 237; Pope *v.* Nickerson, 3 Story (U. S.) 465; The Ship Packet, 3 Mason (U. S.) 255; The Gratitudine, 3 C. Rob. 263; The Lord Cochrane, 2 W. Rob. 312; The Prince Regent, 2 W. Rob. 83; The Osmanli, 3 W. Rob. 214; The Priscilla, Lush. 1; La Constancia, 4 Note of C. 285.

5. Freight money of the Anastasia, 1 Ben. (U. S.) 188.

6. The Lord Cochrane, 1 W. Rob. 312; 2 W. Rob. 320; The Osmanli, 3 W. Rob. 198; Justin *v.* Bollam, 1 Salk. 34.

7. The Edmund, Lush 57.

8. Webst. *followed* in People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 119. A promise "to be responsible" for the contract of another is merely a guaranty, and not a suretyship. Bickel *v.*

REST.—See note 1.

RESTAURANT—(See also INNS, vol. 11, p. 710).—See note 2.

RESTITUTION OF CONJUGAL RIGHTS.—See HUSBAND AND WIFE, vol. 9, pp. 809, 829.

RESTITUTION OF STOLEN GOODS—(See also LARCENY, vol. 12, p. 898).—At common law, there was no mode of obtaining a judicial order for the restitution of stolen goods save by the now obsolete proceeding of appeal. But by an early statute,[3] which is a part of the common law in those States which have no mod-

Auner, 9 Phila. (Pa.) 499. See also Gilbert *v.* Henck, 30 Pa. St. 209; GUARANTY, vol. 9, p. 68; SURETYSHIP.

A statute requiring a writ to be indorsed by some "responsible person," where the plaintiff resides out of the State, intends that the indorser shall possess sufficient pecuniary ability to pay the costs which may be recovered against the plaintiff. The court, by Gilchrist, C. J., said: "It would seem that the meaning of the word responsible could not admit of any doubt in this connection. Strictly speaking, the word means 'liable, answerable,' rather than 'able to discharge an obligation;' but the latter is very clearly the sense in which it is used in the statute." Faley *v.* Day, 26 N. H. 531. See also COSTS, vol. 4, p. 325.

Lowest Responsible Bidder—(See also MUNICIPAL CORPORATIONS, vol. 15, pp. 1090–1099).—Within meaning of statutes and ordinances enacting that municipal work shall be awarded to the "lowest responsible bidder" the word "responsible" includes pecuniary ability to perform the contract, skill, integrity and judgment. Hoole *v.* Kinkead, 16 Nev. 221; People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118; Com. *v.* Mitchell, 82 Pa. St. 348; Douglass *v.* Com., 108 Pa. St. 563; LOWEST, vol. 13, p. 1191.

The lowest responsible bidder is one who complies with all the requirements of the statute, not merely one whose bid is less than his competitors. Boseker *v.* Wabash Co., 88 Ind. 267.

In a Will.—The testator bequeathed a part of his estate for the purpose of founding a school at a certain town, provided that "responsible citizens" of the place should pledge a certain sum for the same purpose within six months after his decease. It was held that a number of subscriptions for small amounts by a large number of persons of limited means, some of them conditional, was not a subscription by "responsible citizens" as contemplated by the testator. Yale College *v.* Runkle, 10 Biss. (U. S.) 300.

1. An Accountant's Rest.—An account is said to be taken with annual or semi-annual rests, when, at the end of the items for each year or half-year, the accountant pauses in his entries and strikes a balance upon which interest is allowed; and at the next rest a new balance is ascertained which likewise draws interest. Abbott's L. Dict. See also EXECUTORS, vol. 7, p. 429.

In Wills.—For the effect of a bequest of the "rest" or "rest and residue," etc., of an estate, see ALL, vol. 1, p. 489; LEGACIES AND DEVISES, vol. 13, p. 45; RESIDUE; WILLS.

Rest His Case.—A party is said to "rest his case" or to "rest" when he has presented all the evidence which he considers necessary to produce at that stage and submits his case to the court or jury, subject to his right to introduce rebutting testimony.

2. In State *v.* Hogan, 30 N. H. 268, it was held that a shop used for the manufacture and sale of tobacco, cigars, etc., and for the sale of beer by the glass, was not a "restaurant" nor a "refreshment saloon" within an ordinance forbidding the sale of intoxicating liquors at any "refreshment saloon or restaurant."

A restaurant has no defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cook-shop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate. Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 426.

3. 21 Henry VIII, ch. 11.

ern statutes dealing with the subject, it was provided that upon conviction for larceny the property stolen should be restored to the prosecutor, and that the courts might issue writs of restitution for that purpose.[1] Under this statute, when property was found in the hands of a convicted felon belonging to another, not the prosecutor, the court could not order restitution to be made to the owner, unless the prosecutor was the personal representative of a person, since deceased, to whom the property had belonged, or unless the property of a master was taken from his servant who procured the conviction of the offender. If the prosecutor had been guilty of negligence in pushing the prosecution, it seems that he would not be entitled to the benefit of the statute.

The writ of restitution for this purpose is practically obsolete, and it has long been the practice of the courts to simply order the return of the goods to the prosecutor in cases where the writ would lie.[2]

The English statute was held not to apply except in cases of larceny and compound larceny.[3]

In *England*, and in most of the *United States*, statutes have been enacted founded upon the above-mentioned statute, and taking its place.[4] These statutes are remedial in their character and are to be construed liberally.[5] Hence it has been held that if stolen property has been converted into money or other personal property, the owner may have an order for the restitution of the latter,[6] though this has been denied in one jurisdiction.[7] It has been said by one eminent authority, that under the modern statutes, as under their English model, no restitution can be ordered, unless the owner is also the prosecutor.[8] But it is

1. 2 Bishop's Crim. Proc., § 755, *et seq.*; 4 Bl. Com. 362–63; 1 Chitty's Crim. Law 817.

2. 2 Bishop's Crim. Proc. 755, *et seq.*; 1 Chitty's Crim. Law 818–819.

3. 2 Bishop's Crim. Proc. 759.

False Pretenses.—Restitution of the property obtained by false pretenses "cannot be ordered as in cases of larceny, either by the ancient common law, or by the statute of 21 Henry VIII, ch. 11. In *England* of late it is provided for by statutes not in force in this country." 2 Bishop's Crim. Proc., § 198. See also FALSE PRETENSES, vol. 7, p. 791.

4. 2 Bishop's Crim. Proc. 757. Note to 1 Arch. Crim. Prac. (8th ed.), p. 604.

Pennsylvania Statute.—In order to support a judgment of restitution, under the provisions of *Pennsylvania* act of March 31, 1860, the indictment must show that the money or other valuable thing was actually obtained and taken by defendant. It is not sufficient that the fact appears outside of the record. Huntzinger *v.* Com., 97 Pa. St. 336.

5. 2 Bishop's Crim. Proc. 758; Abbott's Trial Briefs, § 878.

6. 2 Bishop's Crim. Proc., § 758; Abbott's Trial Briefs, § 878; Rex *v.* Howell, 2 C. & P. 640; Rex *v.* Rooney, 7 C. & P. 515; Lanse *v.* Cowen, 1 Dana (Ky.) 195. In this last case the court said "that the owner had a legal right to restitution when the thief shall have converted the thing stolen into another thing, and the owner may have the produce instead of the specific chattel."

7. Com. *v.* Boudrie, 4 Gray (Mass.) 418.

8. 2 Bishop's Crim. Proc. 762.

thought, having regard to the language of the statutes and their remedial character, that this view is erroneous, and that third persons may claim ownership "and apply for an order of restitution, even though not acting as complainants nor furnishing evidence leading to a conviction."[1] However this may be, it must be remembered that the owner's title is not divested by the theft, and whether he can have an order of restitution under these statutes or not, he is yet entitled to retake his goods wherever he may find them, and may maintain an action against any one withholding them from him.[2]

If the defendant is acquitted he is entitled to have the alleged subject of the larceny returned to him.[3]

RESTITUTION (WRIT OF)—(See also ERROR, WRIT OF, vol. 6, p. 835; JUDGMENTS, vol. 12, p. 125).—1. In a prosecution for larceny, embezzlement, etc., where the offender is prosecuted by the owner of the goods, and convicted, the property is to be restored to the owner, and the court may issue a writ of restitution, or make an order for restitution in a summary manner.[4]

2. At common law, where a defendant appeals in a civil action and the judgment is reversed, he is entitled to be restored to all he has lost by the execution of the judgment. In most cases he may obtain redress by application to the court or judge; but a writ of restitution may in all cases be issued, while in some cases it appears to have been the only remedy.[5] It may be doubted whether in the *United States* the practice of issuing the writ is not obsolete, the court ordering restitution to be made in a summary manner in cases where at common law the writ would lie.

1. Abbott's Trial Briefs, § 883.

2. See RECAPTION; REPLEVIN; TRESPASS; TROVER; Fitzgerald *v.* Jordan, 11 Allen (Mass.) 128.

3. State *v.* Williams, 61 Iowa 517.

4. Sweet's L. Dict.; RESTITUTION OF STOLEN GOODS.

5. Sweet's L. Dict.

At common law, when the judgment of the lower court is reversed, the court of review may specially order that the plaintiff in error be restored to whatever he has lost in consequence of the erroneous judgment. Any such order is part of the judgment in reversal. The judgment, in form, is not only that the judgment of the court below is reversed, but that "it is considered that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid;" and the writ of restitution which is issued in pursuance of it, and in which the sheriff is commanded to levy the money or the chattels of the plaintiff below, or to arrest his person, is strictly an execution. And. L. Dict., *quoting* Gibson, J., in Duncan *v.* Kirkpatricks, 13 S. & R. (Pa.) 294.

Where execution is issued for too large an amount, the defendant in execution cannot have a writ of restitution for the excess. The writ only lies upon reversal of a judgment upon which execution has been paid or levied. Bruere *v.* Britton, 20 N. J. L. 268.

In ejectment, the tenant in possession was alone served, and after judgment, ejected. *Held*, that the landlord could not afterwards come in on motion and have a writ of restitution, —that his remedy was by suit against

RESTORE—(Compare RESTITUTION).—See note 1.

the judgment plaintiff. Edwards *v.* Phillips, 91 N. Car. 355.

"It is well settled that where a party is put out of possession of land in pursuance of a judgment or order improvidently granted, or is required to pay money and the judgment is afterwards declared void, or is set aside, the court will promptly, as far as practicable, restore the party complaining to the possession of the land and give him remedy for the money so paid. . . . It will always restore such party promptly, and place him as nearly as may be in the same plight and condition as he was before the process issued." Little *v.* Little, 94 N. Car. 525.

Scire Facias Quare Restitutionem Non—(See also SCIRE FACIAS).—Where it appears upon record that the money has been levied and paid over to the plaintiff in execution upon a judgment which is subsequently reversed, the court will order the restitution. But where it does not appear by the record that the money has been paid, there the party seeking restitution may sue out a *scire facias quare restitutionem non*, and to this the party may plead.

"As to *certiorari*s, to justice's courts, upon the reversal of a justice's judgment, we do not put the party to the necessity of suing out a *scire facias quare restitutionem non*, because it would be too expensive. But as to the proceedings in this court, we must pursue the common-law practice." Scott *v.* Conover, 10 N. J. L. 61. See also Arrowsmith *v.* Vanarsdale, 21 N. J. L. 471.

Where a proper entry in the docket of the justice shows that the judgment has been paid by the plaintiff in *certiorari* to the justice or constable, a writ of restitution may be ordered without previous notice, but where it does not so appear, a notice of the application for the writ, or a rule to show cause why it should not issue, taken and served, must be proved. McChesney *v.* Wilmot, 8 N. J. L. 179.

Restores the Plaintiff to all Which He Has Lost by the Judgment Reversed.—A writ of restitution, it has been held, restores the plaintiff in restitution to all that he has lost by the judgment reversed, and not only to that which defendant has received. The assessment, therefore, will be for the amount raised upon the judgment reversed, including execution fees and costs, with interest from the day of payment. Arrowsmith *v.* Vanarsdale, 21 N. J. L. 471. But the court in that case admitted "that the practice adopted by this court does not seem to be countenanced by *English* precedents," which limit the amount for which restitution should be ordered to the sum actually paid to the defendant in restitution. And see also 4 Wait's Pr. 556.

Restitution is Not of Mere Right.—It is *ex gratia* resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip. Gould *v.* McFall, 118 Pa. St. 457; Harger *v.* Washington Co., 12 Pa. St. 251; Coster *v.* Peters, 4 Abb. Pr. N. S. (N. Y.) 83; FORCIBLE ENTRY AND DETAINER, vol. 8, p. 178.

In an action of forcible entry and detainer, see FORCIBLE ENTRY, vol. 8, p. 178.

Upon the question of restitution of money, etc., voluntarily paid, see PAYMENT, vol. 18, p. 214.

1. Restore, Restored.—In Esson *v.* Tarbell, 9 Cush. (Mass.) 414, the court, by Shaw, C. J., said: "The right to attach mortgaged property is conditional. If the attaching officer has notice of the mortgagee's debt, and it is demanded of him, and not paid within a time limited, Rev. Sts., ch. 9, §§ 78, 79, the *casus fœderis* does not exist, and the statute expressly declares that the property shall be restored to the mortgagee. If it be argued that the word 'restored' implies that the property, at the time of the attachment, was taken out of the possession of the mortgagee, we think one answer is, and the law assumes, that it is taken out of the constructive possession of the mortgagee. But another, and perhaps more satisfactory answer is, that 'restore,' by the obvious meaning of the context and general tenor and object of the law, has a larger and more generic meaning, equivalent to the direction that it shall be surrendered and delivered to the mortgagee, from whom it is detained by

RESTRAIN —(See also LICENSE, vol. 15, p. 529 *et seq.;* REGULATE).—See note 1.

RESTRAINT.—See note 2.

RESTRAINT OF MARRIAGE.—See ILLEGAL CONTRACTS, vol. 9, p. 918; LIMITATION IN INSTRUMENTS, vol. 13, p. 778; MARRIAGE, vol. 14, p. 473 *et seq.;* REMAINDERS; WILLS.

RESTRAINT OF TRADE.—See CONTRACT, vol. 3, p. 882; ILLEGAL CONTRACTS, vol. 9, p. 884; INJUNCTIONS, vol. 10, p. 943; LEASE, vol. 12, p. 1027.

RESTRAINTS ON ALIENATION.—See ESTATES, vol. 6, p. 677; LIMITATION IN INSTRUMENTS, vol. 13, p. 794; PERPETUITIES, vol. 18, p. 335; REAL PROPERTY.

RESTRAINTS OF PRINCES — OF PEOPLE.—See BILL OF LADING, vol. 2, p. 232; MARINE INSURANCE, vol. 9, pp. 375–378.

RESTRICTIVE INDORSEMENT—(See also BILLS AND NOTES, vol. 2, p. 384).—An indorsement may be so worded as to restrict the further negotiability of the instrument, and it is then called a "restrictive indorsement."[3]

RESULTING TRUST.—See IMPLIED TRUSTS, vol. 10, p. 1.

RESULTING USE.—See USES.

the officer without law and against right. If there be any question respecting the right of possession as between the mortgagor and mortgagee, it would not be affected by such a surrender."

A railroad charter provided that when the railroad company should cross with their road any watercourse, highway, etc., it should "restore" such highway, etc., to its former state, or in a sufficient manner not to impair its usefulness. It was said that the word "restore" imports a physical impairment of the road bed of a highway. "It is an apt word when used with reference to such a road, but is inappropriate when used with reference to a road physically complete, and to indicate the removal of an obstruction which has no connection with the traveled path but is an obstruction only as it is calculated at certain times to frighten horses." State *v.* New Haven, etc., R. Co., 45 Conn. 344.

1. **Restrain, Regulate, Prohibit, Suppress.**—That a power to regulate and restrain is not equivalent to a power to prohibit or suppress, see REGULATE; *In re* Snell, 58 Vt. 207; *In re* Hauck, 70 Mich. 396; Stebbins *v.* Mayer, 38 Kan. 573; 23 Am. & Eng. Corp. Cas. 140.

Some of the significations of the word restrain are, "To keep in, hold in, abridge, limit, confine. Each of these definitions clearly imports that the thing shall be permitted to exist only in modified form, that it shall not be suppressed, but regulated." Hence, when, by the charter of a city, the common council may "suppress and restrain" nine and ten-pin alleys, etc., the common council may, in their discretion, restrain and regulate such places, or they may suppress them. Smith *v.* Madison, 7 Ind. 86.

2. "Restraint," in a married woman's acknowledgment, has been held equivalent to "constraint." Edmonson *v.* Harris, 2 Tenn. Ch. 153.

3. Thus, "Pay the contents to J. S. only," or "to J. S. for my use," are

RETAIL.—To sell in small quantities or by small parcels, and not in gross.[1]

RETAIN, means to continue to hold, to keep in possession, and to keep is a synonym for retain.[2]

To keep in pay; to hire.[3]

RETAINER.—1. The act of a client, by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant. The retaining fee.[4]

2. At common law, an executor or administrator of a deceased person, who was also the creditor of the deceased, had the right to retain out of the assets enough to pay his own debt in priority of any creditor whose debt was of equal degree. This was called

restrictive indorsements and put an end to the negotiability of the paper. Black's L. Dict., *citing* 1 Daniel on Neg. Inst., § 698. See also PROMISSORY NOTE.

1. Com. *v.* Kimball, 7 Met. (Mass.) 308; Bridges *v.* State, 37 Ark. 224; State *v.* Lowenhaught, 11 Lea (Tenn.) 158.

Retail Dealer—(See also INTOXICATING LIQUORS, vol. 11, pp. 669, 670). —"Retailing is selling by small quantities to suit customers articles which are bought in larger amounts generally. Now one who sells in this way, or whose business is so to sell is a retail dealer; one who sells by the nature of his business in gross and not by the small quantity or parcel to consumers, is a wholesale dealer." State *v.* Lowenhaught, 11 Lea (Tenn.) 15.

The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the proprietor a retailer of spirituous liquors. U. S. *v.* Mickle, 1 Cranch (C. C.) 268.

See as to who are "retailers" under special statutes, Beiser *v.* State, 79 Ga. 326; Gorsuth *v.* Butterfield, 2 Wis. 237.

2. Richardson *v.* Seevers, 84 Va. 259.

3. Elderton *v.* Emmens, 6 C. B. 176; 60 E. C. L. 175; see also EMPLOY, vol. 6, p. 636, n.

4. Bouv. L. Dict. *followed* in Knight *v.* Russ, 77 Cal. 410. See also ATTORNEY, vol. 1, p. 952.

In Blackman *v.* Webb, 38 Kan. 668, the court, by Valentine, J., said, after giving the above definition: "The act of employing or engaging an advocate, barrister, attorney, counsellor, solicitor, or proctor, to appear and prosecute or defend. The word is also used for the notice served by an attorney, etc., on the opposite party or attorney that he has been retained, in which use it is by elision for notice of retainer; and for the fee paid to a lawyer upon his undertaking a cause, in which use, it is by elision for retaining fee. Abbott's L. Dict. 'Retainer.'

"It will be seen that the word 'retainer' as used in cases of this kind means: First, the act of the client in employing his attorney or counsellor; second, the notice of the retainer served upon the opposite party or his attorney; third, the retaining fee."

General and Special Retainers.—"First, general retainers. These have for their object the securing beforehand of the services of a particular attorney or counsellor for any emergency that may afterwards arise. They have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable. Counsel thus retained is not at liberty to accept employment or render services adversary to the interest of the client thus retaining him. He is as to such client monopolized. A special retainer has reference to a particular case or to a particular service. It, however, imposes obligations *pro hac vice*, equally binding with those enjoined by a general retainer. It forbids the acceptance of adversary employment, or the performance of adversary's ser-

the right of retainer or redress by retainer. And was allowed because the representative could not sue himself and there was no one else whom he could sue.[1]

RETAKING.—See RECAPTION.

RETIRE.—As applied to bills of exchange, this word is ambiguous. It is commonly used of an indorser who takes up a bill by handing the amount to the transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when the bill is taken up or retired at maturity, it is in effect paid, and all the remedies on it extinguished.[2]

RETORNO HABENDO.—See REPLEVIN.

RETRAXIT.—(See also JUDGMENTS, vol. 12, p. 62.)

I. Definition, 297. II. What Constitutes, 298. III. Legal Effect, 299.

I. DEFINITION.—A retraxit[3] is a voluntary renunciation in open court by the plaintiff in person of his suit.[4]

vices. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people." Agnew *v.* Walden, 84 Ala. 502.

Retaining Fee.—A fee given to counsel on being consulted in order to insure his future services. Bouv. L. Dict. See also ATTORNEY AND CLIENT, vol. 1, p. 953 *et seq.*

Retaining Lien is a lien which an attorney has on all the papers of his client in his possession, by virtue of which he may retain all such papers until his claim for services has been discharged. Goodrich *v.* McDonald, 112 N. Y. 157; ATTORNEY AND CLIENT, vol. 1, p. 969.

1. 4 Min. Ins. 154; EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 311, 316.

2. Byles, Bills, 215; Black's L. Dict.; And. L. Dict.; Bouv. L. Dict.; Abb. L. Dict.

"This word is susceptible of various meanings, according as it is applied to various circumstances. If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid, but if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had had he been called upon in due course and had paid the amount to his immediate indorsee. We think this is the ordinary meaning of the word, 'retire.'" Elsam *v.* Denny, 15 C. B. 87; 80 E. C. L. 87.

3. Retraxit was the name given, in old common-law practice, to a method of withdrawal of his suit by the plaintiff in an action, and was so called because this was the principal word used in making the entry on the record, when Latin was used therein. It is now practically obsolete (Chit. Gen. Pr. 1575), and is only referred to in decisions as to whether modes of withdrawals used in modern practice are equivalent to the old technical retraxit which was attended with certain peculiar consequences.

4. **Other Definitions.**—A retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. 3 Bl. Com. 296. It is where a plaintiff cometh personally into court where his action is brought and saith he will not proceed in it. Lowrey *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501.

A retraxit is an open and voluntary renunciation of his suit in court by the plaintiff. Cox *v.* Mayor, etc., of Griffin, 17 Ga. 249.

II. WHAT CONSTITUTES.—A retraxit must be by the plaintiff in person and cannot be entered by attorney;[1] and it must be made in open court;[2] and cannot be before the filing of the declaration.[3] For the form of judgment in retraxit and remarks upon the essentials thereof, see the notes below.[4]

A retraxit is the open, public and voluntary renunciation by the plaintiff in person, of his suit or action, and if this is done by the plaintiff, and judgment entered thereon by the defendant, the plaintiff's right of action is forever gone. *Georgia* Code 1882, § 3445.

A judgment of retraxit is entered against a plaintiff when, after appearance and before judgment, he enters upon the record that he withdraws his suit. Thomason *v.* Odum, 31 Ala. 108.

1. Beecher *v.* Shirley, Cro. Jac. 211; Beecher's Case, 8 Coke's Rep. 58; Coux *v.* Lowther, 1 Ld. Raym. 597; 2 Sellon's Pr. 461; Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501; Thomason *v.* Odum, 31 Ala. 108; Evans *v.* McMahan, 1 Ala. 45; Barnard *v.* Daggett, 68 Ind. 305; Lambert *v.* Sandford, 2 Blackf. (Ind.) 137; Cox *v.* Mayor, etc., of Griffin, 17 Ga. 249; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220; 6 Am. Dec. 335.

In Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501, before the filing of the declaration in the suit, the plaintiff filed the following order: "You are hereby authorized and required to discontinue forever and withdraw the above stated suit forever on the presentation of this paper." *Held*, that this did not constitute a retraxit, because it was not entered by the plaintiff in person.

In Coux *v.* Lowther, 1 Ld. Raym. 597, the entry of judgment was that A B appeared by attorney and A B entered a retraxit. It was held that the presumption was that the plaintiff entered the retraxit in his own proper person.

In Thomason *v.* Odum, 31 Ala. 108, the recital in the judgment was that the "parties came by attorney and the plaintiff enters a retraxit." The court by Walker, J., said: "The entry says that the parties came by their attorneys, but it says the plaintiff entered the retraxit. We must intend upon the authority of the case from Ld. Raymond that the plaintiff in person entered the retraxit. We must understand the word retraxit in its well ascertained technical meaning."

In Cox *v.* Mayor, etc., of Griffin, 17 Ga. 249, it was held that an order by the court that in the event of certain returns not being made, a cause should be dismissed by the docket as in case of retraxit, does not constitute a retraxit even if cause is so dismissed.

Under the statute of *Indiana*, par. 772 of the Practice Act, Rev. Stat. 1876, p. 305, an attorney has authority to enter a retraxit. Barnard *v.* Daggett, 68 Ind. 305.

2. 3 Bl. Com. 296; Cox *v.* Mayor, etc., of Griffin, 17 Ga. 249; Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501; Coux *v.* Lowther, 1 Ld. Raym. 597; Beecher's Case, 8 Coke's Rep. 58.

In Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501, the plaintiff filed this notice: "You are hereby authorized and required to discontinue forever and withdraw the above stated suit forever on the presentation of this paper." *Held*, not to constitute a retraxit, because not made in open court, and therefore not a bar to another action for the same cause.

In Cox *v.* Mayor, etc., of Griffin, 17 Ga. 249, it was held that, an order by the court that in certain contingencies a cause should be dismissed from the docket as in case of retraxit, does not constitute a retraxit, even if the cause is so dismissed; and is no bar to another suit for the same action.

3. 3 Leonard 34; 2 Shelby's Abr. 476. In Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501, where the plaintiff filed with prothonotary this order: "You are hereby authorized and required to discontinue forever, and withdraw the above-stated suit forever," it was held not to constitute a retraxit. The court by Coulter, J., said: "As no declaration had been filed it could bar nothing, the cause of action being unknown on the record, and this shows the good sense of the doctrine . . . that a retraxit did not exist before declaration filed; and a retraxit cannot be before declaration, for before a declaration it is only nonsuit."

4. The form of a judgment of re-

III. Legal Effect.—A retraxit is a final and complete bar to another suit for the same cause of action.[1]

RETROACTIVE OR RETROSPECTIVE LAWS.—See CONSTITUTIONAL LAW, vol. 3, p. 757; EX POST FACTO LAWS, vol. 7, p. 525; STATUTES.

RETROCESSION.—In civil law. When the assignee of heritable rights conveys his rights back to the cedent, it is called a "retrocession."[2]

"A retrocession means the restitution of an ancient title to a true owner. Such an act confers no new title; it merely recognizes and confirms a previously existing title in another."[3]

traxit as given by Chitty is as follows: "The said A B came into the said court in his own proper person and confessed that he would not further prosecute his said suit against the said C D, but from the same altogether withdrew himself."

In Evans *v.* McMahan, 1 Ala. 45, the judgment was entered in the above form except that the words "and dismissed the same" were also inserted. *Held*, that these words did not affect the plea.

In Pinner *v.* Edwards, 6 Rand. (Va.) 675, a mere *obiter dicta* says: "In a retraxit the plaintiff voluntarily abandons his case, but he also goes further, and admits he has no cause of action." This same view is supported by Coffman *v.* Brown, 7 Smed. & M. (Miss.) 125, in which the judgment was "the plaintiff in his own proper person came into the court and confessed that he would not further prosecute his suit against the defendant, but from the same altogether withdrew himself." And this was held not to amount to a retraxit, because in it the plaintiff does not admit "that he has no cause of action." These two cases stand alone, and do not seem to be good law.

Agreement to Dismiss.—For a discussion as to when an agreement to dismiss a suit will amount to a retraxit, see Wholford *v.* Compton, 79 Va. 338, and cases there cited.

1. 3 Bl. Com. 296; 2 Tucker's Com. 251; Beecher's Case, 8 Coke's Rep. 58; 2 Sellon's Pr. 461; Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501; Evans *v.* McMahan, 1 Ala. 45; Thomason *v.* Odum, 31 Ala. 108; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220; 6 Am. Dec. 335; Harris *v.* Preston, 10 Ark. 201; Wholford *v.* Compton, 79 Va. 333; U. S. *v.* Parker, 120 U. S. 89; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46.

The court by Walker, J., in Harris *v.* Preston, 10 Ark. 201, said: "The legal effect of a retraxit is a personal and perpetual release and the abatement of all right of action in the subject-matter of dispute so that at no subsequent period can the retraxit in any form of action contest with the defendant his right or title to the possession of the property in the suit."

In Evans *v.* McMahan, 1 Ala. 45, is acknowledged with approval, 1 Dunlap's Pr. 494, which says: "A retraxit is as complete and effectual bar as if a verdict had been rendered for the defendant, and he can never commence another action for the same cause.

In Beechers' Case, 8 Coke's Rep. 58, the court said a retraxit "shall be a perpetual bar and in a manner a release."

Modern Application.—Retraxit, as has been seen, is in modern practice practically obsolete. The question frequently arises, however, whether modes of withdrawal or dismissal of a suit are a bar to another suit upon the same cause of action. It then often becomes valuable to determine whether or not such mode of dismissal is equivalent to the old technical retraxit; for, if so, the second suit is barred.

2. Ersk. Insts. 3, 5, 1; Black's L. Dict.; Bouv. L. Dict.

3. Amet *v.* Boyer (La. 1891), 9 So. Rep. 627; *citing* Rev. Civ. Code of *Louisiana*, art. 2272, *et seq.*; Payne *v.* Nowell, 41 La. Ann. 852.

RETURN.—**1.** To return is defined to come or go back to the same place; to revisit.[1]

2. An Officer's Return.—See note 2.

3. Election Return.—See note 3.

RETURN OF PREMIUM.—See MARINE INSURANCE, vol. 14, p. 400.

REVEL.—To revel is to behave in a noisy boisterous manner, like a bacchanalian.[4]

REVENDICATION.—In civil law, revendication is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim, in specie, such part of the goods as remain in the hands of the vendee entire, and without having changed in quality.[5]

1. First Soc. of Waterbury *v.* Platt, 12 Conn. 187. In that case it was held that a man cannot be said to return to a place, and yet never actually change his location. Although a man's residence is at one time within the political division of A, and then by a change of the boundaries is thrown out of such division, and the boundaries are once more changed, bringing his residence again within A, it cannot be said that he has "returned" to A. *Compare* REMOVE.

A condition to a legacy, that the legatee "return" to a place, means that he come back to that place; and the condition is not performed if he die, or is lost at sea whilst returning. Priestly *v.* Holgate, 26 L. J. Ch. 448; 3 K. & J. 286; Sprigg *v.* Sprigg, 2 Vern. 394. So, if the word is "arrive." Burgess *v.* Robinson, 3 Mer. 7. See, however, 2 Jarm. on Wills, 12, 13. See also WILLS.

"Return" in a Will.—Where a testator devised land to his sons during their lives and provided that, in "default of male issue the land shall return" to the said sons, "return" was construed as equivalent to "remain," in order to give effect to the testator's intention. Den *v.* McMurtrie, 15 N. J. Eq. 276.

Where a testatrix devised land to F, and provided that upon a certain contingency it should "return" to her legatees as F should direct, it was said that "the word 'return' as used by the testatrix obviously means the same as to go or to pass;" and, again, that "to return is to come back to him from whom it was given; but to come back from him to him is inconceivable and contradictory." Den *v.* Crawford, 8 N. J. L. 112.

Statutes of Limitation.—It was provided that the absence of the defendant from the State should toll the statute, and that upon his "return" the plaintiff might bring his action. It was held that the use of the word "return" indicated that this clause could not apply where the statutory period had expired and the debtor had never been within the State. "A person cannot return to a place until he has previously been at the place." Hyman *v.* Bayne, 83 Ill. 259. For cases *contra* see LIMITATION OF ACTIONS, vol. 13, p. 742, n.

2. For a return made by an officer of the court upon its process, see generally SERVICE OF PROCESS, and for the several returns upon the various writs, see such specific titles as ATTACHMENT, EXECUTIONS, HABEAS CORPUS, MANDAMUS, etc.

Due Return.—See DUE, vol. 6, p. 42.

"Filed" Included Under "Return" as Applied to Writs.—See FILE, vol. 7, p. 963.

3. See ELECTIONS, vol. 6, p. 334.

4. *In re* Began, 12 R. I. 309. And in that case it was held that a complaint that charged that the defendant did revel, quarrel, etc., was not bad for uncertainty.

5. Benedict *v.* Schaettle, 12 Ohio St. 520, *quoting In re* Westzynthius, 2 N. & M. 650, n. In those cases it was said that the common-law doctrine of stoppage *in transitu* was derived from this revendication of the civil law. *Compare* STOPPAGE IN TRANSITU.

REVENUE LAWS.

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I. DEFINITION.—The term "revenue law" means a law imposing duties on imports or tonnage, or a law providing in terms for revenue.[1]

II. CUSTOMS—1. Construction of Tariff Laws.—Revenue laws are in general to be liberally construed to carry out the purposes of their enactment.[2] Even the provisions for forfeiture of goods for violation of the revenue laws are not to be interpreted strictly.[3] In case of ambiguity in the language used, the law should be construed in favor of the importer.[4]

1. The foregoing definition given by Mr. Chief Justice Waite in U. S. *v.* Hill, 123 U. S. 686, seems broad enough to include laws relating to internal revenue; and those laws will be included in this article, though it was said in Stevens *v.* Mack, 5 Blatchf. (U. S.) 514, that the term "revenue laws of the United States" should not be considered to include laws for the collection of internal revenue.

The power of Congress to enact revenue laws is founded upon section 8 of article 1 of the Constitution, which authorizes Congress "to lay and collect taxes, duties, imposts, and excises." The constitutionality of the existing tariff act, passed Oct. 1, 1890, has been affirmed in *In re* Sternbach, 45 Fed. Rep. 175, and by the Supreme Court of the United States, by a decision not yet reported.

2. Smythe *v.* Fiske, 23 Wall. (U. S.) 380.

3. U. S. *v.* Stowell, 133 U. S. 1.

In U. S. *v.* Breed, 1 Sumn. (U. S.) 160, the court by Story, J., said: "Revenue and duty acts are not in the sense of the law, penal acts; and are not therefore to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial; and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them."

And it was said by Gray, J., in U. S. *v.* Stowell, 133 U. S. 1, that revenue laws are to be fairly and reasonably construed.

4. Powers *v.* Barney, 5 Blatchf. (U.

All existing tariff laws should be considered together in construing any one of them;[1] and repeal by implication is not favored by the courts,[2] though where two provisions of the tariff laws are clearly inconsistent the latter will be held to supersede the former.[3]

In construing tariff acts, words are to be understood in their commercial signification when they have one;[4] but they will be understood to have the same meaning in commerce that they have in popular speech unless the contrary is shown.[5] And gen-

S.) 202; Adams *v.* Bancroft, 3 Sumn. (U. S.) 384; Ross *v.* Fuller, 17 Fed. Rep. 226; McCoy *v.* Hedden, 38 Fed. Rep. 89; U. S. *v.* Wigglesworth, 2 Story (U. S.) 369.

1. Stuart *v.* Maxwell, 16 How. (U. S.) 160; Saxonville Mills *v.* Russell, 116 U. S. 13.

2. Fabbri *v.* Murphy, 95 U. S. 196; U. S. *v.* Sixty-Seven Packages, 17 How. (U. S.) 85; Saxonville Mills *v.* Russell, 116 U. S. 21.

Thus when an article is made dutiable by its specific name, it will not be affected by the general words of a later statute, which would otherwise include it.

Reiche *v.* Smythe, 13 Wall. (U. S.) 162, where "birds" were on the free list of act March 2, 1861, and it was held that they were not included in "horses, cattle, sheep, hogs, and other live animals," on which act May 16, 1866, imposed a duty; Arthur *v.* Rheims, 96 U. S. 143, where it was held that artificial flowers, being dutiable *eo nomine*, were not embraced in the provisions for manufactures of cotton. And see also Smythe *v.* Fiske, 23 Wall. (U. S.) 374; Movius *v.* Arthur, 95 U. S. 144; Arthur *v.* Lahey, 96 U. S. 112; Homer *v.* The Collector, 1 Wall. (U. S.) 486. Unless the language of the latter act manifests a plain intention to substitute that tariff act in the place and stead of all prior tariff legislation so far as such legislation lays duties upon imported articles of any kind. *In re* Straus, 46 Fed. Rep. 522.

3. Butler *v.* Russell, 3 Cliff. (U. S.) 251; U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. Rep. 508; 21 Blatchf. (U. S.) 511; *In re* Straus, 46 Fed. Rep. 522.

Thus it has been held that section 12 of the act of June 22, 1874, which provided for the forfeiture of merchandise fraudulently entered and for penalties against the guilty party, was inconsistent with and therefore repealed U. S. Rev. St., § 2864, which provided for an alternative forfeiture of the goods or their value. U. S. *v.* Auffmordt, 122 U. S. 197.

And where one section of a tariff act imposed a duty upon a certain article, and a later section of the same act placed that article on the free list, it was held that the later section repealed the former. Powers *v.* Barney, 5 Blatchf. (U. S.) 202.

An instance of such inconsistency occurred in act March 3, 1883, where the chemical schedule contained a provision relating to alcohol and distilled spirits which was irreconcilable with a provision of the liquor schedule.

4. Arthur *v.* Morrison, 96 U. S. 108; Curtis *v.* Martin, 3 How. (U. S.) 106; Leo *v.* Lincoln, 1 Story (U. S.) 610; U. S. *v.* One Hundred and Twelve Casks of Sugar, 8 Pet. (U. S.) 277; Bacon *v.* Bancroft, 1 Story (U. S.) 341; Roosevelt *v.* Maxwell, 3 Blatchf. (U. S.) 391; U. S. *v.* Sarchet, 1 Gilp. (U. S.) 273; Fox *v.* Cadwalader, 42 Fed. Rep. 209; Barlow *v.* U. S., 7 Pet. (U. S.) 404; Elmes on Customs, §§ 48, 49.

The terms used, being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact depending on evidence. Stuart *v.* Maxwell, 16 How. (U. S.) 163.

5. Schmieder *v.* Barney, 113 U. S. 645; 13 Blatchf. (U. S.) 37; 6 Fed. Rep. 150; Greenleaf *v.* Goodrich, 101 U. S. 278; Swan *v.* Arthur, 103 U. S. 597.

Words are to receive the meaning given to them in ordinary commercial operations, unless a different trade meaning is established by a preponderance of the evidence. Weilbacher *v.* Merritt, 37 Fed. Rep. 85.

Thus the word "articles" may include things manufactured, unmanufactured, and partly manufactured. Junge *v.* Hedden, 37 Fed. Rep. 197.

eral terms are to be taken in their ordinary and comprehensive meaning unless it is shown that they have in their commercial use acquired a special or restricted meaning.[1]

The trade usage which is to determine the meaning of words used in a tariff act is that which prevailed among commercial men in our own ports at the time when the act was passed ;[2] and it must be a well known and general usage.[3]

Where the words in the statute are not technical, their interpretation is for the court ;[4] but the question whether a particular article is included in the particular name specified in the tariff laws is for the jury.[5]

The provisions of a tariff act supersede all previous treaty obligations, since a treaty is of no higher authority than an act of Congress.[6]

The term "cotton cloth" means any woven fabric of cotton. Ullmann *v.* Hedden, 38 Fed. Rep. 95; Robertson *v.* Hedden, 40 Fed. Rep. 322; Maillard *v.* Lawrence, 16 How. (U. S.) 251; Greenleaf *v.* Goodrich, 101 U. S. 278.

The word "liquors" includes fermented as well as distilled liquors. Hollender *v.* Magone, 38 Fed. Rep. 912.

The word "toys" is to receive the signification ordinarily attributed to it in common speech. Zeh *v.* Cadwalader, 42 Fed. Rep. 525.

The word "bottle" does not include a demijohn containing more than four gallons. U. S. *v.* Ninety Demijohns of Rum, 4 Woods (U. S.) 637; 8 Fed. Rep. 485.

The word "country" includes all the territorial possessions of any particular nation however widely scattered. U. S. *v.* Ship Recorder, 1 Blatchf. (U. S.) 218; Stairs *v.* Peaslee, 18 How. (U. S.) 521. But in the expression, "countries beyond the Cape of Good Hope," the word "countries" is used in its geographical rather than in its political sense, and therefore includes the British Possessions in India. Campbell *v.* Barney, 5 Blatchf. (U. S.) 221.

The phrase "actual cost" means the price actually paid in a *bona fide* purchase, and not the market value. Alfonso *v.* U. S., 2 Story (U. S.) 421; U. S. *v.* Sixteen Packages of Goods, 2 Mason (U. S.) 48.

The words "true value" mean the actual cost. U. S. *v.* Tappan, 11 Wheat. (U. S.) 419.

The phrase "of similar description" is not a commercial term. Greenleaf *v.* Goodrich, 101 U. S. 278; Schmieder *v.* Barney, 113 U. S. 645.

1. Arthur *v.* Morrison, 96 U. S. 108, where it was held that silk veils, known commercially as "crape veils," were not dutiable under a specific provision for silk veils, but as manufactures of silk not otherwise provided for.

2. Arthur *v.* Cumming, 91 U. S. 363; Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430; Elliott *v.* Swartont, 10 Pet. (U. S.) 151; Curtis *v.* Martin, 3 How. (U. S.) 106; McCoy *v.* Hedden, 38 Fed. Rep. 89.

But in Pickhardt *v.* Merritt, 132 U. S. 252, it was held that evidence to show what the goods in question were called in trade at the time of the trial was admissible, though the trial occurred five years after the entry of the goods, and ten years after passage of the act under which the duties were claimed.

3. Dodge *v.* Hedden, 42 Fed. Rep. 446.

4. Marvel *v.* Merritt, 116 U. S. 11; Nix *v.* Hedden, 39 Fed. Rep. 109.

5. Weilbacher *v.* Merritt, 37 Fed. Rep. 85.

6. Taylor *v.* Morton, 2 Curt. (U. S.) 454; Whitney *v.* Robertson, 124 U. S. 190; 21 Fed. Rep. 566; Kelly *v.* Hedden, 124 U. S. 196; 31 Fed. Rep. 607.

A treaty provision with Denmark that no higher duties shall be imposed on Danish goods than on goods from any other country does not *ipso facto* operate to reduce the duty on Danish sugar to that imposed on Hawaiian sugar, where the duty on the latter has been reduced in consideration of compensation to be made by Hawaii. Bartram *v.* Robertson, 122 U. S. 116; 21

2. Property Subject to Duty.—Customs duties are levied only on goods imported from foreign countries.[1]

To constitute an importation there must be an actual arrival within the limits of a port of entry with intent to unload the cargo there,[2] and an actual or constructive delivery to the consignee.[3]

Blatchf. (U. S.) 211; 15 Fed. Rep. 212; Netherclift *v.* Robertson, 27 Fed. Rep. 737.

1. U. S. Rev. St., § 2502.

Goods brought into the United States from a port, which, though at the time in the military possession of the United States, is not within the territorial limits of the country as established by treaty or act of Congress, and which has no United States custom-house, are imported from a foreign country within the purview of the revenue laws. Fleming *v.* Page, 9 How. (U. S.) 614.

Merchandise shipped from one American port to another is not imported, even though the vessel touch on the way at an intermediate foreign port. U. S. *v.* The Forrester, 1 Newb. Adm. 88.

But where foreign goods which have been once lawfully introduced into the United States are taken out of the country and landed at a foreign port, whence they are reshipped to the United States, their return to this country constitutes an importation from a foreign country. U. S. *v.* Ten Cases of Opium, Deady (U. S.) 71. And where barrels manufactured in the United States are shipped empty to Cuba, to be filled with molasses and returned, their return is an importation of the barrels as well as of the molasses. Knight *v.* Schell, 24 How. (U. S.) 526; Belcher *v.* Linn, 24 How. (U. S.) 533.

Where goods are withdrawn from a bonded warehouse, exported as if to a foreign port, and carried beyond the limits of the United States, their return to this country constitutes an importation which makes them dutiable, even though they have not been actually landed in any foreign port. McGlinchy *v.* U. S., 4 Cliff. (U. S.) 312; Perkins *v.* U. S., 4 Cliff. (U. S.) 321.

Where whales are caught and whale oil manufactured from them on the high seas by the crew of an American vessel, the oil is not the product of "foreign fishing," though it has since been owned and brought into port by persons in a foreign service. U. S. *v.* Burdett, 2 Sumn. (U. S.) 336.

2. U. S. *v.* Vowell, 5 Cranch (U. S.) 368; U. S. *v.* Arnold, 1 Gall. (U. S.) 348; Meredith *v.* U. S., 13 Pet. (U. S.) 486; U. S. *v.* Lindsay, 1 Gall. (U. S.) 366; Prince *v.* U. S., 2 Gall. (U. S.) 204; Arnold *v.* U. S., 9 Cranch (U. S.) 104; Elmes on Customs, § 32.

The importation is complete on such arrival, and not upon entry of the goods at the custom-house. Perots *v.* U. S., Pet. (C. C.) 256; U. S. *v.* Lindsay, 1 Gall. (U. S.) 365.

In Cross *v.* Harrison, 16 How. (U. S.) 164, it was held that goods brought into California after execution of the treaty by which Mexico ceded California to the United States, were imported within the meaning of the revenue laws, though at the time of the importation, such laws had not been put into effective operation in California.

Goods shipped from one port to another by way of a United States port, where they are transferred from one vessel to another, are not imported into this country, since in such case the element of intent to unload is wanting. McLean *v.* Hager, 31 Fed. Rep. 602.

A horse driven from Canada into the United States as a mere means of conveyance in the prosecution of a temporary visit to this country is not imported, since it is not brought in as merchandise. U. S. *v.* One Sorrel Horse, 22 Vt. 655.

The arrival of goods from abroad within the limits of the United States, and of a collection district, but outside the limits of any port of entry, does not constitute an importation. U. S. *v.* Vowell, 5 Cranch (U. S.) 368; Arnold *v.* U. S., 9 Cranch (U. S.) 119. Thus the mere transit of a vessel through a river which forms the boundary between the United States and a foreign country, for the purpose of proceeding to a foreign port, is not an arrival within the limits of the United States. The Appollon, 9 Wheat. (U. S.) 362.

3. The importation of foreign goods is not complete as between the im-

Goods brought into the *United States* against the will of the owner, either by force, accident, or stress of weather, are not imported and are therefore not subject to duty.[1]

But if such goods are sold afterwards and pass into consumption within the *United States*, they become dutiable.[2]

Goods imported by the United States are not subject to duty.[3] Neither are sea stores,[4] nor ship's furniture,[5] nor articles whose importation is prohibited by statute.[6]

3. When Liability Accrues.—The liability for duties accrues immediately on importation.[7]

Where an act levies duties on goods imported from and after the passage of the act, goods which come into a collection district on the very day the act is passed are dutiable under it.[8]

porter and the government, so long as the goods remain in the custody of the customs officers. U. S. *v.* Benzon, 2 Cliff. (U. S.) 525; Fabbri *v.* Murphy, 95 U. S. 197.

1. Elmes on Customs, § 35; Chitty Com. Law 244; The Gertrude, 3 Story (U. S.) 68; Lewis *v.* Sixty-Five Packages of Merchandise, 30 Fed. Rep. 195; 32 Fed. Rep. 111. By 18 St. at Large 194, ch. 398, any portion of the cargo of a vessel which has sunk and been abandoned for two years, may, when raised, be admitted free of duty. Cargo from Wreck of Bark Edwards, 12 Fed. Rep. 508.

2. Merritt *v.* One Package of Merchandise, 30 Fed. Rep. 195; 32 Fed. Rep. 111.

Goods captured and brought into port for adjudication, then sold by order of court and the proceeds ultimately restored to a neutral claimant as his property, are dutiable as goods imported in foreign bottoms. The Nereid, 1 Wheat. (U. S.) 171; Brig Concord, 9 Cranch (U. S.) 387.

3. U. S. *v.* Lutz, 2 Blatchf. (U. S.) 383.

Thus where prize goods are brought into port by United States naval vessels, the interest of the United States in the goods is not dutiable. The Liverpool Hero, 2 Gall. (U. S.) 184.

4. But what may be a reasonable allowance to a vessel as sea stores, rests, in the absence of fraud, in the judgment of the collector and naval officer. An Ullage Box of Sugar, 1 Ware (U. S.) 350. Cordage, raven's duck and sail cloth, found on board of a vessel on her return from a voyage, are not sea stores. U. S. *v.* Twenty-Four Coils of Cordage, 1 Baldw. (U. S.) 502; 1 Gilp. (U. S.) 299.

5. U. S. *v.* Chain Cable, 2 Sumn. (U. S.) 362; Weld *v.* Maxwell, 4 Blatchf. (U. S.) 136; U. S. *v.* Twenty-Four Coils of Cordage, 1 Baldw. (U. S.) 502; 1 Gilp. (U. S.) 299.

6. McLane *v.* U. S., 6 Pet. (U. S.) 404. The reason is that such goods become forfeited by the very act of importation.

7. Meredith *v.* U. S., 13 Pet. (U. S.) 486; U. S. *v.* Cobb, 11 Fed. Rep. 76; M'Andrew *v.* Robertson, 24 Blatchf. (U. S.) 170; 29 Fed. Rep. 246.

Duties accrue when the vessel arrives at the port of entry with intent to unload, and not when the goods are entered at the custom house. U. S. *v.* Dodge, Deady (U. S.) 124; U. S. *v.* Vowell, 5 Cranch (U. S.) 372; Arnold *v.* U. S., 9 Cranch (U. S.) 120; U. S. *v.* Lindsay, 1 Gall. (U. S.) 366; Prince *v.* U. S., 2 Gall. (U. S.) 208; U. S. *v.* Bags of Sugar, 2 Abb. (U. S.) 423; U. S. *v.* Cigars, 2 Curt. (U. S.) 437; M'Lean *v.* Hager, 31 Fed. Rep. 602.

But so long as the goods remain in charge of the customs officers and have not been delivered to the importer either on ship board or in warehouse they are subject to any duties on imports that Congress may see fit to impose. U. S. *v.* Benzon, 2 Cliff. (U. S.) 525; Fabbri *v.* Murphy, 95 U. S. 197.

8. U. S. *v.* Arnold, 1 Gall. (U. S.) 348; Arnold *v.* U. S., 9 Cranch (U. S.) 119; U. S. *v.* Williams, 1 Paine (U. S.) 261.

And the courts may look back of the record to determine the actual date of the approval of the act by the President, where the date is not stated in the act itself. Gardner *v.* The Collector, 6 Wall. (U. S.) 499.

But a tariff act which takes effect the day after a vessel has arrived in port, though before its cargo has been entered at the custom-house, does not apply to the articles imported on such vessel.[1]

Where property is brought into the United States by salvors or by privateers and is afterward sold here with the consent of the owner, it then becomes dutiable.[2] The liability in such case, relates back to the time of the importation.[3]

4. Liquidation of Duties—*a.* HOW MADE.—The duty is to be estimated upon the quantity of goods that actually arrives at the port of entry and not upon the quantity shipped.[4]

No allowance should be made for damage received by goods in transit; but the consignee may abandon to the United States part of the goods, not less than one-tenth part of the invoice, and thus relieve himself from liability for duties on the goods so abandoned.[5]

1. McAndrew *v.* Robertson, 24 Blatchf. (U. S.) 170; 29 Fed. Rep. 246.

Under the tariff act of March 3d, 1883, which provided that "all imported goods which may be in public stores or bonded warehouses on the day when this act shall go into effect shall be subject to no other duty upon entry for consumption than if the same were imported after that day," goods which are on that day on board a vessel in port in charge of a custom-house inspector are dutiable only according to that act. Hartranft *v.* Oliver, 125 U. S. 525; Sherman *v.* Robertson, 136 U. S. 570.

2. Brig Concord, 9 Cranch (U. S.) 387; Merritt *v.* One Package of Merchandise, 30 Fed. Rep. 195; 32 Fed. Rep. 111.

3. Prince *v.* U. S., 2 Gall. (U. S.) 204.

4. Marriott *v.* Brune, 9 How. (U. S.) 619; U. S. *v.* Southmayd, 9 How. (U. S.) 637; Shelton *v.* Austin, 1 Cliff. (U. S.) 388; Weaver *v.* Saltonstall, 38 Fed. Rep. 493; Lawrence *v.* Caswell, 13 How. (U. S.) 488; Robertson *v.* Bradbury, 132 U. S. 491.

This was held to be the law even under the Tariff Act of 1846, which provided "that under no circumstances shall the duty be assessed upon an amount less than the invoice value." Marriott *v.* Brune, 9 How. (U. S.) 619.

And the rule is not affected by the fact that the probable loss from leakage and drainage was taken into consideration in fixing the price in the country of exportation. U. S. *v.* Southmayd, 9 How. (U. S.) 637.

Where the statute prescribes the method of determining the weight of goods, the importer is not entitled to any allowance for tare other than that prescribed by the statute. Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316.

Where a cargo of coke shrinks in weight during the voyage on account of evaporation of its moisture, the duties should be estimated upon the actual weight of the coke when received at the port of entry. Balfour *v.* Sullivan, 8 Sawy. (U. S.) 648; 17 Fed. Rep. 231.

Where merchandise shrinks in weight during transit and thereby increases in value per pound, the duty should be estimated on the actual quantity which reaches the port of entry at its increased valuation. Reiss *v.* Magone, 39 Fed. Rep. 105.

5. 26 St. at Large 140, § 23.

It was held in Wright, etc., Lead Co. *v.* Seeberger, 44 Fed. Rep. 258, that U. S. Rev. St., § 2898 which prohibits the allowance of "draught" in assessing customs duties does not forbid deduction for impurities in an article subject to a specific duty.

Before the passage of the law of 1890, it was necessary to ascertain before entry the extent to which the goods had been damaged in transit, and proof of the damage had to be lodged in the custom-house of the port of entry within ten days after the goods had been landed. Shelton *v.* The Collector, 5 Wall. (U. S.) 113.

If dutiable goods are wrecked and cast ashore by the waves, they are subject to duty, only upon their value as they lie upon the shore. If they are

Where there is any doubt as to the classification of an imported article, the use for which it is designed is an important element in determining its classification,[1] especially if the article is new and is used as a substitute for other articles.[2] But neither the use of an article nor the purpose for which it was imported, necessarily determines its classification for tariff purposes.[3]

Goods in charge of a custom officer on board ship at the time a tariff law goes into effect, are dutiable at the same rate as though they were then in the custody of such officer in a public store or bonded warehouse.[4]

Imported articles not specially named in the tariff acts but which bear a similitude, either in material, quality, texture, or use, to enumerated dutiable articles are dutiable at the same rate as the articles which they resemble.[5]

worthless in that condition they are subject to no duty. U. S. *v.* Cook, 1 Sprague (U. S.) 213.

1. Zucker, etc., Chemical Co. *v.* Magone, 37 Fed. Rep. 776; Hagdon *v.* Seeberger, 38 Fed. Rep. 401.

Thus, whether certain articles, such as barometers are "philosophical apparatus" or merely non-enumerated manufactured articles composed wholly or in part of metal is to be determined by ascertaining whether they are used wholly or mainly in carrying on observations and experiments of a philosophical character or merely in the practice of the arts. Robertson *v.* Oelschlaeger, 137 U. S. 436.

The fact that imported animals are fit for breeding purposes does not make them free of duty where they are in fact imported for sale. U. S. *v.* Eleven Horses, 30 Fed. Rep. 916.

And under a statute exempting from duty certain materials necessary for the construction of vessels to be employed "in the foreign trade," such materials, when used in the construction of a vessel built in the United States for a foreign government, are not free of duty. Russell *v.* U. S., 15 Blatchf. (U. S.) 26.

2. Koch *v.* Seeberger, 30 Fed. Rep. 424.

3. U. S. *v.* Nichols, 46 Fed. Rep. 359; Dwight *v.* Merritt, 140 U. S. 213. Thus, gunny bags, only valuable for paper stock, have been held admissible as paper stock, regardless of the purpose for which they were imported, or the use to which they were afterwards put. Jessup, etc., Paper Co. *v.* Cooper, 46 Fed. Rep. 186.

4. Hartranft *v.* Oliver, 125 U. S. 529.

The present tariff act, passed Oct. 1, 1890, reduced the duty on lumber from two dollars to one dollar per thousand feet, but provided that lumber imported from any country which maintained an export duty on logs should be dutiable at the old rate. The Canadian export duty on logs was removed Oct. 13, 1891. In *In re* Mathews, 45 Fed. Rep. 850, it was held that lumber imported from Canada, Sept. 27, 1891, deposited at once in bond, and not withdrawn until Oct. 16, 1891, was dutiable at only one dollar per thousand.

5. Schmieder *v.* Barney, 113 U. S. 645. The similitude must be something more than a mere adaptability to sale as a substitute for another article. Sykes *v.* Magone, 38 Fed. Rep. 494; Murphy *v.* Arnson, 96 U. S. 131; but it need not apply to all the four particulars of material, quality, texture, and use. Weilbacher *v.* Merritt, 37 Fed. Rep. 85; Arthur *v.* Fox, 108 U. S. 125.

But in Lazard *v.* Magone, 40 Fed. Rep. 662, it was held that a statutory provision that "non-enumerated articles, similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free," referred to a similitude in all four of the particulars mentioned.

A non-enumerated manufactured article which bears no substantial similitude to any enumerated article, is dutiable under the general provision for non-enumerated manufactured articles. Sykes *v.* Magone, 38 Fed. Rep. 494.

An article which is dutiable by its specific designation will not be affected by the general words of the same or another statute which would otherwise include it, whether such general words would reduce or increase the duty.[1]

The officers of the revenue cannot exact duties not warranted by law.[2]

Articles imported from *England* but produced in other countries which have been changed in their condition in *England* without destroying their identity, are dutiable as the products of the other countries.[3]

b. BY WHOM MADE.—The rate and amount of duties chargeable on imported goods are to be determined in the first instance by the collector, from whose decision an appeal may be taken to a board consisting of three general appraisers.[4] The decision of this board may be reviewed by proceedings in the circuit court.[5] Upon such review, the board must, when ordered by the court, return to the court the record and evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon.[6]

c. RATES OF DUTY ON PARTICULAR ARTICLES.—The decisions as to the duties applicable to particular articles will be found in the notes.[7]

1. Arthur *v.* Rheims, 96 U. S. 143; Homer *v.* The Collector, 1 Wall. (U. S.) 486; Movius *v.* Arthur, 95 U. S. 144.

Where two provisions of the tariff act apply to a certain article, and one provision is qualified by the phrase "not otherwise provided for," the article is dutiable under the other provision. Zucker, etc., Chemical Co. *v.* Magone, 37 Fed. Rep. 776.

2. Morrill *v.* Jones, 106 U. S. 466; Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Munsell *v.* Maxwell, 3 Blatchf. (U. S.) 364. Thus where the statute provides that animals specially imported for breeding purposes shall be admitted free upon proof thereof satisfactory to the Secretary of the Treasury, the Secretary cannot confine the exemption to animals of superior stock. Morrill *v.* Jones, 106 U. S. 466.

And under a statute authorizing the Secretary of the Treasury to prescribe regulations as to the return of grain bags he has no power to impose a duty on them. Balfour *v.* Sullivan, 19 Fed. Rep. 578.

3. Thus, the advancing, in England, to tram, thrown, and organzine, of raw silk produced in India does not make the silk any the less the production of India. Strange *v.* Barney, 35 Fed. Rep. 196. And the cleaning in England, of rice grown in India does not so change its identity as to cause it to be an Indian product. Williams *v.* Barney, 5 Blatchf. (U. S.) 219.

4. 26 U. S. St. at Large 137, § 14. It is the duty of such board to pass upon the questions of fact raised by the importer. *In re* Sternbach, 44 Fed. Rep. 413; *In re* Blumlein, 45 Fed. Rep. 236.

5. 26 U. S. St. at Large 138, § 15.

6. 26 U. S. St. at Large 138, § 15.

A return is not sufficient which states that all the facts are contained in the board's opinion, where such opinion merely affirms the collector's assessment of duty and states that it was not deemed advisable to enter into the merits of the question. *In re* Rosenwald, 45 Fed. Rep. 236. Neither is a return sufficient in which the only fact certified is that "silk is the component material of chief value." *In re* Dieckerhoff, 45 Fed. Rep. 235. Nor one in which the only facts certified are that the coverings of the goods were entered as free, and that the importer's protests were rejected as not being sufficiently specific. *In re* Downing, 45 Fed. Rep. 412.

7. The duties on the following-named articles, which, for conveni-

ence of reference, have been arranged in alphabetical order, have been passed upon by the courts in the cases following the name of each article, respectively:

A, B, C, plates and mugs: Maddock *v.* Magone, 41 Fed. Rep. 882. Agate: Hahn *v.* Erhardt, 46 Fed. Rep. 519. Agate penholders: Hahn *v.* Erhardt, 46 Fed. Rep. 519. Albums: Liebenroth *v.* Robertson, 33 Fed. Rep. 457. Alcoholometers: Robertson *v.* Oelschlaeger, 137 U. S. 436. Alizarine assistant: Lloyd *v.* McWilliams, 31 Fed. Rep. 261. Almonds: Homer *v.* The Collector, 1 Wall. (U. S.) 486. Amer Picon: Curiel *v.* Beard, 44 Fed. Rep. 551. Anchovies: Reiss *v.* Magone, 39 Fed. Rep. 105. Anchovy paste: Bogle *v.* Magone, 40 Fed. Rep. 226. Anemometers: Robertson *v.* Oelschlager, 137 U. S. 436; Manasse *v.* Spalding, 24 Fed. Rep. 86. Angostura bitters: Dallet *v.* Smythe, 6 Blatchf. (U. S.) 419. Aniline dyes: Pickhart *v.* Merritt, 132 U. S. 562. Animal charcoal: Schriefer *v.* Wood, 5 Blatchf. (U. S.) 215. Animals: U. S. *v.* 196 Mares, 29 Fed. Rep. 139. Antique rugs: *In re* Godwin, 46 Fed. Rep. 361; Antiquities: Baumgarten *v.* Magone, 41 Fed. Rep. 770; U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. Rep. 508; 21 Blatchf. (U. S.) 511; Marine *v.* Robson, 47 Fed. Rep. 34. Arp's pepsin bitters: Gommes *v.* Seeberger, 41 Fed. Rep. 32. Arrasene: Mandel *v.* Spalding, 26 Fed. Rep. 609. Artificial flowers: Arthur *v.* Rheims, 96 U. S. 143; Walker *v.* Seeberger, 38 Fed. Rep. 724. Artists' colors: Thayer *v.* Seeberger, 31 Fed. Rep. 883. Axles: Ross *v.* Fuller, 17 Fed. Rep. 224.

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Rep. 33. Carpenters' pincers: Wiebusch *v.* Saltonstall, 45 Fed. Rep. 40. Carriages: Arthur *v.* Morgan, 112 U. S. 495. Cartons in which hosiery and gloves are packed: Overteuffer *v.* Robertson, 116 U. S. 499. Caustic soda: Field *v.* Schell, 5 Blatchf. (U. S.) 1; Gamble *v.* Mason, 7 Am. Law Reg. 178. Celery seed: Clay *v.* Magone, 40 Fed. Rep. 230. Chalk slags: Anglo-American, etc., Cement Co. *v.* Seeberger, 39 Fed. Rep. 763. Champagne: De Bary *v.* Arthur, 93 U. S. 420; Ballinger's Champaigne, 3 Wall. (U. S.) 560. Chenilles: Walker *v.* Seeberger, 38 Fed. Rep. 724. Chicory: Arthur *v.* Herold, 100 U. S. 75. China organzine: Strange *v.* Barney, 35 Fed. Rep. 196. China tram: Strange *v.* Barney, 35 Fed. Rep. 196. Chinese coin: Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; 18 How. (U. S.) 85. Chinese shoes: Swayne *v.* Hager, 37 Fed. Rep. 780. Chocolate: Arthur *v.* Stephani, 96 U. S. 125. Chromo lithographs: Arthur *v.* Moller, 97 U. S. 365. Citron: Levy *v.* Robertson, 38 Fed. Rep. 714. Cloakings made of calf hair and cotton: Herman *v.* Robertson, 41 Fed. Rep. 881. Clothing: Astor *v.* Merritt, 111 U. S. 202. Coat linings: Lesher *v.* Seeberger, 40 Fed. Rep. 61. Coffee: Oldfield *v.* Marriott, 10 How. (U. S.) 146. Collections of antiquities: U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. Rep. 508; 21 Blatchf. (U. S.) 511. Colored cotton hosiery: Reimer *v.* Schell, 4 Blatchf. (U. S.) 328. Colored fashion plates: Blood *v.* Merritt, 11 Fed. Rep. 289. Copper cash: Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; 18 How. (U. S.) 85. Copper plates: U. S. *v.* Potts, 5 Cranch (U. S.) 284; U. S. *v.* Kid, 4 Cranch (U. S.) 1. Coral cameo: Bailey *v.* Schell, 5 Blatchf. (U. S.) 195. Cork carpeting: Keveney *v.* Magone, 42 Fed. Rep. 491. Corset laces: Dieckerhoff *v.* Robertson, 40 Fed. Rep. 568. Cotton and hair goods: Arthur *v.* Herman, 96 U. S. 141. Cotton and linen goods: Stuart *v.* Maxwell, 16 How. (U. S.) 150. Cotton and linen shirtings: Fisk *v.* Arthur, 103 U. S. 431. Cotton backed worsteds: Bernheimer *v.* Robertson, 39 Fed. Rep. 190. Cotton hosiery: Reimer *v.* Schell, 4 Blatchf. (U. S.) 328. Cotton Italians; coat linings: Newman *v.* Arthur, 109 U. S. 132. Cotton lace goods: Sidenberg *v.* Robertson, 41 Fed. Rep. 763. Cotton laces and insertings: Barber *v.* Schell, 107 U. S. 617. Cotton shoes: Swayne *v.* Hager, 37 Fed. Rep. 780. Cotton ties: Badger *v.* Ranlett, 106 U. S. 255; Kennedy *v.* Hartranft, 9 Fed. Rep. 18. Crape veils: Arthur *v.* Morrison, 96 U. S. 108; Morrison *v.* Arthur, 13 Blatchf. (U. S.) 194. Crushed loaf sugar: U. S. *v.* Breed, 1 Sumn. (U. S.) 159. Currycombs: McCoy *v.* Hedden, 38 Fed. Rep. 89.

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Radiometer: Robertson *v.* Oelschlaeger, 137 U. S. 436; Manasse *v.* Spalding, 24 Fed. Rep. 86. Rattan: Foppes *v.* Magone, 40 Fed. Rep. 570. Red lead: Meyer *v.* Arthur, 91 U. S. 570. Reeds: Foppes *v.* Magone, 40 Fed. Rep. 570. Reps: Greenleaf *v.* Goodrich, 101 U. S. 278. Rhumkorff

coil: Robertson *v.* Oelschlaeger, 137 U. S. 436. Ribbons: Chapon *v.* Smythe, 11 Blatchf. (U. S.) 120; Hartranft *v.* Langfeld, 125 U. S. 128; Lane *v.* Russell, 4 Cliff. (U. S.) 122; Robertson *v.* Edelhoff, 132 U. S. 614. Rice: Bullock *v.* Magone, 39 Fed. Rep. 198; Williams *v.* Barney, 5 Blatchf. (U. S.) 219. Rocora: Schneider *v.* Lawrence, 3 Blatchf. (U. S.) 115. Rosaries: Benziger *v.* Robertson, 122 U. S. 211. Rosewood boxes: Sill *v.* Lawrence, 1 Blatchf. (U. S.) 605. Round reeds: Foppes *v.* Magone, 40 Fed. Rep. 570. Rubber bags: Paturel *v.* Robertson, 41 Fed. Rep. 329; Vanacker *v.* Seeberger, 40 Fed. Rep. 57; Vanacker *v.* Spalding, 24 Fed. Rep. 88. Rubber shoes: Jessup, etc., Paper Co. *v.* Cadwalader, 43 Fed. Rep. 288; Lawrence *v.* Allen, 7 How. (U. S.) 785. Rugs: Baumgarten *v.* Magone, 41 Fed. Rep. 770; Riggs *v.* Frick, Taney's Dec. (U. S.) 100. Ruhenkorf coils: Manasse *v.* Spalding, 24 Fed. Rep. 86. Rush: Blydenburgh *v.* Magone, 40 Fed. Rep. 573.

Saccharine: Lutz *v.* Magone, 41 Fed. Rep. 128. Saddlery: McCoy *v.* Hedden, 38 Fed. Rep. 89. Sago flour: Chung Yune *v.* Kelly, 8 Sawy. (U. S.) 415; 14 Fed. Rep. 639. Salmon net twine: Leeson *v.* Young, 45 Fed. Rep. 627. Salmon seine: Leeson *v.* Young, 45 Fed. Rep. 627. Sardines: Reiss *v.* Magone, 39 Fed. Rep. 105. Saxony dress goods: Schmieder *v.* Barney, 113 U. S. 645; Greenleaf *v.* Goodrich, 101 U. S. 278. Scarfs: Maillard *v.* Lawrence, 1 Blatchf. (U. S.) 504; 16 How. (U. S.) 251. Scotch caps: Toplitz *v.* Hedden, 33 Fed. Rep. 617. Scrap iron: Schlessinger *v.* Beard, 14 Fed. Rep. 687; Schlessinger *v.* Beard, 120 U. S. 164. Scrap tobacco: Cohn *v.* Spalding, 24 Fed. Rep. 19; Castro *v.* Seeberger, 40 Fed. Rep. 531. Scythes: Wiebusch *v.* Saltonstall, 45 Fed. Rep. 40. Seeds: Boring *v.* Lawrence, 1 Blatchf. (U. S.) 616. Shawl pins: Dieckerhoff *v.* Robertson, 44 Fed. Rep. 160. Shawls: Maillard *v.* Lawrence, 1 Blatchf. (U. S.) 504; 16 How. (U. S.) 251. Shawls made of cotton and silk: Leahy *v.* Spaulding, 19 Fed. Rep. 417. Shears: Simmons Hardware Co. *v.* Lancaster, 31 Fed. Rep. 445. Sheep shears: Simmons Hardware Co. *v.* Lancaster, 31 Fed. Rep. 445. Sheep-skins: Coggill *v.* Lawrence, 1 Blatchf. (U. S.) 602; DeForest *v.* Lawrence, 13 How. (U. S.) 274. Shell opera glasses: Young *v.* Spalding, 24 Fed. Rep. 87. Shells: Hartranft *v.* Wiegmann, 121 U. S. 609; Hartranft *v.* Winters, 121 U. S. 616. Ship furniture: U. S. *v.* Chain Cable, 2 Sumn. (U. S.) 362; Weld *v.* Maxwell, 4 Blatchf. (U. S.) 136; U. S. *v.* Twenty-Four Coils of Cordage, 1 Baldw. (U. S.) 502; 1 Gilp. (U. S.) 299; The Gertrude, 3 Story (U. S.) 68. Shirtings of linen and cotton: Fisk *v.* Arthur, 103 U. S. 431. Shoddy: Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Shoes made of silk and cotton; Swayne *v.* Hager, 37 Fed. Rep. 780. Silk: Strange *v.* Barney, 35 Fed. Rep. 196. Silk and cotton goods: Solomon *v.* Arthur, 102 U. S. 208; Swan *v.* Arthur, 103 U. S. 597. Silk and cotton linings: Lesher *v.* Seeberger, 40 Fed. Rep. 61. Silk and woolen cloth: Hartranft *v.* Meyer, 135 U. S. 237; 28 Fed. Rep. 358. Silk arrasene: Mandel *v.* Spalding, 26 Fed. Rep. 609. Silk gloves: Adams *v.* Bancroft, 3 Sumn. (U. S.) 384. Silk hosiery: Hardy *v.* Hoyt, 13 Pet. (U. S.) 292. Silk laces: Arthur *v.* Lahey, 96 U. S. 112. Silk plaited gloves: Arthur *v.* Unkart, 96 U. S. 118. Silk shoes: Swayne *v.* Hager, 37 Fed. Rep. 780. Silk ties: Davies *v.* Arthur, 13 Blatchf. (U. S.) 34; Smythe *v.* Fiske, 23 Wall. (U. S.) 374. Skins dressed with the hair on: Schlessinger *v.* Seeberger, 40 Fed. Rep. 872. Slate books: Keary *v.* Magone, 40 Fed. Rep. 873. Slipper patterns: Kohlsaat *v.* Murphy, 96 U. S. 153. Snuff: Venable *v.* Richards, 105 U. S. 636. Soda: Field *v.* Schell, 5 Blatchf. (U. S.) 1; Gamble *v.* Mason, 7 Am. Law Reg. 178. Spectacle lenses: Fox *v.* Cadwalader, 42 Fed. Rep. 209; Young *v.* Spalding, 24 Fed. Rep. 22. Spectacles: Arthur *v.* Sussfield, 96 U. S. 128. Split ash timber: U. S. *v.* Quimby, 4 Wall. (U. S.) 408. Spotted net: Drew *v.* Grinnell, 115 U. S. 477. Square reeds: Foppes *v.* Magone, 40 Fed. Rep. 570. Starch: Union Nat. Bank *v.* Seeberger, 30 Fed. Rep. 429. Statuary: Merritt *v.* Tiffany, 132 U. S. 167; Viti *v.* Tutton, 14 Fed. Rep. 241; Tutton *v.* Viti, 108 U. S. 312. Staves for casks: U. S. *v.* Hathaway, 4 Wall. (U. S.) 404; U. S. *v.* Quimby, 4 Wall. (U. S.) 408. Steel: Farris *v.* Magone, 46 Fed. Rep. 845. Steel rail crop ends: Robertson *v.* Perkins, 129 U. S. 233; 29 Fed. Rep. 842. Steel tire blooms: Chicago Tire, etc., Works Co. *v.* Spaulding, 19 Fed. Rep. 412; 116 U. S. 541. Stereopticans: Manasse *v.* Spalding, 24 Fed. Rep. 86; Robertson *v.* Oelschlaeger, 137 U. S. 436. Stearine:

5. Entry and Invoice.—Entry should be made by the original consignee or the indorsee of the bill of lading.[1] A sub-purchaser, after importation, cannot make entry.[2] In the absence of fraud

Fairbanks *v.* Spaulding, 19 Fed. Rep. 416. Stockings: Vietor *v.* Arthur, 104 U. S. 498; 19 Fed. Rep. 250; Arthur *v.* Vietor, 127 U. S. 572. Sugar: Merritt *v.* Welsh, 104 U. S. 694; Cox *v.* Pennington, 1 Wash. (U. S.) 65; 2 Cranch (U. S.) 33; U. S. *v.* Pennington, Pet. (C. C.) 113; U. S. *v.* Breed, 1 Sumn. (U. S.) 159. Sulphate of potash: Schultz *v.* Cadwalader, 43 Fed. Rep. 290; Heller *v.* Magone, 38 Fed. Rep. 908. Swedish iron rail rods: Abbott Worthington, 20 Fed. Rep. 495; Worthington *v.* Abbott, 124 U. S. 434.

Taffeta gloves: Wilson *v.* Spalding, 19 Fed. Rep. 413. Taggers' tin: Arthur *v.* Dodge, 101 U. S. 34. Tartar: Ross *v.* Peaslee, 2 Curt. (U. S.) 499. Tea: Smith *v.* Draper, 5 Blatchf. (U. S.) 238; Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430. Telegraph cable: U. S. *v.* U. S. Tel. Co., 2 Ben. (U. S.) 362. Telescopes: Robertson *v.* Oelschlaeger, 137 U. S. 436. Terne plates: Arthur *v.* Dodge, 101 U. S. 34. Terne tin: Bruce *v.* Murphy, 10 Blatchf. (U. S.) 229. Thermometers: Robertson *v.* Oelschlaeger, 137 U. S. 436. Thread lace: Lottimer *v.* Lawrence, 1 Blatchf. (U. S.) 613; Steegman *v.* Maxwell, 3 Blatchf. (U. S.) 365. Thibet cloth: Sullivan *v.* Robertson, 37 Fed. Rep. 778. Tiger-eye penholders: Hahn *v.* Erhardt, 46 Fed. Rep. 519. Tiles: Rossman *v.* Hedden, 37 Fed. Rep. 99; Morris *v.* Seeberger, 40 Fed. Rep. 58. Tin in plates: Arthur *v.* Dodge, 101 U. S. 34. Tin plates: May *v.* Simmons, 4 Fed. Rep. 499. Tissue paper: Lawrence *v.* Merritt, 127 U. S. 113. Tobacco: Castro *v.* Seeberger, 40 Fed. Rep. 531; Cohn *v.* Spalding, 24 Fed. Rep. 19; D'Estrinoz *v.* Gerker, 43 Fed. Rep. 285; Falk *v.* Robertson, 137 U. S. 225; 25 Fed. Rep. 897; Venable *v.* Richards, 105 U. S. 636. Tomatoes: Nix *v.* Hedden, 39 Fed. Rep. 109. Torchon laces: Smith *v.* Field, 105 U. S. 52. Track tools: Procter *v.* Spalding, 26 Fed. Rep. 610. Trimmings for hats: Marsh *v.* Seeberger, 30 Fed. Rep. 422; Robertson *v.* Edelhoff, 132 U. S. 614. Tumblers: Binns *v.* Lawrence, 12 How. (U. S.) 9. Twine: Leeson *v.* Young, 45 Fed. Rep. 627. Twisted straw: Rheimer *v.* Maxwell, 3 Blatchf. (U. S.) 124.

Underclothes: *In re* Arnold, 46 Fed. Rep. 510. Urinometer: Robertson *v.* Oelschlaeger, 137 U. S. 436.

Vases: U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. Rep. 508; 21 Blatchf. (U. S.) 511. Veils: Arthur *v.* Morrison, 96 U. S. 108; Morrison *v.* Arthur, 13 Blatchf. (U. S.) 194. Velours: Arthur *v.* Fox, 108 U. S. 125. Velvet paper: Dejonge *v.* Magone, 41 Fed. Rep. 432. Velvet ribbons: Hartranft *v.* Langfeld, 125 U. S. 128. Vermilion: Boving *v.* Lawrence, 1 Blatchf. (U. S.) 607.

Watch enamel: Elgin Watch Co. *v.* Spalding, 19 Fed. Rep. 411. Watch materials: Worthington *v.* Robbins, 139 U. S. 337. Wearing apparel: Astor *v.* Merritt, 111 U. S. 202. Webbing: Beard *v.* Nichols, 120 U. S. 260; 7 Fed. Rep. 579. White lead: Meyer *v.* Arthur, 91 U. S. 570. Wine: Cavaroc *v.* The Collector, 1 Woods (U. S.) 172; De Bary *v.* Arthur, 93 U. S. 420; Bensusan *v.* Murphy, 10 Blatchf. (U. S.) 530. Wool: Arthur *v.* Pastor, 109 U. S. 139; U. S. *v.* Midgley, 42 Fed. Rep. 668. Woolen dress goods: Farwell *v.* Seeberger, 40 Fed. Rep. 529; Seeberger *v.* Farwell, 139 U. S. 608. Woolen goods: Myer *v.* Hartranft, 28 Fed. Rep. 359. Woolen underwear: *In re* Arnold, 46 Fed. Rep. 510. Wool scoured: U. S. *v.* Patton, 46 Fed. Rep. 461. Wool tops: Juillard *v.* Magone, 37 Fed. Rep. 857; U. S. *v.* Patton, 46 Fed. Rep. 461. Wool waste: U. S. *v.* Patton, 46 Fed. Rep. 461. Worsted bindings: Whiting *v.* Bancroft, 1 Story (U. S.) 560. Worsted carpet bindings: Chester *v.* Curtis, 1 Blatchf. (U. S.) 499. Worsted coatings: Bernheimer *v.* Robertson, 39 Fed. Rep. 190. Worsteds: Seeberger *v.* Cahn, 137 U. S. 95; 30 Fed. Rep. 425. Worsted yarns: Ballin *v.* Magone, 41 Fed. Rep. 921. Wrecked goods: Cargo from wreck of Bark Edwards, 12 Fed. Rep. 508.

Yarn: Stephenson *v.* Cooper, 44 Fed. Rep. 53.

1. Harris *v.* Dennie, 3 Pet. (U. S.) 292; Conard *v.* Pacific Ins. Co. of N. Y., 6 Pet. (U. S.) 262; U. S. *v.* Aborn, 3 Mason (U. S.) 126; Knox *v.* Devins, 5 Mason (U. S.) 380; Childs *v.* Shoemaker, 1 Wash. (U. S.) 494; Elmes on Customs, § 432.

2. U. S. *v.* Lyman, 1 Mason (U. S.) 482.

or protest the original entry is conclusive on all parties after the expiration of one year.[1]

The collector may refuse to receive an amendment of an entry made in order to avoid a penalty.[2]

The entry should be accompanied by an invoice verified by oath, when the goods exceed one hundred dollars in value.[3]

Where, for want of the original invoice, goods are entered without specification of particulars, they must be stored by the collector until their value has been ascertained.[4]

The invoice should be made out in the currency of the country of exportation.[5]

But the executor of a deceased importer may. U. S. *v.* Aborn, 3 Mason (U. S.) 126.

1. U. S. *v.* Seidenberg, 17 Fed. Rep. 230.

A picture which was free of duty was brought into the United States without entry; and it was held that all questions as to the entry were barred after one year. U. S. *v.* One Oil Painting, 31 Fed. Rep. 881.

The year begins to run from the date of the original entry. U. S. *v.* Seidenberg, 17 Fed. Rep. 227; U. S. *v.* Frazer, 10 Ben. (U. S.) 347.

2. Harriman *v.* Maxwell, 3 Blatchf. (U. S.) 421.

3. 26 U. S. St. at Large 131, § 4.

But this does not apply to free goods. Siegfried *v.* Phelps, 40 Fed. Rep. 660; nor to a passenger's personal effects. 26 U. S. St. at Large 131, § 4. The Secretary of the Treasury, under the power given him to prescribe rules and regulations for the enforcement of the revenue laws, cannot restrict the method of proving the character of imported goods to one particular kind of certificate, since such a regulation is not reasonable. Pascal *v.* Sullivan, 21 Fed. Rep. 496; 10 Sawy. (U. S.) 284. Duplicates of the invoice produced by the consignee at the time of entry are not other invoices within the meaning of the statute, requiring the person making entry to swear that he does not know of any other invoice than that then produced by him. U. S. *v.* Harrison, 32 Fed. Rep. 386.

In Sinn *v.* U. S., 14 Blatchf. (U. S.) 550, it appeared that the plaintiff, through his agent, bought unfinished goods in *England* and had them dyed there by one man and made up by another. The goods were then consigned by the agent to the plaintiff, and invoiced at a price equal to the cost of purchase, dyeing and making up, with the agent's commission added; and the court held that the invoice and oath ought to have been such as the statute requires from a manufacturer.

Where imported goods are the property of the manufacturer, the invoice need only state their fair market value at the place of manufacture. U. S. *v.* Auffmordt, 122 U. S. 197.

Under the tariff law of 1799, a manufacturer living in an inland town of a foreign country might invoice articles manufactured by him, at the actual cost of the raw material plus the value of the labor employed in manufacturing the articles and the cost of transporting them to the port of exportation. Ninety-Five Bales of Paper *v.* U. S., 1 Paine (U. S.) 149.

If an entry does not contain part of the goods consigned by the same invoice and bill of lading, it is *prima facie* evidence that the duties have not been paid. U. S. *v.* Certain Hogsheads of Molasses, 1 Curt. (U. S.) 276.

The invoice is *prima facie* evidence of the value of the goods. Graham *v.* Pennsylvania Ins. Co., 2 Wash. (U. S.) 113. When in possession of the consignee, it is also *prima facie* evidence of the receipt of the goods. Field *v.* Moulson, 2 Wash. (U. S.) 155.

Where gauging is rendered necessary by the failure of the importer to state the quantity correctly, the importer is liable for the expense of the gauging. Casado *v.* Schell, 33 Fed. Rep. 332.

4. U. S. Rev. St., § 2926. And in such case charges for cartage from the warehouse to the appraiser's stores and for storage and labor at such stores may be exacted by the government. Kennedy *v.* Magone, 41 Fed. Rep. 768; Hempstead *v.* Cadwalader, 42 Fed. Rep. 529.

5. 26 U. S. St. at Large 131, § 2; De Forest *v.* Redfield, 4 Blatchf. (U. S.) 478.

6. Appraisal. — It is the duty of the collector to cause all merchandise imported within his district to be appraised.[1]

The appraisers should personally examine and inspect the merchandise;[2] and an appraisal made without such personal examination is invalid.[3]

The appraisers may, in their discretion, refuse to postpone a hearing after notice of the hearing has been given,[4] and they need not act in the presence of the importer.[5] An appraisement made by only part of the appraisers is good where no objection is made on that account.[6]

The importer is not estopped from asserting that the goods are worth less than the values entered on the invoice.[7]

Where there is no charge of fraud, the appraisers cannot compel the importer to disclose the meaning of the cipher in which the values are stated in the invoice.[8]

Under a statute authorizing the Secretary of the Treasury to classify all worsted cloth as woolen cloth, the appraisers have no power to make such classification.[9]

1. 26 U. S. St. at Large 134, § 7. Under the act of 1818, the collector had no right to direct an appraisement unless he suspected the goods to be invoiced below their actual cost. U. S. *v.* Tappin, 11 Wheat. (U. S.) 419.

Under the act of 1832, the collector had power to direct wool to be appraised in order to ascertain whether it was dutiable. Rankin *v.* Hoyt, 4 How. (U. S.) 327.

2. Gibb *v.* Washington, 1 McAll. (U. S.) 430. An examination such as is usually made by merchants when purchasing the article is sufficient. Sampson *v.* Peaslee, 20 How. (U. S.) 571. Under a statute allowing sugar to be examined by samples, the fact that the appraisers did not see the original packages from which the samples were taken does not, in the absence of timely objection by the importer, invalidate the appraisement. Yzuaga *v.* Peaslee, 1 Cliff. (U. S.) 493; though if such examination by sample is not substantially equivalent to an examination of one package in ten of the importation, it is invalid. Converse *v.* Burgess, 18 How. (U. S.) 413.

3. Oelbermann *v.* Merritt, 123 U. S. 356; Greely *v.* Thompson, 10 How. (U. S.) 225; Ystalifera Iron Co. *v.* Redfield, 23 Fed. Rep. 650; U. S. *v.* Thurber, 28 Fed. Rep. 56. The report of an appraiser who never saw the goods is not sufficient to justify a reliquidation of the duties. U. S. *v.* Frazer, 10 Ben. (U. S.) 347.

4. U. S. *v.* Earnshaw, 30 Fed. Rep. 672.

5. Bangs *v.* Maxwell, 3 Blatchf. (U. S.) 135.

Under the act of 1842, the appraisal had to be made at the custom-house. Howland *v.* Maxwell, 3 Blatchf. (U. S.) 146.

6. McCall *v.* Lawrence, 3 Blatchf. (U. S.) 360.

7. Yanada *v.* Spalding, 24 Fed. Rep. 21. And the importer may demand an appraisement even after the goods have been entered at their full invoice value and the duties as estimated on such valuation have been paid. U. S. *v.* Phelps, 107 U. S. 320. Where the consignee is told by the customs officers that he must enter the goods at their invoice value, he is not bound to ask for an appraisement. Robertson *v.* Bradbury, 132 U. S. 491.

Where the invoice states the gross value of the goods and makes a deduction for specific packing charges, an appraisement which merely disallows such charges or adds them to the net value to make dutiable value does not justify the collector in exacting duty on the value as increased by such charges. Morris *v.* Cadwalader, 33 Fed. Rep. 243.

8. U. S. *v.* Doherty, 27 Fed. Rep. 730.

9. *In re* Ballin, 45 Fed. Rep. 170; 26 U. S. St. at Large 105, ch. 200.

After the goods have been appraised the collector may, if dissatisfied with the result, order a reappraisement; and the importer, if dissatisfied, may notify the collector, who will in such case order a reappraisement.[1]

Formerly an appeal might be taken from the appraiser's decision to the merchant appraisers; but under the act of 1890 the appeal is to be taken to the board of general appraisers, whose decision as to the value of the goods is final.[2]

In the absence of an appeal, the appraisement itself is conclusive evidence that the goods were appraised as of their actual market value.[3]

In making the appraisement the appraisers should value the goods at their actual market value and wholesale price at the time of exportation to the United States in the principal markets of the country whence they have been exported;[4] and any

1. 26 U. S. St. at Large 136, § 13. The fact that the goods have been delivered to the consignee with a memorandum on the invoice that the entry is right, does not deprive the collector of his right to order a reappraisement. Iasigi *v.* The Collector, 1 Wall. (U. S.) 375.

The right to a reappraisement applies equally to goods imported by the manufacturer and those imported by a purchaser. Bannendahl *v.* Redfield, 4 Blatchf. (U. S.) 223.

If the collector refuse to order a reappraisement, the only remedy of the importer is an action on the case for breach of duty. Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408.

2. 26 U. S. St. at Large 136, § 13; Hilton *v.* Merritt, 110 U. S. 97; Belcher *v.* Linn, 24 How. (U. S.) 508; Tappan *v.* U. S., 2 Mason (U. S.) 393. But the appraiser's decision as to the amount to be added to the market value of the goods for cost of transportation, etc., is not conclusive. Robertson *v.* Frank Bros. Co., 132 U. S. 17.

And where the appraisement is not made in the manner required by law, the decision is not conclusive. Oelbermann *v.* Merritt, 123 U. S. 356; Mustin *v.* Cadwalader, 123 U. S. 369.

Under the former practice it was held that a re-appraisement might be made without a re-examination of the goods themselves. U. S. *v.* McDowell, 21 Fed. Rep. 563. And that the Treasury Department might provide, by general regulations, that a reappraisement should not assume the nature of a judicial inquiry. Auffmordt *v.* Hedden, 137 U. S. 310, and that the importer could not be compelled to pay for a reappraisement by a merchant appraiser. Iselin *v.* Hedden, 28 Fed. Rep. 416; Hedden *v.* Iselin, 31 Fed. Rep. 266; Auffmordt *v.* Hedden, 30 Fed. Rep. 360.

3. Iasigi *v.* The Collector, 1 Wall. (U. S.) 375.

4. 26 U. S. St. at Large 136, § 10; U. S. *v.* Gabriel, 36 Fed. Rep. 888. And this is the rule even for goods manufactured abroad for the importer, where like goods can be purchased by any one at the place of manufacture. Muser *v.* Magone, 41 Fed. Rep. 877.

Under former statutes it was held that where imported goods had been purchased in a foreign country, their true valuation was the actual cost at which they were purchased. U. S. *v.* Twelve Casks, Gilp. (U. S.) 510; Tappan *v.* U. S., 2 Mason (U. S.) 393; U. S. *v.* May, 3 Mason (U. S.) 98; Three Thousand one Hundred and Nine Cases of Champagne, 1 Ben. (U. S.) 241. But an accepted order for goods to be manufactured did not constitute such a purchase as would determine the dutiable value. Pierson *v.* Lawrence, 2 Blatchf. (U. S.) 495; Pierson *v.* Maxwell, 2 Blatchf. (U. S.) 507; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508; Wilson *v.* Lawrence, 2 Blatchf. (U. S.) 514.

The expense of changing goods from one condition to another, constitutes part of their dutiable value. Bullock *v.* Magone, 39 Fed. Rep. 191. Thus where wool is baled before it is purchased in the foreign market, the cost of baling is to be included in its actual market value. Harding *v.* Whitney, 4 Cliff. (U. S.) 96.

discount from the market value that may be made to purchasers should not be taken into account in estimating duties.[1]

The cost of transporting imported goods to the port of shipment from another country is not to be included in estimating their dutiable value.[2] Where goods are invoiced in a foreign currency the value of the foreign coins, as ascertained by the Director of the Mint and determined by act of Congress, is conclusive,[3] and this value is to be fixed by the act in force at the time of entry and not at the time of purchase.[4] But where the invoice sets forth the purchase price in a depreciated paper currency, allowance should be made for the depreciation.[5]

Where machinery, subject to letters patent both in Great Britain and the United States, has been manufactured in England and there sold to the importer, the royalty which is paid for its use by the purchaser in this country, and which formed no part of the price in England, does not constitute part of its dutiable value. U. S. *v.* Leigh, 39 Fed. Rep. 764.

Under the act of 1823, the proper time for fixing the value of imported goods was not the time of their shipment, but of their purchase in the foreign country. Greely *v.* Thompson, 10 How. (U. S.) 225; Maxwell *v.* Griswold, 10 How. (U. S.) 242.

Under the act of 1842, sugar transported from Cuba to Halifax, and thence imported into the United States, was dutiable on its market value in Cuba at the time when it was shipped from Halifax. Barnard *v.* Morton, 1 Sprague (U. S.) 186. And iron produced and purchased in Wales, but shipped to the United States from Liverpool, was dutiable at its value in the Liverpool market. Goddard *v.* Maxwell, 3 Blatchf. (U. S.) 131. But under the act of 1851, an article imported from Halifax was dutiable according to its value in the principal markets of the British Dominions. Stairs *v.* Peaslee, 18 How. (U. S.) 521. And under the act of 1863, it was held that the "actual market value at the time and place where the goods were procured or manufactured," did not mean any locality more limited than the entire country in which the goods were bought or made. Cliquot's Champagne, 3 Wall. (U. S.) 114.

1. Ballard *v.* Thomas, 19 How. (U. S.) 382; Riess *v.* Redfield, 4 Blatchf. (U. S.) 381. But where goods are invoiced at more than their true market value and then reduced to such value by means of a discount, the invoice price, less the discount, is the value on which the duties should be estimated. Gray *v.* Lawrence, 3 Blatchf. (U. S.) 117.

2. Robertson *v.* Downing, 127 U. S. 607; Barnard *v.* Morton, 1 Sprague (U. S.) 186; Gant *v.* Peaslee, 2 Curt. (U. S.) 250; Grinnell *v.* Lawrence, 1 Blatchf. (U. S.) 346; Wilbur *v.* Lawrence, 2 Blatchf. (U. S.) 314.

But the cost of transporting goods from the place of production to the port of shipment where both are in the same country, should be added to the invoice price in determining the dutiable value. Robertson *v.* Downing, 127 U. S. 607.

3. Hadden *v.* Merritt, 115 U. S. 25; Meyer *v.* Cooper, 44 Fed. Rep. 55; Gordon *v.* Magone, 40 Fed. Rep. 747. Where the invoice states the value of the goods in two different kinds of currency, duties should be estimated according to the currency whose value has been declared by the Director of the Mint. *In re* McCarty, 46 Fed. Rep. 360.

4. Heinemann *v.* Arthur, 120 U. S. 82.

Where the law is changed after the importation of the goods but before their entry, the valuation of the goods is governed by the law as so changed. Heinemann *v.* Rollins, 120 U. S. 82.

5. Grant *v.* Maxwell, 2 Blatchf. (U. S.) 220; Loewenstein *v.* Maxwell, 2 Blatchf. (U. S.) 401; Dutilh *v.* Maxwell, 2 Blatchf. (U. S.) 541.

Under a statutory provision authorizing the President to make fit and proper regulations for estimating the duties on imported goods whose cost is stated in a depreciated foreign currency, the President cannot arbitrarily fix a value on such currency regardless of its intrinsic value. De-

The coverings in which goods are imported are to be included in the dutiable value of the goods. Unusual coverings designed for use otherwise than in a *bona fide* transportation to the United States are dutiable separately from the goods.[1]

7. Lien.—The government has a lien on imported goods for the duty for which they are liable; but this lien does not extend to other property of the importer.[2] This lien is inferior to that of salvors.[3] It attaches to imported articles at the moment of importation.[4]

8. Drawback.—When imported merchandise is, within three years of the time of the entry, exported directly from the custody of the customs officers, the importer is entitled to a return of the duty paid by him.[5] But this does not apply to additional duties, levied on imported goods as a penalty for violation of the revenue laws.[6]

III. INTERNAL REVENUE—1. License Fees and Taxes—*a.* WHAT SUBJECT TO.—Under the statutory provision,[7] that every proprietor of any still shall be liable for taxes on the distilled spirits produced therefrom, the word "proprietor" is used in the

Forest *v.* Redfield, 4 Blatchf. (U. S.) 478.

A consular certificate attached to the invoice, stating the value of the currency in which the invoice is made out is conclusive evidence of such value. Cramer *v.* Arthur, 102 U. S. 612; and where no such certificate is attached, the depreciation of the currency cannot be shown by parol evidence. Dutilh *v.* Maxwell, 2 Blatchf. (U. S.) 541; Alsop *v.* Maxwell, 2 Blatchf. (U. S.) 557.

1. 26 St. at Large 139, § 19; Elmes on Customs, §§ 504–507.

Under the act of 1883 the coverings intended merely for use in transportation were not to be considered in ascertaining the dutiable value of the goods. Oberteuffer *v.* Robertson, 116 U. S. 499; Tryon *v.* Hartranft, 31 Fed. Rep. 443.

Glass bottles containing natural mineral water are dutiable, although the water itself is free. Merritt *v.* Stephani, 108 U. S. 106; Merritt *v.* Park, 108 U. S. 109; Schmidt *v.* Badger, 107 U. S. 85.

Bags in which salt is packed are to be included in estimating the value of the salt. Barnard *v.* Morton, 1 Curt. (U. S.) 404.

2. Harris *v.* Dennie, 3 Pet. (U. S.) 292. The existence of this lien does not relieve the importer from personal liability for the duties. Meredith *v.* U. S., 13 Pet. (U. S.) 486. This lien cannot be enforced by libel in admiralty. U. S. *v.* Three Hundred and Fifty Chests of Tea, 12 Wheat. (U. S.) 487. The lien does not prevent the consignee from passing title to the goods subject to the lien. Howland *v.* Harris, 4 Mason (U. S.) 497; D'Wolf *v.* Harris, 4 Mason (U. S.) 515.

3. Merritt *v.* One Package of Merchandise, 30 Fed. Rep. 195; 32 Fed. Rep. 111.

4. U. S. *v.* Three Hundred and Fifty Chests of Tea, 12 Wheat. (U. S.) 486.

5. U. S. Rev. St., §§ 2977, 2978, 3015.

If payment of the drawback is refused, the importer may maintain an action therefor against the government in the court of claims. Campbell *v.* U. S., 107 U. S. 407.

The power of the Secretary of the Treasury to prescribe regulations as to the return free of duty of grain bags that have been exported filled with American grain, does not authorize him to impose a duty thereon in repayment of a drawback. Balfour *v.* Sullivan, 19 Fed. Rep. 578.

Where goods are entered for drawback in the name of the exporter's agents and the debentures therefor are issued to them, the exporter has a right of action against the agents for the drawback received by them. Lake *v.* Devoe Mfg. Co., 7 Daly (N. Y.) 161.

6. Bartlett *v.* Kane, 16 How. (U. S.) 263.

7. U. S. Rev. St., § 3251.

sense of an owner or one who, whether in possession or not, has exclusive control over the premises.[1] Thus, where the property is leased, the lessee, not the lessor, is the proprietor.[2] And the stockholders of a corporation engaged in operating a distillery are "persons interested" within the meaning of this statute.[3]

An organization of retail liquor dealers, which purchases beer at less than usual retail rates, is liable to tax as a wholesale liquor dealer.[4]

If a city distills and sells spirits, whether under authority of its charter or not, it must pay the internal revenue tax.[5]

One who buys beer by the case and sells it to the public without having special orders and buying specific quantities to fill the respective orders, is a liquor dealer liable to a special tax.[6]

The act of 1864 imposing a tax on all spirits imported prior to the passage of the act applies to goods in bonded warehouse as well as elsewhere.[7]

When distilled spirits are destroyed by accidental fire or other casualty while in the custody of the revenue officers, the unpaid taxes thereon may be canceled by the Secretary of the Treasury.[8]

b. HOW ESTIMATED.—The measure of taxation is the producing capacity of a distillery and not the amount of spirits actually produced.[9]

1. U. S. *v.* Van Slyke, 8 Biss. (U. S.) 227.

2. U. S. *v.* Van Slyke, 8 Biss. (U. S.) 227.

3. U. S. *v.* Wolters, 46 Fed. Rep. 509. But knowledge on the part of the lessor of premises that illicit spirits are being distilled thereon does not render him liable for the tax. U. S. *v.* Van Slyke, 8 Biss. (U. S.) 227. And a person who owns a still and keeps mash, wort or wash intended for the manufacture of vinegar and which could not yield spirits when distilled, is not a distiller. U. S. *v.* Frerichs, 16 Blatchf. (U. S.) 547.

In Philadelphia *v.* The Collector, 5 Wall. (U. S.) 720, the facts were as follows: The city of Philadelphia appointed trustees to manufacture gas for it under arrangements with the creditors of the city that the city should not take the ultimate ownership of the property where the gas was manufactured until the debts created by raising the funds required to start and successfully conduct the establishment so used should be paid. It was further agreed with said creditors that the city should have the gas at a certain reduced rate, and that the said trustees should manage the business and set aside all profits as a sinking fund to pay said debts. The court held that the gas furnished the city under said agreement was sold to it and was therefore taxable under the acts of 1862 and 1863 taxing illuminating gas if "made and sold," but exempting it if made for the manufacturer's own use.

4. U. S. *v.* Kallstrom, 30 Fed. Rep. 184.

In United States *v.* Durham, 33 Fed. Rep. 834, it was held that liquor dealers who have paid the special retail tax at the distillery may receive and fill orders and send the liquor to persons residing at a distance, but they may not make sales in small quantities from barrels to persons along the road.

5. Salt Lake City *v.* Hollister, 3 Utah 200.

6. U. S. *v.* Allen, 38 Fed. Rep. 736.

7. Westfall *v.* Shook, 5 Blatchf. (U. S.) 383.

8. U. S. Rev. St., § 3221.

But this does not apply to the case of spirits lost through the warping of barrels caused by unusual or excessive summer heat, or through abnormal evaporation caused by such heat, or through undiscovered wormholes in the barrels. Crystal Springs Distillery Co. *v.* Cox, 47 Fed. Rep. 693.

9. U. S. Rev. St., § 3309. U. S. *v.* Halloran, 14 Blatchf. (U. S.) 1.

The tax attaches as soon as the spirits come into existence.[1] When two liquor assessments cover practically the same period they will be presumed to be for different liquors.[2]

c. CONSTRUCTION OF LICENSE LAWS.—The lien of the government on distillery property for internal revenue taxes can be enforced only by a suit in equity.[3]

A penalty imposed on the owner of liquor in a bonded warehouse for failure to pay the internal revenue tax within three years is a lien on all the property of the delinquent, and is not discharged by the exportation of the liquor.[4]

Where a firm of brewers pays the special tax for one year, and

Thus, a distiller is bound to pay taxes on eighty per cent. of the producing capacity of his distillery, even though he do not produce that much. U. S. *v.* Nissley, 1 Dillon (U. S.) 586: U. S. *v.* Ferrary, 93 U. S. 625; Stoll *v.* Pepper, 97 U. S. 438. But if the spirits produced exceed eighty per cent. of the capacity of the distillery, the distiller is also liable for taxes on the excess. U. S. *v.* Singer, 15 Wall. (U. S.) 111.

In Weitzel *v.* Rabe, 103 U. S. 340, the facts were as follows: The owner of a distillery which had a capacity of 416 bushels of grain every twenty-four hours, and which was in full operation, made application to have the capacity reduced to 207 bushels by closing six tubs. According to local custom, the tubs were closed at the rate of two a day, beginning May 2, 1876. On May 2 and May 3 he mashed only 207 bushels, but on each of those days he distilled spirits from 415 bushels of grain which had been mashed previously. Thereafter he used only 207 bushels daily. The court held that the capacity of the distillery was not reduced to 207 bushels until May 4th, and that the distiller was not subject to taxation as for material used by him in excess of the producing capacity of his distillery on May 2d and 3d for the spirits distilled from the 415 bushels of grain used on each of said days.

The penalty provided for in U. S. Rev. St., § 3309, is not to be assessed against an apparent excess above the daily average in one month which is balanced by a corresponding deficiency in the next month. Chicago Distilling Co. *v.* Stone, 140 U. S. 647.

1. U. S. Rev. St., § 3248. In Clay *v.* Swope, 38 Fed. Rep. 396, it appeared that the plaintiffs had deposited distilled spirits in their bonded warehouse in December, 1880, and had given the required bond to pay the tax within three years from entry. On Feb. 24, 1884, the tax remaining unpaid, the collector gave them notice that unless the tax was paid within ten days it would be his duty to collect a penalty of five per cent. in addition. The court held that the tax and penalty were due and payable before March 3, 1884.

2. U. S. *v.* O'Neill, 19 Fed. Rep. 567.

3. Mansfield *v.* Excelsior Refinery Co., 135 U. S. 326.

U. S. Rev. St., § 3262, provides that where a distiller does not own the land on which his distillery is situated, he must file with the collector the written consent of the owner of the fee, or of any mortgagee, judgment creditor, or other person having a lien thereon, that the premises may be used for such purpose, and stipulating that the lien of the United States for taxes shall take precedence of such mortgage and other liens. In the case of Mansfield *v.* Excelsior Refinery Co., 135 U. S. 326, the court held that the consent provided for passed no interest in the land to the distiller, but merely gave the United States a first lien thereon.

4. Clay *v.* Swope, 38 Fed. Rep. 396.

In Hartman *v.* Bean, 99 U. S. 393, it appeared that A had, on May 8, 1875, bought from B certain high wines which the latter had produced, and removed to the bonded warehouse without having paid the tax. While the wines were in the warehouse, the commissioner of internal revenue assessed a tax on the number of proof gallons of spirits distilled by B at his distillery between Jan. 6, 1875, and Mar. 8, 1875. The court held that the wines purchased by A were subject to the lien of the tax.

the firm is dissolved during the year, the partner who retains the business may carry it on for the rest of the year without paying any additional tax.[1]

The commissioner of internal revenue may require rectifiers to file with the collector statements describing all casks and packages that they propose to empty in order to rectify the liquor in them.[2]

A distiller who indorses on the report that the collector's survey of his distillery is accepted as binding, thereby waives his right to demand a copy of the survey.[3]

A United States liquor license gives the licensee no authority to carry on the licensed business in a State where such business is prohibited by the State laws.[4]

The act of Congress authorizing railroad companies to add the revenue tax to their fares, applied also to street railroads.[5]

d. REMEDIAL RIGHTS.—It is an imperative prerequisite to an action for the refunding of internal revenue taxes which have been erroneously assessed, that a claim should be filed therefor within two years; a mere protest on a return for taxation is not sufficient.[6]

An injunction to restrain the collection of an assessment will not be granted upon allegations that the assessment is irregular, in violation of law, and void.[7]

2. Stamps—*a.* LIABILITY.—The act of 1864, imposing a stamp duty on "writs or other processes on appeal from justices' courts or other courts of record of inferior jurisdiction to a court of record," comprehended any instrument or paper which in effect transferred a cause from a lower court to a court of record.[8] But it has been held by several State courts that Congress has no

1. U. S. *v.* Glab, 99 U. S. 225. See also Spielman *v.* State, 27 Md. 520.

2. Thatcher *v.* U. S., 103 U. S. 679. In order to constitute a lawful removal of distilled spirits from a distiller's bonded warehouse under the act of 1866; it is necessary that the casks should be inspected, gauged, and marked, and a transportation bond or other security duly executed. U. S. *v.* 508 Barrels of Distilled Spirits, 5 Blatchf. (U. S.) 407.

3. Wright *v.* U. S., 108 U. S. 281.

4. License Tax Cases, 5 Wall. (U. S.) 462; Pervear *v.* Com., 5 Wall. (U. S.) 475.

5. Moneypenny *v.* Sixth Ave. R. Co., 4 Abb. Pr., N. S. (N. Y.) 357. But in Black *v.* Sixth Ave. R. Co., 1 Daly (N. Y.) 536, it was held that if the rate of fare to which a company is limited by law was so small that the proportionate amount of the tax was but an insignificant fraction of a cent, the railroad company was not entitled to add anything to the fare on account of the tax.

6. U. S. Rev. St., § 3228; Kings Co. Sav. Institution *v.* Blair, 116 U. S. 200; Stuart *v.* Barnes, 43 Fed. Rep. 281. Since the collector may reckon each fraction of a gallon left in a package after the whole number of gallons therein have been counted as a whole gallon, the distiller cannot recover the amount of the taxes collected on such extra gallons. Stuart *v.* Barnes, 43 Fed. Rep. 281. A claimant is not entitled to interest on taxes illegally exacted unless it be specially allowed in the award. Stuart *v.* Barnes, 43 Fed. Rep. 281.

7. Alkan *v.* Bean, 8 Biss. (U. S.) 83.

8. Mussellman *v.* Mank, 18 Iowa 239. It includes a summons issued by a justice of the peace when the amount claimed exceeds $100. Cole *v.* Bell, 48 Barb. (N. Y.) 194.

power to require a revenue stamp to be affixed to process of State courts,[1] or to tax deeds, unless the State consents thereto.[2] A list of the instruments that have been held not to require stamps will be found in the notes.[3]

The act of 1868, in regard to sales in bonded warehouse, does not render a dealer in tobacco liable for stamps on sales in a bonded warehouse, unless the stamps were affixed at the time of the sales, and thereby entered into the value of the tobacco and formed a part of its price.[4] And a statute[5] requiring cigars manufactured and sold, or removed for consumption and use, to be stamped, does not apply to a pledge of unstamped cigars.[6]

b. CONSTRUCTION OF STAMP LAWS.—The person executing

1. Smith *v.* Short, 40 Ala. 385; Warren *v.* Paul, 22 Ind. 276; Fifield *v.* Close, 15 Mich. 505; Walton *v.* Bryenth, 24 How. Pr. (N.Y.) 351; Jones *v.* Keep, 19 Wis. 369; *contra*, German Liederkranz *v.* Schiemann, 25 How. Pr. (N. Y.) 388.

2. Sayles *v.* Davis, 22 Wis. 225.

3. A writ of *certiorari:* Pierce *v.* Hudleston, 10 Minn. 131. A writ issued by a justice of the peace, although returnable to the superior court: Greene *v.* New London, etc., Soc., 32 Conn. 95. A writ of *scire facias:* Smyth *v.* Ripley, 32 Conn. 156. A writ of error: Hinchman *v.* Rutan, 31 N. J. L. 496. A petition to set aside the probate of a will: Sowell *v.* Sowell, 40 Ala. 243. An affidavit made in the progress of a cause: Reed *v.* Curry, 35 Ill. 536. A bond on appeal from a justice of the peace: Brayton *v.* Delaware Co., 16 Iowa 44; Depuy *v.* Schuyler, 45 Ill. 306; Smith *v.* Waters, 25 Ind. 397; Violet *v.* Heath, 26 Ind. 178; Anderson *v.* Cable, 26 Ind. 329; Topf *v.* King, 26 Ind. 391. A waiver of protest and notice of dishonor written by the indorser on the back of a promissory note: Guyther *v.* Bourg, 20 La. Ann. 157. A certified copy of the record of a justice of the peace, sent to a superior court on appeal: Norris *v.* Hannibal, etc., R. Co., 37 Mo. 286; Com. *v.* Hardiman, 9 Allen (Mass.) 487. Bond to dissolve an attachment: Sampson *v.* Barnard, 98 Mass. 359; Bowers *v.* Beck, 2 Nev. 139. Notice of appeal in proceeding by an elector to contest an election under a State statute: State *v.* Taylor, 15 Ohio St. 137. An insolvent's bond: McGovern *v.* Hoseback, 53 Pa. St. 176. An *alias* summons: Gorman *v.* Steed, 1 W. Va. 1. Process against a garnishee in aid of a suit at law: Bear *v.* Hays, 36 Ill. 280. The certificate of the officer taking a deposition: Cardell *v.* Bridge, 9 Allen (Mass.) 355; Prather *v.* Pritchard, 26 Ind. 65. The certificate of the justice to a transcript required by statute: Toledo, etc., R. Co. *v.* Nordyke, 27 Ind. 95. Papers used in proceedings for surety of the peace under the statute: Deloohery *v.* State, 27 Ind. 521. A submission to arbitration, or an award: Celley *v.* Gray, 37 Vt. 136; McKnight *v.* McCullouch, 21 Iowa 111; Lovell *v.* Wheaton, 11 Minn. 92. A mortgage made to secure the indorser of a draft drawn for the benefit of the mortgagor, and payable subsequently to the mortgagee: Vail *v.* Knepp, 49 Barb. (N. Y.) 299. The certificate of a magistrate attached to an order for the removal of a pauper: East Haven *v.* Derby, 38 Vt. 253. A mere declaration in writing that the person making it holds certain land conveyed to him in trust for another: Sime *v.* Howard, 4 Nev. 473. A letter containing an offer which is verbally accepted: Crocker *v.* Foley, 13 Allen (Mass.) 379. A letter not containing evidence of a debt, but merely expressing the intention of the writer: Boyd *v.* Hood, 57 Pa. St. 98. A receipt by an express company: Belger *v.* Dinsmore, 51 Barb. (N. Y.) 69; De Barre *v.* Livingston, 48 Barb. (N. Y.) 511.

4. Jones *v.* Van Benthuysen, 115 U. S. 464.

5. U. S. Rev. St., §§ 3387, 3486.

6. Combs *v.* Tuchel, 24 Minn. 423. A mixture of smoking tobacco consisting of leaves from which the stems have been removed, and of stems so prepared that they cannot be distinguished from the leaf, is taxable as smoking tobacco stemmed or butted. Lilienthal's Tobacco *v.* U. S., 97 U. S. 237.

an instrument which requires a stamp, is the proper person to affix it.[1] An internal revenue stamp affixed to a note formed no part of the note.[2]

The stamp required to be affixed to "every writ or other original process" might be affixed either to the petition by which an adverse proceeding is begun in a probate court or to the citation issued thereon.[3]

A substitute for a lost instrument might, with the consent of the court, be stamped during the trial in which it was to be used, so as to give validity to the original instrument.[4] A written agreement signed by four persons, jointly and severally promising to pay to a fifth person the sums set opposite their names, required but a single agreement stamp.[5]

The act of Congress requiring an internal revenue stamp to be affixed to packages of manufactured tobacco intended for exportation,[6] is not unconstitutional as imposing an export tax.[7]

An act increasing the tax on tobacco does not apply to tobacco which is stamped, sold, and removed on the very day the act went into effect, but before it had been approved by the President.[8]

A firm license to trade, under the *Maryland* revenue act of 1862, holds good for one of the partners after dissolution of the firm.[9]

IV. Collection of Revenue—1. Payment.—Customs duties and internal revenue taxes can only be paid in money.[10] Special taxes should be paid in advance.[11] Where imported goods have been withdrawn from the warehouse, upon giving bond conditioned for the payment of duties within a year, payment within that time, of the duties as liquidated, operates as a satisfaction of the bond, even though the duties have in the meantime been reliquidated at a larger sum.[12] The proper place of payment of duties is the port of entry.[13]

1. Myers *v.* Smith, 48 Barb. (N. Y.) 614. But it has been held in *Indiana* that either party to a contract may affix the revenue stamp thereto. Adams *v.* Dale, 29 Ind. 273; Teagarden *v.* Garver, 24 Ind. 399. In the case of Wayman *v.* Torreyson, 4 Nev. 124, it was held that the maker of a note could not affix a stamp to it after the death of the payee, even though it was done at the request of the payee's administrator.

2. Hallock *v.* Jaudin, 34 Cal. 169.

3. Hotchkiss' Appeal, 32 Conn. 353.

4. Doller *v.* Cushwa, 27 Md. 354.

5. Ballard *v.* Burnside, 49 Barb. (N. Y.) 102.

6. U. S. Rev. St., § 3385.

7. Turpin *v.* Burgess, 117 U. S. 504.

8. Burgess *v.* Salmon, 97 U. S. 381.

9. Spielman *v.* State, 27 Md. 520. See also U. S. *v.* Ylab, 99 U. S. 225.

For construction of the *Maryland* stamp acts of 1844 and 1845, see Atwell *v.* Grant, 11 Md. 101; Burton *v.* State, 3 Gill (Md.) 1; Union Bank *v.* Kerr, 7 Md. 88.

10. U. S. Rev. St., §§ 3009, 5182.

Payment by bank check which is not honored by the bank is a nullity, even though the collector receives the check as payment and gives his receipt acknowledging payment of the duties. Johnson *v.* U. S., 5 Mason (U. S.) 425; U. S. *v.* Williams, 1 Ware (U. S.) 175.

11. U. S. *v.* Clare, 14 Phila. (Pa.) 543.

12. U. S. *v.* Georgi, 44 Fed. Rep. 255.

13. In Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453, it was held that goods

2. Duty of Master of Vessel.—In order to facilitate the collection of customs' duties, the master of every vessel arriving within the United States is required to report its arrival within twenty-four hours to the chief officer of customs in the district.[1]

Where such report is made in apt time, the fact that it is not made at the office of the chief officer of customs is immaterial.[2] Where the master is obliged by law to deliver a manifest, he does not comply unless he delivers a true one.[3]

3. Powers of Collectors.—The collection of duties is in charge of collectors appointed by the President. Their powers are defined by statute and they cannot exceed their statutory authority, or waive the requirements of the revenue laws.[4] For official acts not warranted by law they are liable in damages, even though they are innocent of any illegal purpose.[5] A collector cannot act as such after he has ceased to hold the office ;[6] nor can he act outside of his district.[7]

consigned to a person in New Orleans were not relieved from paying duty there by the fact that they were marked "for transportation to Mobile," under a statutory provision permitting duties on imports at New Orleans to be paid at Mobile, when it appeared by the invoice and the manifest that the goods were consigned to and destined for Mobile.

1. U. S. Rev. St., § 2774.

It has been held that this statute does not apply to vessels that are obliged to put into port by accident, stress of weather, or the pursuit of an enemy. Elmes on Customs, § 337; Rowe *v.* The Brig, 1 Mason (U. S.) 380; U. S. *v.* Shackford, 5 Mason (U. S.) 445; Harrison *v.* Vose, 9 How. (U. S.) 372; Toler *v.* White, 1 Ware (U. S.) 277; *contra*, U. S. *v.* Webber, 1 Gall. (U. S.) 392.

Neither does the statute apply to privateers, since they are classed as ships of war. The Wilson *v.* U. S., 1 Brock (U. S.) 423.

2. U. S. *v.* Rendell, 1 Curt. (U. S.) 369; U. S. *v.* Randall, 1 Sprague (U. S.) 546; *contra*, U. S. *v.* Galacar, 1 Sprague (U. S.) 545.

3. Phile *v.* Ship Anna, 1 Dall. (U. S.) 197.

4. Thus a collector has no right to detain the papers of a vessel that has not been seized. Badger *v.* Gutierez, 111 U. S. 734. Nor to impose duties not named in the statute. Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Munsell *v.* Maxwell, 4 Blatchf. (U. S.) 364. Nor to allow goods to be brought into the United States without compliance with the statutory requirements. 134,901 Feet of Pine Lumber, 4 Blatchf. (U. S.) 182. Nor to grant clearance to a vessel until the master has given him a manifest of the cargo. Bas *v.* Steel, Pet. (C. C.) 406. Nor to order goods to the public stores after the duties have been paid on them and a permit to land has been given. Rowland *v.* Miln, 2 Hilt. (N. Y.) 150.

Nor to take as security for the payment of duties the bond of any person other than the importer. U. S. *v.* Lyman, 1 Mason (U. S.) 482. Nor to inquire whether a difference between an invoice and an entry was caused by accident or mistake. U. S. *v.* One Case of Hair Pencils, 1 Paine (U. S.) 400. Nor to impose a penalty for undervaluation where the error in the invoice was innocently made, and was corrected by the importer as soon as discovered. Carnes *v.* Maxwell, 3 Blatchf. (U. S.) 420.

5. Badger *v.* Gutierez, 111 U. S. 734; Maxwell *v.* Griswold, 10 How. (U. S.) 242; Ogden *v.* Maywell, 3 Blatchf. (U. S.) 319.

6. Thus, after his removal from office, a collector cannot collect duties that accrued during his term of office. Sthreshley *v.* U. S., 4 Cranch (U. S.) 169. Neither can he, after such removal, appropriate money of the United States in his hands to the payment of fees due the office of the customs, since that is an official act. Champney *v.* Bancroft, 1 Story (U. S.) 423.

7. And the decisions of the Secretary of the Treasury as to the boundaries

Where the collector has discretionary powers given him, the courts will not, in the absence of fraud, interfere with their exercise.[1]

The collector estimates the duty, on imported goods, and, after the duty has been paid, is authorized to grant a permit to land the goods.[2] He has the right to hold possession of the goods until the duty is paid;[3] and it is his duty, when goods are seized for suspected violation of the revenue laws, to institute proceedings for their condemnation.[4] Collectors have power to appoint deputies.[5]

4. Bond.—Before the year 1842 importers were allowed to land their goods and take them away upon giving bond, with sureties, for the payment of duties within a stated period.[6] Such a bond did not operate to extinguish the debt for the duties, but merely to secure it.[7] A mere informality in the form of such bond would not avoid it,[8] neither would a cancellation fraudulently made by the collector without the payment of the duties.[9]

5. Bonded Warehouse.—A delay in the payment of duties or taxes may be obtained by storing the goods in a bonded warehouse. While so stored, they are in the possession of the United States,[10] though they are at the owner's risk and expense.[11]

of collection districts, are not binding on the courts. U. S. *v.* McNelly, 28 Fed. Rep. 609. Within the limits of his district, the collector may move the custom-house from one port to another when the former port is in possession of a public enemy. U. S. *v.* Hayward, 2 Gall. (U. S.) 511.

1. Thus, the decision of the collector as to the amount of goods which a vessel may carry as sea stores will not be reviewed by the courts. The Isabelle, 1 Paine (U. S.) 1.

2. U. S. Rev. St., § 2869; Kohne *v.* Insurance Co. of N. A., 1 Wash. (U. S.) 158.

3. Tracy *v.* Swartwout, 10 Pet. (U. S.) 80.

4. U. S. Rev. St., § 3087. If the result of the suit shows that there was no probable cause for the seizure, the collector is liable therefor. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246; Hall *v.* Warren, 2 McLean (U. S.) 332. If the collector neglects to bring such suit, he may be compelled either to do so or to abandon the seizure. Brig Ann, 9 Cranch (U. S.) 289.

5. U. S. Rev. St., § 2630. These deputies have the same powers as the collectors. Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408; Falleck *v.* Barney, 5 Blatchf. (U. S.) 38. They are officers of the customs and not merely the agents of the collectors. U. S. *v.* Barton, Gilp. (U. S.) 439.

6. Elmes on Customs, § 625. And the act of May 20, 1862, authorized collectors to exact from importers, bonds conditioned that the goods would not be transported to any place under insurrectionary control. U. S. *v.* Mora, 97 U. S. 413.

In the case of teas, however, the duties could be secured by the individual bond of the importer with a deposit of the teas. U. S. *v.* Three hundred and fifty Chests of Tea, 12 Wheat. (U. S.) 486.

7. U. S. *v.* Lyman, 1 Mason (U. S.) 482.

8. U. S. *v.* Pingree, 1 Sprague (U. S.) 339.

9. Johnson *v.* U. S., 5 Mason (U. S.) 425. In the U. S. *v.* Rousmaniere, 2 Mason (U. S.) 373, it was held that where such a bond was placed by the government in a bank for collection and the bank discounted for the principal obligor notes having forged indorsements, and placed the proceeds to the credit of the United States in discharge of the bond, the bond was thereby discharged.

10. *In re* Clifford, 2 Sawy. (U. S.) 428; Clark *v.* Peaslee, 1 Cliff. (U. S.) 545.

11. Thus the destruction of distilled

Where the custom-house officers allow the goods to be withdrawn from the warehouse without full payment of duty, the owner is not thereby relieved of liability for such duties.[1] When a change is made in the rate of duty while the goods remain in bond, they may be withdrawn within one year from the date of original importation on payment of duty according to the new rate.[2] Perishable goods deposited in bonded warehouse must be sold forthwith;[3] and the collector is the one to determine whether the goods are perishable.[4]

The collector is not responsible for goods lost while in warehouse, unless the loss was caused by his personal negligence.[5]

6. Recovery by Suit.—Both duties and internal revenue taxes constitute a personal debt to the United States from the importer or owner, for which suit may be brought by the United States.[6] The proper form of action is debt,[7] or assumpsit,[8] the statutory remedy by bill in equity being cumulative.[9] The consignee of imported goods, not the consignor, is the one personally liable for the duties;[10] and the destruction of the goods after importation does not relieve him from such liability.[11]

An appraisement and liquidation of the duties claimed are not conditions precedent to the right to sue.[12]

spirits by fire while they are deposited in a bonded warehouse, does not relieve the distiller from liability for the taxes. Farrell *v.* U. S., 99 U. S. 221; 8 Biss. (U. S.) 259. But see U. S. Rev. St., § 3221.

And goods while in warehouse may become subject to new and increased rates of duty. U. S. *v.* Benzon, 2 Cliff. (U. S.) 512.

1. Minturn *v.* U. S., 106 U. S. 437.

But where spirits in warehouse are seized and sold by the marshal for the fraudulent acts of the distiller and the taxes are paid out of the proceeds of the sale, the sureties on the distiller's warehouse bond are thereby discharged. U. S. *v.* Ulrici, 111 U. S. 38.

2. Merritt *v.* Cameron, 137 U. S. 542.

Where the goods have been transported to an interior port the time of their arrival there is the "date of original importation." Farwell *v.* Spalding, 24 Fed. Rep. 18.

3. U. S. Rev. St., § 2975.

4. Gould *v.* Hammond, 1 McAll. (U. S.) 235; Conway *v.* Stannard, 17 Wall. (U. S.) 398; U. S. *v.* De Visser, 10 Fed. Rep. 642.

5. Brissac *v.* Lawrence, 2 Blatchf. (U. S.) 121.

6. U. S. Rev. St., § 733; U. S. *v.* Boyd, 23 Blatchf. (U. S.) 299; 24 Fed. Rep. 690; U. S. *v.* Dodge, Deady (U. S.) 124; Meredith *v.* U. S., 13 Pet. (U. S.) 493; U. S. *v.* Cobb, 11 Fed. Rep. 79; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312. It is no objection to such suit that a bond for the payment of the duties has been given. U. S. *v.* Lyman, 1 Mason (U. S.) 482.

7. U. S. *v.* Goodwin, 4 Mason (U. S.) 130; Box of Sugar, 1 Ware (U. S.) 350; U. S. *v.* Hathaway, 3 Mason (U. S.) 324; U. S. *v.* Lyman, 1 Mason (U. S.) 482.

8. U. S. *v.* Howland, 2 Cranch (C. C.) 508.

9. U. S. Rev. St., § 3207; Alkan *v.* Bean, 8 Biss. (U. S.) 83.

10. U. S. *v.* Murdoch, 2 Cranch (C. C.) 486.

11. Wolfe *v.* Howard Ins. Co., 1 Sandf. (N. Y.) 124.

12. U. S. *v.* Boyd, 24 Fed. Rep. 690.

And the tax on the undistributed sums added to the surplus funds of a savings bank may be collected by the government in an action of debt, though the tax has never been assessed by the revenue officers. Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227.

But where an invalid reliquidation is made after the duties as originally assessed, have been paid, no suit can be maintained for the balance due according to such reliquidation. U. S.

Such suit should be brought either in the district where the liability for the tax occurred or in the district where the debtor resides.[1]

The defendant is entitled to a deduction of any sum admitted to have been overpaid, even though he has made no plea of set-off.[2] And when the suit is based on a reliquidation of the duties, he may, if he has protested and appealed, show in defense that the assessment was illegal.[3] When such suit is brought against a bailee, it is a good defense to the action that a suit therefor against the owner of the goods was dismissed by the government after plea filed, and that four years elapsed between the dismissal of such suit and the commencement of the suit against the bailee, during which time the bailee had paid over the proceeds of the goods to the owner.[4]

In such action the government must prove the facts constituting the defendant's liability;[5] but where any attack is made upon any of the proceedings for assessing or liquidating the tax or duty, the presumption is in favor of the regularity and correctness of such proceedings.[6]

V. Violations of Revenue Laws—1. What Constitutes Violation.—In order to constitute a violation of the revenue laws there must be some overt act coupled with an intent to evade the law or to defraud the government.[7] The mere

v. Phillips, 46 Fed. Rep. 466. And after duties have been paid as liquidated, a suit cannot be maintained for duties alleged to be due in excess of the liquidation on account of fraud in the appraisal. U. S. *v.* McDowell, 21 Fed. Rep. 563.

1. U. S. Rev. St., § 733. And such suit cannot be brought in any other district, even though the debtor may be found and served with process therein. U. S. *v.* New York, etc., R. Co., 10 Ben. (U. S.) 144.

2. Missouri River, etc., R. Co. *v.* U. S., 19 Fed. Rep. 66.

3. U. S. *v.* Schlesinger, 120 U. S. 109.

But where the appeal is taken before the final liquidation, the importer cannot, when sued for the duties, show in defense that the appraisement was irregular. Watt *v.* U. S., 15 Blatchf. (U. S.) 29. And unless protest is duly made and appeal taken, objections to the appointment of the appraiser cannot be urged in defense to an action for the duties. U. S. *v.* Earnshaw, 45 Fed. Rep. 782.

4. Pettigrew *v.* U. S., 97 U. S. 385.

5. Thus in an action to recover duties, the government must show the fact of importation, the quantity imported and the non-payment of the duty. U. S. *v.* Koblitz, 15 Fed. Rep. 900.

6. Thus the action of the customs officers in placing imported goods in a different class from that in which they were entered, is *prima facie* evidence that they belong in the class to which they were transferred. U. S. *v.* Patton, 46 Fed. Rep. 461; U. S. *v.* Midgley, 42 Fed. Rep. 668.

A consular certificate as to the value of the foreign currency in which an invoice is made out is only *prima facie* evidence of such value. De Forest *v.* Redfield, 4 Blatchf. (U. S.) 478.

In an action against a distiller for non-payment of taxes on a certain number of gallons of spirits alleged to have been distilled at his distillery between certain dates, the assessment of the commissioner of internal revenue is *prima facie* evidence of the defendant's liability. U. S. *v.* Rindskopf, 105 U. S. 418. But when the defendant has rebutted the presumption as to the validity of the assessment, the burden of proof is shifted upon the government to establish its validity. U. S. *v.* Rindskopf, 8 Biss. (U. S.) 507.

7. U. S. *v.* Breed, 1 Sumn. (U. S.) 159.

unexecuted intention to violate the revenue laws is not punishable.[1]

Ignorance of the law, however, does not render innocent a willful infraction of the revenue laws.[2]

It is a violation of law for a druggist or a physician to sell spirituous liquor without paying the tax required of retail liquor dealers.[3]

It is a criminal offense to work in a distillery on which no sign is kept;[4] and also to retail liquor at another place than that for

Thus the accidental omission of some of the cargo from the manifest is not an offense. Fairclough *v.* Gatewood, 4 Call (Va.) 158. Neither is an untrue valuation, when not fraudulently made. U. S. *v.* Fourteen Packages of Merchandise, 1 Gilp. (U. S.) 235.

The fact that a picture which is entitled to be entered free of duty is brought into the country in a trunk without entry does not show an intent to defraud. U. S. *v.* One Oil Painting, 31 Fed. Rep. 881.

The offense of bringing merchandise into the United States contrary to law is not committed by fraud or illegality in invoicing or paying duties, since such acts can only be done after the goods have been brought into the country. U. S. *v.* Kee Ho, 33 Fed. Rep. 333; U. S. *v.* Claflin, 97 U. S. 546.

Dutiable goods cannot be imported through the foreign mail, even though there is no fraudulent intent in the sending. Von Cotzhausen *v.* Nazro, 107 U. S. 215; 15 Fed. Rep. 891.

A person who goes to Canada for the purpose of buying clothes, which he wears back without entering them at the custom-house or paying duty is guilty of smuggling. U. S. *v.* Simmons, 1 Brown Adm. 128.

In U. S. *v.* The Walla Walla, 44 Fed. Rep. 796, where a vessel had been seized for alleged violation of the revenue laws, there was no charge against the owner and there was uncontradicted evidence to the effect that the packages alleged to contain contraband goods were received, transported and delivered as freight in the ordinary course of business, and that the master had no knowledge as to the contents of the packages. The court held that the vessel must be released.

1. U. S. *v.* Riddle, 5 Cranch (U. S.) 311; Le Tigre's Case, 3 Wash. (U. S.) 576. Thus the making of a fraudulent invoice when not followed up by an attempt to use it in entering the goods, is not a violation of law. U. S. *v.* Twenty-Eight Packages, Gilp. (U. S.) 306; Goodwin *v.* U. S., 2 Wash. (U. S.) 493.

And the mere possession, with fraudulent intent, of parts of internal revenue stamps that have been used upon snuff jars is not a criminal offense. U. S. *v.* Loup, 1 McCrary (U. S.) 168.

2. Barlow *v.* U. S., 7 Pet. (U. S.) 404. And this is true even where the party is a foreigner. Cambiose *v.* Maffett, 2 Wash. (U. S.) 98.

3. This applies to the sale of packages of "brandy cherries," where the brandy and not the cherries is the inducement to the sale. U. S. *v.* Stafford, 20 Fed. Rep. 720. And to the sale of medicinal preparations which are but disguised forms of spirituous liquors, intended for use as a beverage. U. S. *v.* Starnes, 37 Fed. Rep. 665; U. S. *v.* Cota, 17 Fed. Rep. 734. And to the sale of whiskey by a physician upon prescriptions given by himself. U. S. *v.* Smith, 45 Fed. Rep. 115. And a druggist is criminally liable for unauthorized sales of liquor by his clerk without payment of the special tax, if the sales made by the clerk were within the scope of his authority. U. S. *v.* White, 42 Fed. Rep. 138.

But it is not a violation of law for an apothecary to use spirituous liquor in the preparation of medicine without paying the special tax required of retail liquor dealers. U. S. *v.* Calhoun, 39 Fed. Rep. 604. Nor is it a violation of law for him to use alcohol in the preparation of cologne water. U. S. *v.* White, 42 Fed. Rep. 138.

4. U. S. Rev. St., § 3279; U. S. *v.* Flynn, 15 Blatchf. (U. S.) 302. But this does not apply to one who merely works in putting up a building in which an illicit still is set up. U. S. *v.* Burgess, 33 Fed. Rep. 833.

which the dealer has paid a special tax.[1] A manufacturer of cigars has no right to sell at his factory cigars there made by him, even though he has paid a special tax as a dealer in tobacco.[2] Retail liquor dealers who enter into a "protective union" which sells beer at wholesale to its members without taking out a wholesale dealer's license are guilty of a violation of law.[3] A member of a firm who has acquired the interests of his co-partners and succeeded to the firm business, does not violate the law by continuing the business under a license issued to the firm.[4] It is a criminal offense to resist a revenue officer in the execution of his duty.[5] It is no violation of law to use for other purposes imported animals which have been admitted free of duty because specially imported for breeding purposes.[6]

2. Seizure.—The usual remedy for a violation of the revenue laws is a seizure of the offending property, preparatory to its condemnation and forfeiture.[7] In some cases seizure may also be made of any other property of the delinquent.[8] Such seizure,

1. Thus, one who pays the special retail tax for retailing at a distillery, may not sell from wagons along the road. U. S. *v.* Durham, 33 Fed. Rep. 834. And one who has paid a special tax as a retail liquor dealer at a certain town, cannot fill orders from another town without paying another special tax for the latter town. U. S. *v.* Shriver, 23 Fed. Rep. 134. But on removal from the place mentioned in the license, the dealer may continue his business at the place to which he has removed without paying an additional special tax. U. S. *v.* Davis, 37 Fed. Rep. 468.

2. Ludloff *v.* U. S., 108 U. S. 176.

3. U. S. *v.* Kallstrom, 30 Fed. Rep. 184.

4. U. S. *v.* Glab, 1 McCrary (U. S.) 166; U. S. *v.* Davis, 37 Fed. Rep. 468.

5. U. S. Rev. St., § 3068. The refusal of a vessel to slacken speed so as to allow a revenue officer to board her is a violation of this statute. The Barracouta, 42 Fed. Rep. 160.

Where several persons are concerned in resisting a revenue officer, each person is guilty of a several offense. U. S. *v.* Babson, 1 Ware (U. S.) 450.

But resisting a seizure of goods by a revenue officer does not constitute the offense of concealing the goods. U. S. *v.* Farnsworth, 1 Mason (U. S.) 1.

Nor is it a criminal offense to resist an officer of the customs while he is attempting to make a seizure which is without probable cause. U. S. *v.* Gay, 2 Gall. (U. S.) 359.

6. U. S. *v.* 196 Mares, 29 Fed. Rep. 139.

7. Imported goods entered under a fraudulent invoice may be seized even after the duties have been paid and the goods delivered to the consignee. Wood *v.* U. S., 16 Pet. (U. S.) 342.

Under section 43 of the collection law of 1799, spirits, wines, and teas were not subject to seizure unless both the certificates and marks were wanting. Six Hundred and Fifty-One Chests of Tea *v.* U. S., 1 Paine (U. S.) 499.

To justify a seizure there must be reasonable ground to believe that some offense has been committed. U. S. *v.* Cook, 1 Sprague (U. S.) 213; a mere intention on the part of master and crew to violate the revenue laws is not enough. Le Tigre's Case, 3 Wash. (U. S.) 572.

For a wrongful seizure without probable cause the collector is liable in damages. McLane *v.* U. S., 6 Pet. (U. S.) 404; Burke *v.* Trevitt, 1 Mason (U. S.) 96. But an action to recover such damages cannot be brought in a court of common law until a final decree has been pronounced in the proceeding to condemn the seized goods. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246. And an action of trover against the collector will not lie in such case, the remedy given by the *United States* statutes being exclusive. McGuire *v.* Winslow, 23 Blatchf. (U. S.) 425; 26 Fed. Rep. 304.

8. U. S. Rev. St., § 3187.

however, is not a jurisdictional prerequisite to a suit to enforce a lien on the property for the penalty imposed for violation of a revenue law.[1] A seizure is not invalidated by mere irregularities;[2] nor by a subsequent judgment declaring invalid the assessment, to enforce which the seizure was made.[3] An actual taking possession of the property is necessary to constitute a valid seizure.[4]

3. Forfeiture.—A seizure is commonly followed by a suit to forfeit the seized property. This is a civil and not a criminal proceeding;[5] and the pleadings are governed by the general rules of admiralty pleading applicable to suits *in rem*,[6] except

Congress, under its power "to lay and collect taxes, duties, imposts and excises," may authorize the seizure and sale of the delinquent's property, in order to enforce the collection of the same. Such acts do not constitute a taking of property "without due process of law." Springer *v.* U. S., 102 U. S. 586.

1. The Paolina S., 11 Fed. Rep. 171; The Missouri, 3 Ben. (U. S.) 508.

2. Taylor *v.* U. S., 3 How. (U. S.) 197.

Nor is it essential that the seizure should be made by the collector in person or under his written authority. The Bolina, 1 Gall. (U. S.) 75; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246; Taylor *v.* U. S., 3 How. (U. S.) 197; The Caledonian, 4 Wheat. (U. S.) 100; The Marianna Flora, 11 Wheat. (U. S.) 1.

3. Harding *v.* Woodcock, 137 U. S. 43.

4. Keene *v.* U. S., 5 Cranch (U. S.) 304; Brig Ann, 9 Cranch (U. S.) 289; The Silver Spring, 1 Sprague (U. S.) 551; Ship Octavia, 1 Gall. (U. S.) 488. An abandonment of the property by the seizing officer after he has seized it, nullifies the seizure. Josefa Segunda, 10 Wheat. (U. S.) 312; Hudson *v.* Guestier, 4 Cranch (U. S.) 293; U. S. *v.* Ninety-Two Barrels Spirits, 5 Ben. (U. S.) 323.

5. Lilienthal's Tobacco *v.* U. S., 97 U. S. 237; Friedenstein *v.* U. S., 125 U. S. 224; Fein *v.* U. S., 1 Wyoming 246; U. S. *v.* Steamship Missouri, 9 Blatchf. (U. S.) 433.

And it is independent of a criminal prosecution for the offense. Origet *v.* U. S., 125 U. S. 240. But it has been held that where an offense of a distilling company is convicted of a violation of the internal revenue law, an action to forfeit the company's property on account of the same offense cannot be maintained, even though the forfeiture is only resisted by the other stockholders. U. S. *v.* McKee, 4 Dill. (U. S.) 128; U. S. *v.* One Distillery, 43 U. S. 846.

An action for forfeiture is a "common-law cause" within the meaning of a statute providing for proceedings supplementary to execution. A Quantity of Tobacco, 10 Ben. (U. S.) 447. But such action is so akin to a criminal prosecution, that a general verdict on several counts seeking the same object under different forms, should be sustained if any one count is good. Snyder *v.* U. S., 112 U. S. 216; Coffey *v.* U. S., 116 U. S. 436.

6. Coffey *v.* U. S., 116 U. S. 427. The proceeding is not affected by the statute which assimilates the pleadings in civil causes to the State practice. Coffey *v.* U. S., 117 U. S. 233.

The information need not allege that the illegal acts charged were done with fraudulent intent. Friedenstein *v.* U. S., 125 U. S. 224; Origet *v.* U. S., 125 U. S. 240. But it should allege that the master or owner was a party or privy to the illegal act. The Snow Drop, 30 Fed. Rep. 79. An information to forfeit goods because unladen without a permit, should allege that they were unladen at some port or place within a collection district, but it need not give the name of the port or district if they are unknown to the pleader. U. S. *v.* Bernham, 1 Mason (U. S.) 57. Nor need it allege the goods to be of foreign growth or manufacture. Schooner Betsey, 1 Mason (U. S.) 354. The libel should show that the vessel to be forfeited has been seized within the jurisdiction of the court. The Washington, 4 Blatchf. (U. S.) 101; The Lewellen, 4 Biss. (U. S.) 156.

The information is amendable even

when the seizure takes place on land, in which case the proceedings for forfeiture are had on the common-law side of the court.[1] The suit should be brought in the district court of the district in which the seizure is made,[2] regardless of the place where the offense was committed.[3] As a general rule it is necessary to show that the acts complained of were done with the knowledge or acquiescence of the claimant of the property of which forfeiture is sought;[4] but the rule is not without exception.[5] It is also necessary to show an intent to defraud the government,[6] and the question of intent is for the jury.[7]

after the taking of proofs. U. S. *v.* Cigars, 18 Fed. Rep. 147.

When the allegations of the information are vague, the claimant may demand a bill of particulars. U. S. *v.* 200 Bushels of Corn, 9 Ben. (U. S.) 186.

1. The Sarah, 8 Wheat. (U. S.) 391; U. S. *v.* Spirits, 1 Bond (U. S.) 587; U. S. *v.* Winchester, 99 U. S. 372.

2. The Lewellen, 4 Biss. (U. S.) 167; Ketland *v.* The Crassius, 2 Dall. (U. S.) 369; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246.

Where the seizure is made on the high seas, the district court of the district into which the property is brought and where it is held, has jurisdiction. The Merino, 9 Wheat. (U. S.) 391.

3. U. S. *v.* Schooner Betsey, 4 Cranch (U. S.) 443; Keene *v.* U. S., 5 Cranch (U. S.) 304.

4. Thus, in order to forfeit the property of one who has allowed his premises to be used for ingress to or egress from an illicit distillery, it must appear that he knew that the ingress or egress over his premises was to or from a distillery. Gregory *v.* U. S., 17 Blatchf. (U. S.) 325. And a vessel used as a common carrier is not liable to forfeiture for violation of the revenue laws, unless it is shown that the master knowingly consented to the commission of the illegal act. The Saratoga, 15 Fed. Rep. 382; Fairclough *v.* Gatewood, 4 Call (Va.) 158; U. S. *v.* The Snowdrop, 30 Fed. Rep. 79. See 21 U. S. St. at Large 322.

Where the cause of forfeiture was a false oath made by an agent, it has been held that his ignorance of the falsity of his statements would not save the property from forfeiture when it was shown that his principal had knowledge of the facts and had devised the fraud. U. S. *v.* A Cargo of Sugar, 3 Sawy. (U. S.) 46; U. S. *v.* Newmark, 3 Sawy. (U. S.) 584.

5. Thus goods which have been actually smuggled may be forfeited though the claimant has bought them in good faith and for full value. U. S. *v.* Certain Diamonds, 30 Fed. Rep. 364. And in order to forfeit a team and wagon used in transporting spirits contrary to law it need not be shown that the owner had knowledge of the illegal transportation. U. S. *v.* Two Horses, 9 Ben. (U. S.) 529; U. S. *v.* Two Bay Mules, 36 Fed. Rep. 84. And a forfeiture is not purged by a purchase made with knowledge of facts sufficient to put the purchaser upon inquiry. The Ploughboy, 1 Gall. (U. S.) 41.

In the case of U. S. *v.* Stowell, 133 U. S. 1, it was held that personal property found in a distillery at the time when the distillery was being operated in violation of law was forfeited although the distiller had sold the property, before he began to violate the law, to a person who knew nothing of his illegal acts and who did not participate therein.

6. The Purissima Concepcion, 24 Fed. Rep. 358; U. S. *v.* One hundred and twenty-nine Bales of Merchandise, 46 Fed. Rep. 468; U. S. *v.* Newmark, 3 Sawy. (U. S.) 584. Bringing in goods that are not specified in the manifest does not necessarily show an intent to defraud where it appears that it has been the practice, acquiesced in by the revenue officers, to pass such goods without an entry on the manifest. U. S. *v.* Three Trunks, 7 Sawy. (U. S.) 364. In U. S. *v.* Two thousand one hundred and seventeen Bushels of Malt, 8 Fed. Rep. 224, it is asserted, and in U. S. *v.* Fourteen Packages of Merchandise, Gilp. (U. S.) 235, denied that a false invoice, knowingly mads, is cause for forfeiture, even though there is no actual intent to defraud the government.

7. Lewey *v.* U. S., 15 Blatchf. (U. S.) 1.

The burden of proof is, in the first instance, upon the government;[1] but after it has shown probable cause for the seizure, the burden shifts, and the claimant must then prove his innocence.[2] But a preponderance of the evidence in favor

But in Four Packages *v.* U. S., 97 U. S. 404, the supreme court held that where the proof of the violation of the law was clear, the court might direct the jury to find for the government instead of submitting to them the question of fraudulent intent.

1. U. S. *v.* One hundred and twenty-nine Bales of Merchandise, 46 Fed. Rep. 468; Schooner Abigail, 3 Mason (U. S.) 331.

Proof that either a false manifest or no manifest at all was presented to the collector is sufficient to make out a *prima facie* case. 134,901 Feet of Pine Lumber, 4 Blatchf. (U. S.) 182.

In the case of Three thousand eight hundred and eighty Boxes of Opium, 8 Sawy. (U. S.) 129, the government proved that the opium had been seized while in a boat at night in San Francisco harbor, under circumstances indicating an attempt to smuggle the opium, provided it was foreign opium, and the evidence tended to show that it was foreign opium. The court held that in the absence of any explanation by the claimant, the evidence justified a judgment of forfeiture.

Where proof of fraudulent acts has been made, it need not be also shown that the government was damnified thereby. Bollinger's Champagne, 3 Wall. (U. S.) 560.

Where a vessel used as a common carrier, has been seized for carrying contraband goods, proof that the master knew that the packages shipped on his vessel contained contraband goods is essential to the government's case. U. S. *v.* The Walla Walla, 44 Fed. Rep. 796.

Proof that a vessel was unladen without authority of a customs officer is not sufficient to justify forfeiture of the cargo where the evidence also shows that the vessel had been driven ashore by stress of weather. The Cargo ex Lady Essex, 39 Fed. Rep. 765; U. S. *v.* The Hunter, Pet. (C. C.) 10.

Proof that goods which had been stolen on the sea were smuggled by the thief, is not sufficient to justify their forfeiture as against the owner. U. S. *v.* Two hundred and eight Bags of Kainit, 37 Fed. Rep. 326.

Proof that goods that have been entered free of duty because imported for a purpose, were afterwards used for another purpose is not sufficient for a forfeiture. An Ullage Box of Sugar, 1 Ware (U. S.) 350. U. S. *v.* One hundred and ninety-six Mares, 29 Fed. Rep. 139.

Proof that foreign goods were landed without a permit, is sufficient to justify a forfeiture of the vessel from which they were unladed, although they were brought from a foreign port in another vessel and transferred to the vessel which was seized. The Harmony, 1 Gall. (U. S.) 123. But see Jackson *v.* U. S., 4 Mason (U. S.) 186. And it makes no difference that the goods landed were of a kind whose importation is prohibited. Harford *v.* U. S., 9 Cranch (U. S.) 109.

The fact that wine and spirits are not marked and certified as required by law, is not cause for forfeiture where it appears that they were saved from a wreck. Peisch *v.* Ware, 4 Cranch (U. S.) 347; The Gertrude, 1 Davies (U. S.) 176.

Mere proof of a variance between the goods and the entry is not sufficient for forfeiture. U. S. *v.* Shawls, 2 Paine (U. S.) 162; Wright *v.* U. S., 2 Paine (U. S.) 184.

Neither is proof of concealment, unless the concealment was from the officers of customs. U. S. *v.* Twenty-Six Diamond Rings, 1 Sprague (U. S.) 294.

2. Three thousand eight hundred and eighty Boxes of Opium *v.* U. S., 23 Fed. Rep. 367; 9 Sawy. (U. S.) 259; The Thomas and Henry, 1 Brock (U. S.) 367.

Thus, where probable cause for the seizure has been shown and the claimant does not explain why the goods were shipped under a false designation or show how he acquired title to them, the burden of proving his innocence is thrown upon the claimant. U. S. *v.* Seven hundred and forty Tins of Opium, 44 Fed. Rep. 798.

But where the offense charged is landing goods without a permit, a permit obtained by fraudulent collusion between the claimant and a deputy col-

of the government is sufficient to justify a judgment of forfeiture.[1]

The official appraisement of the goods seized is admissible in evidence in a suit for forfeiture.[2]

Judgment of forfeiture can only be entered in cases where it is authorized by statute.[3] It is not essential to its validity that it recite that the jury found an intent to defraud.[4] A judgment of forfeiture for violation of the internal revenue laws may provide for the sale of the forfeited goods, even though they will not sell for enough to pay both the internal revenue taxes and the customs duties.[5] Where the judgment may be for the forfeiture either of the goods or their value, such value is not limited to the price for which the goods were sold.[6] A motion to vacate a judgment of forfeiture will not be entertained in an action on a bond given in the action for forfeiture.[7] The abandonment by the government of an action for forfeiture does not affect its lien on the seized property for unpaid taxes.[8]

A judgment for forfeiture relates back to the date of the illegal act and avoids all intermediate sales or alienations even to purchasers in good faith.[9] The fact that the fraud in an

lector is no defense to the action. Bottomley *v.* U. S., 1 Story (U. S.) 135.

The claimant, where the defense relied on is mistake, is not required by the fact that proof of probable cause has been made, to produce more than the ordinary proof of mistake. U. S. *v.* Nine Packages of Linen, 1 Paine (U. S.) 129. But the mistake must be clearly proved. U. S. *v.* Fairclough, 4 Wash. (U. S.) 398. And the mistake must be one of fact in order to be a defense. U. S. *v.* Eighty-Five Hogsheads of Sugar, 2 Paine (U. S.) 54.

1. Three thousand eight hundred and eighty Boxes of Opium *v.* U. S., 23 Fed. Rep. 367; 9 Sawy. (U. S.) 259. But a verdict for the claimant will not be set aside as against the evidence, even though as to a small part of the goods seized, the court is convinced that the verdict is wrong. U. S. *v.* One hundred and seventeen Packages of Tobacco, 10 Ben. (U. S.) 343.

2. Buckley *v.* U. S., 4 How. (U. S.) 251; and such appraisement is *prima facie* evidence of the character, quality and value of the goods. U. S. *v.* Fourteen Packages of Merchandise, Gilp. (U. S.) 235.

And an invoice of similar goods made by the same party a year previous is admissible to show the importer's knowledge as to the value of the goods seized. U. S. *v.* One hundred and forty-six thousand six hundred and fifty Clapboards, 4 Cliff. (U. S.) 301.

3. An Ullage Box of Sugar, 1 Ware (U. S.) 350.

In U. S. *v.* One Case Stereoscopic Slides, 1 Sprague (U. S.) 467, it was held that where some stereoscopic slides in a case were found to be indecent the rest of the slides imported in that case were not on that account forfeitable.

4. This was decided in a case where the record showed that the jury did so find. Friedenstein *v.* U. S., 125 U. S. 224; Origet *v.* U. S., 125 U. S. 240.

5. U. S. *v.* Fifty-Nine Demijohns Aguardiente, 39 Fed. Rep. 401.

6. U. S. *v.* York St., etc., Spinning Co., 17 Blatchf. (U. S.) 138. But the act under which that point was decided has since been repealed so far as it provided for a forfeiture of the value. U. S. *v.* Auffmordt, 122 U. S. 197.

7. U. S. *v.* Bergenthal, 29 Fed. Rep. 444.

8. Alkon *v.* Bean, 8 Biss. (U. S.) 83.

9. U. S. *v.* Stowell, 133 U. S. 1; Fontaine *v.* Phoenix Ins. Co., 11 Johns. (N. Y.) 293; U. S. *v.* One Copper Still, 8 Biss. (U. S.) 270; U. S. *v.* One thousand nine hundred and sixty Bags of Coffee, 8 Cranch (U. S.) 416; Henderson's Distilled Spirits, 14 Wall. (U. S.) 44. But a mere violation of law subjecting the property to for-

entry of merchandise is not discovered until the goods have been delivered by the customs officers to the importer, does not prevent a forfeiture.[1]

Property situated upon distillery property and used in the business of illicit distilling is forfeitable.[2]

4. Criminal Prosecution.—Prosecutions for fines imposed for violations of the revenue laws are criminal proceedings, and should be begun by indictment.[3] Such an indictment should state with reasonable certainty in what the illegal act consisted.[4]

On a trial for smuggling, possession of smuggled goods is *prima facie* evidence of guilt.[5] The criminal offense of removing an

feiture does not, when no proceedings to forfeit the property have been brought, so divest the owner of title as to prevent him from suing a trespasser for the conversion of the property. Wessels *v.* Beeman (Mich. 1891), 49 N. W. Rep. 483.

1. Wood *v.* U. S., 16 Pet. (U. S.) 362; Clifton *v.* U. S., 4 How. (U. S.) 242; Buckley *v.* U. S., 4 How. (U. S.) 251.

2. U. S. Rev. St., § 3281.

And this liability to forfeiture is irrespective of the ownership of the property. U. S. *v.* One Copper Still, 8 Biss. (U. S.) 270. But it does not extend to spirits which are not the product of illicit distillation and which the distiller has sold to innocent purchasers for value, although the distiller may have owned such spirits at some time during the period of his illicit distilling. U. S. *v.* Three hundred and seventy-two Pipes of Distilled Spirits, 5 Sawy. (U. S.) 421.

However, the fact that a third person has in good faith advanced money upon distilled spirits, is no defense to an action for their forfeiture. Boyd *v.* U. S., 14 Blatchf. (U. S.) 317.

A distiller's liability to forfeiture cannot be affected by any collusion between him and a government storekeeper. U. S. *v.* One Distillery, 8 Ben. (U. S.) 473.

In a suit to forfeit a distillery, the acts of the distiller's servants and agents within the scope of their employment, are imputable to him. Bush *v.* U. S., 24 Fed. Rep. 917.

3. U. S. *v.* Johanneson, 35 Fed. Rep. 411.

Such fines and penalties cannot be recovered by an action of debt. U. S. *v.* Claflin, 97 U. S. 546.

4. Charging the offense in the language of the statute is not sufficient. U. S. *v.* Kee Ho, 33 Fed. Rep. 333.

An indictment charging the defendant with smuggling "smoking opium" and "prepared opium" sufficiently specifies the offense of smuggling "opium prepared for smoking." U. S. *v.* Gardner, 42 Fed. Rep. 832.

An indictment which charges the removal from the distillery warehouse of a certain quantity of "distilled spirits" on which no tax has been paid is good. U. S. *v.* Anthony, 14 Blatchf. (U. S.) 92.

An indictment for hindering a collector from entering a building where taxable articles are manufactured need not aver that the defendant concealed the articles, but it must show the authority under which the officer acted. U. S. *v.* Fears, 3 Woods (U. S.) 510. An indictment for removing stamps from casks containing distilled spirits without destroying the stamps, need not state the capacity of the casks, nor charge intent; nor, when it describes the stamps by their statutory designation, need it set out the stamps themselves. U. S. *v.* Bayand, 16 Fed. Rep. 376.

An indictment for smuggling need not describe the goods minutely or give their marks or numbers. U. S. *v.* Claflin, 13 Blatchf. (U. S.) 178; 97 U. S. 546.

An indictment charging the defendant with knowingly effecting an entry of goods contrary to law without specifying the fraudulent means used in effecting the entry, is bad. U. S. *v.* Bettilini, 1 Woods (U. S.) 654.

5. U. S. Rev. St., § 3082.

A defendant who is proved to have been in possession of smuggled goods will be convicted, unless he can explain his possession to the satisfaction of the jury. U. S. *v.* Fraser, 42 Fed. Rep. 140.

But the mere possession of the goods by the defendant does not tend to

empty cask which had contained foreign spirits before the marks on it have been effaced is not committed where the removal is made by a purchaser after his purchase.[1] On a trial for obstructing an inspector, proof need not be made of the commission of the collector who appointed him.[2] Evidence that goods were taken from a vessel to the wharf at night and then returned to the vessel is not sufficient to show an illegal landing.[3] A defendant may be convicted of an attempt to rescue seized property, even though no actual force was used.[4] Proof of partial rectification is sufficient to convict one of illicit distilling.[5] Whether a defendant is liable depends upon his good faith and his real intention.[6]

5. Remission of Penalties.—Any person who has incurred any fine, penalty or forfeiture for violation of the revenue laws may file with the district judge a petition to have the same remitted or mitigated. The judge thereupon investigates the case in a summary manner and reports his findings of facts to the Secretary of the Treasury. The Secretary may thereupon mitigate or remit such fine, penalty, or forfeiture, if, in his opinion, the same was incurred without willful negligence or fraudulent intent.[7]

prove that they were smuggled. U. S. *v.* A Lot of Jewelry, 13 Blatchf. (U. S.) 60.

The gist of the offense of smuggling is the introduction of the goods into the country with intent to defraud the revenue. U. S. *v.* Thomas, 4 Ben. (U. S.) 370; 2 Abb. (U. S.) 114; U. S. *v.* Smith, 2 Blatchf. (U. S.) 127.

1. U. S. *v.* Halberstadt, Gilp. (U. S.) 262.

2. U. S. *v.* Sears, 1 Gall. (U. S.) 215.

3. U. S. *v.* Smith, 2 Wash. (U. S.) 310.

4. U. S. *v.* Ford, 33 Fed. Rep. 861. In this case intimidation was the means used to effect the rescue.

5. U. S. *v.* Byrne, 19 Blatchf. (U. S.) 259.

6. U. S. *v.* Buchanan, 4 Hughes (U. S.) 487. This was so held in a case where the charge was failing to obliterate the revenue stamp on an empty liquor cask, and the defense was that the cask was not quite empty and that it had merely been moved to one side until it could be emptied.

In a trial for removing and concealing spirits where the defense was that the spirits had been removed from the designated place of deposit to an adjoining smoke room merely for the purpose of preventing waste from leakage, it was held that no offense was committed unless it appeared that the removal was not only made voluntarily but also with a bad purpose. U. S. *v.* Smith, 27 Fed. Rep. 854.

One accused of transporting empty barrels on which were uneffaced revenue stamps is presumed to know whether or not there were such stamps on the barrels transported by him. U. S. *v.* Goodrich Transp. Co., 8 Biss. (U. S.) 224.

The fact that one is a grocer raises no presumption that he violated the law because he bought a barrel of whiskey for a purchaser, charging him just what he paid for it. U. S. *v.* Howell, 20 Fed. Rep. 718.

Where cigars are found in other boxes than those specified in the internal revenue laws, the presumption is that they were removed from the factory while in said boxes. Jackson *v.* U. S., 21 Fed. Rep. 35.

An importer who by means of a false statement made in a letter to an officer of the Treasury procures from the Secretary an order for the admission of certain goods free of duty is guilty of a fraudulent attempt to import merchandise by means of a false letter or false statement. U. S. *v.* Boyd, 24 Fed. Rep. 692.

7. U. S. Rev. St., § 5292.

The Secretary has no power to remit penalties except in cases expressly provided for by law. The Margaretta, 2 Gall. (U. S.) 515.

And the remission can only be made

Under the act of 1866, the penalty imposed for omitting to stamp an instrument which required a revenue stamp might be remitted by the collector.[1]

6. Indirect Consequences.—A contract in violation of the revenue laws is void.[2] But a contract made for the purpose of violating the revenue laws of a foreign country is not, therefore, void.[3]

The omission of a revenue stamp from an instrument required to be stamped does not render the instrument void, unless there is an intent to evade the provisions of the law.[4]

by him in the manner provided by the statute. Petrel Guano Co. *v.* Jarnett, 25 Fed. Rep. 675. But in a case where he has authority to act and where he has acted according to the proper forms, no appeal lies from his decision. Dorssheimer *v.* U. S., 7 Wall. (U. S.) 166; Macheca *v.* U. S., 26 Fed. Rep. 845.

This right to remit penalties is not an encroachment on the pardoning power of the President. The Laura, 114 U. S. 411.

The remission may be partial, or conditional, at the discretion of the Secretary. Jungbluth *v.* Redfield, 4 Blatchf. (U. S.) 219; U. S. *v.* One Case of Hair Pencils, 1 Paine (U. S.) 400; Murray *v.* Arthur, 13 Blatchf. (U. S.) 429; The Palo Alto, 1 Davies (U. S.) 343.

The power to remit may be exercised even after a judgment of forfeiture has been rendered. U. S. *v.* Morris, 10 Wheat. (U. S.) 246; 1 Paine (U. S.) 209; U. S. *v.* Griswold, 24 Fed. Rep. 365; McLane *v.* U. S., 6 Pet. (U. S.) 404; The Laura, 114 U. S. 411; 8 Fed. Rep. 617; Brig Hollen, 1 Mason (U. S.) 431. But it has been held that it could not be exercised in forfeiture cases after the collector had received his share of the forfeiture. U. S. *v.* Collier, 3 Blatchf. (U. S.) 325; U. S. *v.* Morris, 10 Wheat. (U. S.) 246.

A remission of forfeiture granted before a libel to condemn the property has been filed operates to revest the petitioner's title. The Palo Alto, 1 Davies (U. S.) 343.

1. But this could only be done in case of accident or mistake. The decision of the collector, in such case, was conclusive. Peoria Ins. Co. *v.* Perkins, 16 Mich. 380. A deputy collector had no power to make such remission. McAfferty *v.* Hale, 24 Iowa 355; Brown *v.* Crandal, 23 Iowa 112.

2. Armstrong *v.* Toler, 11 Wheat. (U. S.) 258; Cambioso *v.* Maffett, 2 Wash. (U. S.) 98; Hannay *v.* Eve, 3 Cranch (U. S.) 242.

Thus, a contract to carry goods in violation of the revenue laws does not entitle the carrier to any claim for freight. Petrel Guano Co. *v.* Jarnette, 25 Fed. Rep. 675.

And remission of the penalty imposed does not operate to legalize the contract. Petrel Guano Co. *v.* Jarnette, 25 Fed. Rep. 675.

But a sale of brandy before payment of the internal revenue tax is not void, when made without any intent to avoid payment of the tax. Ross *v.* Crow, 9 Baxt. (Tenn.) 420.

3. Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94; Kohn *v.* Schooner Renaissance, 5 La. Ann. 25; 52 Am. Dec. 577; Biggs *v.* Lawrence, 3 T. R. 454.

4. Dudley *v.* Wells, 55 Me. 145; Govern *v.* Littlefield, 13 Allen (Mass.) 127; Harper *v.* Clark, 17 Ohio St. 190; Hitchcock *v.* Sawyer, 39 Vt. 412; Weltner *v.* Riggs, 3 W. Va. 445; Hallock *v.* Jaudin, 34 Cal. 167.

Thus, it was held that an unstamped deed might be introduced in evidence, where the internal revenue collector's receipt showed the stamp to have been paid for, he not having affixed it. Lerch *v.* Snyder, 112 Pa. St. 161. But as a general rule an unstamped deed which the law required to be stamped was not admissible in evidence. Barney *v.* Ivins, 22 Iowa 163.

An unstamped promissory note has been held not admissible in evidence under the common counts. Jacquin *v.* Warren, 40 Ill. 459; Israel *v.* Redding, 40 Ill. 362; Wilson *v.* Carey, 40 Vt. 179; Latham *v.* Smith, 45 Ill. 29. But it has been held in *Louisiana* that a note made before the passage of the law requiring notes to be stamped, though not void for want of a stamp, was, until stamped, inadmissible in evidence after the passage of such law. McLearn *v.* Skelton, 18 La. Ann. 514.

VI. ACTIONS AGAINST COLLECTORS—1. Before the Act of 1890— *a.* PROTEST AND APPEAL.—An importer cannot sue a collector for the recovery of duties illegally exacted under the law in force prior to August 1, 1890, unless he has paid the duties under protest and has appealed to the Secretary of the Treasury from the collector's liquidation.[1]

The courts are liberal in their construction of protests, in determining the question of their sufficiency in point of form.[2]

Where a note was executed unstamped, through the parties' ignorance of the law, and the maker, on being advised of the law, affixed a stamp to the note and redelivered it to the payee, it was held that the maker could not deny that the note was legally stamped. Green *v.* Lowry, 38 Ga. 548.

The absence of the requisite revenue stamps from letters of administration has been held to invalidate them. Blake *v.* Hall, 19 La. Ann. 49. But it has been decided that the fact that an assignment of a judgment was not stamped could not affect the validity of the judgment or of an execution issued thereon. Campbell *v.* Johnston, 3 Del. Ch. 94.

1. U. S. Rev. St., §§ 2931, 3011; Cadwalader *v.* Partridge, 137 U. S. 553; Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; Chung Yune *v.* Kelly, 8 Sawy. (U. S.) 418; 14 Fed. Rep. 639; Bodart *v.* Schell, 33 Fed. Rep. 825.

It was once held that such protest might be made verbally. Swartwout *v.* Gilion, 3 How. (U. S.) 110. But the Revised Statutes expressly require the protest to be in writing. U. S. Rev. St., § 3011; Nichols *v.* U. S., 7 Wall. (U. S.) 122.

The requirement of a protest is still substantially in force, though in the act of 1890 the document is called a notice instead of a protest. *In re* Downing, 45 Fed. Rep. 412.

2. Fauche *v.* Schell, 33 Fed. Rep. 336. Thus, a protest which contains a number of different and perhaps inconsistent claims does not therefore necessarily fail to be distinct and specific. Legg *v.* Hedden, 37 Fed. Rep. 861. And where a protest is written upon the entry, the descriptions of the goods as given in the entry will be taken as incorporated in the protest. Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385.

A protest upon the ground that the goods were not fairly and faithfully examined by the appraisers is good, although it does not specify in what particulars the examination was not fair and faithful. Converse *v.* Burgess, 18 How. (U. S.) 413.

A protest against a duty of twenty-five per cent. on lace which alleges that the lace should pay twenty per cent. duty is sufficiently distinct. Steegman *v.* Maxwell, 3 Blatchf. (U. S.) 365.

And so is a protest which states that "the merchant appraiser was not legally sworn in," where the oath itself shows that it was administered to the merchant appraiser by the official appraiser. Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368. See Christ *v.* Maxwell, 3 Blatchf. (U. S.) 129.

Where a collector has rated imported gin at its invoice quantity without making any allowance for leakage, a protest claiming "the actual gauge and two per cent. for leakage," is sufficient. Schuchardt *v.* Lawrence, 3 Blatchf. (U. S.) 397.

A protest against paying duty on a carriage which states that the carriage is personal effect, and has been used over a year and that by U. S. Rev. St., § 2505, "personal effects in actual use" are free, is sufficient, though the statutory exemption is of "household effects." Arthur *v.* Morgan, 112 U. S. 495.

Where the duty on hay is assessed at twenty per cent., a protest "against any greater rate of duties than at the rate of ten per cent. *ad valorem* for the reason and on the grounds that no higher rate than ten per cent. can lawfully or properly be charged on hay imported," is sufficiently distinct and specific. Frazee *v.* Moffitt, 20 Blatchf. (U. S.) 267; 18 Fed. Rep. 584.

A protest against an assessed duty of twenty-four per cent. which states that the goods are only liable to a duty of nineteen per cent. "as a manufacture of worsted" is sufficiently specific. Schell *v.* Fauche, 138 U. S. 570.

And so is a protest which states that

But the protest should point out, by positive and direct notice, every particular of fact and of law relied upon by the protester.[1]

It has been held that an importer might make a protest which would cover not only goods actually imported at the time of the protest but also his subsequent importations of similar goods.[2]

The protest should be signed by the protester or his agent,[3] and delivered to the collector[4] within ten days after his liquidation of the duties.[5]

the act complained of is the exaction of a penalty of twenty per cent. assessed because the true value of the goods was not stated. Swanston *v.* Morton, 1 Curt. (U. S.) 294.

1. Durand *v.* Lawrence, 2 Blatchf. (U. S.) 396; Norcross *v.* Greely, 1 Curt. (U. S.) 114; Goddard *v.* Maxwell, 3 Blatchf. (U. S.) 131; Curtis *v.* Fiedler, 2 Black. (U. S.) 461.

Thus, general allegations that the appraisers were prejudiced or incompetent, or not duly qualified, are too vague to be effective. Bangs *v.* Maxwell, 3 Blatchf. (U. S.) 135; Christ *v.* Maxwell, 3 Blatchf. (U. S.) 129.

A protest against the duty levied upon an unenumerated article, which states only that the article is dutiable at a certain rate which applies to more than fifty enumerated articles, is insufficient. Fauche *v.* Schell, 33 Fed. Rep. 336.

And so is a protest which only states that under the tariff act the articles on which duty has been paid are only liable to a duty of fifteen per cent. without pointing out the clause of the law under which the articles are dutiable. Smith *v.* Schell, 27 Fed. Rep. 648; Cummins *v.* Robertson, 27 Fed. Rep. 654.

2. Marriott *v.* Brune, 9 How. (U. S.) 619; Stiegman *v.* Maxwell, 3 Blatchf. (U. S.) 367.

These decisions were made under the law of 1845, and it has been asserted that they do not apply under the act of 1864 (U. S. Rev. St., § 2931), which speaks of protest being made "on each entry." But, in the very recent cases of Davies *v.* Miller, 130 U. S. 284, and Schell *v.* Fauche, 138 U. S. 570, the Supreme Court has reaffirmed the validity of prospective protests, without reference to the act of 1864, and notwithstanding a Treasury regulation requiring a special protest in each case.

The act of 1890 requires that the notice which is thereby substituted for the former protest shall be given "in respect to each entry," and that it shall be served "within ten days after but not before" the liquidation of the duties. 26 St. at Large 137, § 14. This would seem to do away in the future with the use of prospective protests.

It has been held that a prospective protest would not affect importations made by the successors of the protesting firm two years after the original protest. Sorchan *v.* Schell, 33 Fed. Rep. 580. But in Herman *v.* Schell, 18 Fed. Rep. 891, 21 Blatchf. (U. S.) 560, it was held that a prospective protest made by an individual importer would cover subsequent importations made by a firm of which he was a member.

The filing of a specific protest is not necessarily an abandonment of a prior prospective protest. Schell *v.* Fauche, 138 U. S. 570; though it was held in Baxter *v.* Maxwell, 4 Blatchf. (U. S.) 32, that a specific protest which did not affirm or refer to a prior prospective protest was evidence that in regard to the entry covered by the specific protest, all grounds of objection had been abandoned except those distinctly stated in the specific protest.

3. U. S. Rev. St., § 3011; Gray *v.* Lawrence, 3 Blatchf. (U. S.) 117. It has been held that a protest signed by A is sufficient to include importations by A & Co. Herman *v.* Schell, 18 Fed. Rep. 891; 21 Blatchf. (U. S.) 560.

4. It has been held that service upon one taking the place of the collector for that purpose is sufficient where that manner of service has been long recognized as valid by the Treasury Department. Fauche *v.* Schell, 33 Fed. Rep. 336; Schell *v.* Fauche, 138 U. S. 570.

5. U. S. Rev. St., § 2931; 26 St. at Large 137, § 14.

A protest delivered after the collector's estimation of the duties has been made but before the final liquidation

A protest must be followed by an appeal to the Secretary of the Treasury or it is unavailing.[1]

b. SUIT.—A collector may render himself liable to a suit by an importer, either because of his negligence or misconduct in his execution of the revenue laws,[2] or because of his exaction of excessive duties before August 1, 1890.[3] The former right of action is given by the common law and is governed by common-law principles.[4] The latter right of action is of statutory origin; and recovery thereon depends upon conformity to the requirements of the statute.[5]

The time within which a suit to recover excessive duties may

has been stamped on the entry, is in apt time. Davies *v.* Miller, 130 U. S. 284.

A protest delivered more than ten days after liquidation of the duties on goods entered in bond comes too late, even though its delivery takes place less than ten days after the withdrawal of the goods for consumption. Merritt *v.* Cameron, 137 U. S. 542; Cadwalader *v.* Partridge, 137 U. S. 553.

1. U. S. Rev. St., § 3011; U. S. *v.* Cobb, 11 Fed. Rep. 79; Westray *v.* U. S., 18 Wall. (U. S.) 322; Arthur *v.* Unkart, 96 U. S. 118; U. S. *v.* Consinery, 7 Ben. (U. S.) 251; Watt *v.* U. S., 15 Blatchf. (U. S.) 33; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312; Chase *v.* U. S., 9 Fed. Rep. 882; U. S. *v.* Sowers, 14 Phila. (Pa.) 525.

And an appeal that has been abandoned has no more effect than if it had not been taken. Bartlett *v.* Kane, 16 How. (U. S.) 263.

The Secretary of the Treasury is not obliged to notify the appellant of his decision on the appeal. Arnson *v.* Murphy, 115 U. S. 579; 24 Fed. Rep. 355. Neither need the collector notify him. John Shillito Co. *v.* McClung, 45 Fed. Rep. 778.

The necessity of taking such an appeal cannot be waived by a stipulation between the importer and the collector agreeing that the case shall be governed by the decision of the Secretary upon another appeal. Haynes *v.* Brewster, 46 Fed. Rep. 471.

Under the act of 1890 the appeal is taken to the board of general appraisers instead of to the Secretary. 26 St. at Large 137, § 14.

2. McLane *v.* U. S., 6 Pet. (U. S.) 404; Burke *v.* Trevitt, 1 Mason (U. S.) 96; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137.

3. U. S. Rev. Stat., § 3011; 26 Stat. at Large, 141, § 29.

Such suit may also be brought by one who purchases goods from an importer while they are in bond, pending an appeal to the Secretary of the Treasury. Castro *v.* Seeberger, 40 Fed. Rep. 531.

4. Thus a collector cannot be held liable for goods lost while deposited in a custom-house warehouse, unless it is shown that their loss was due to his personal negligence, misfeasance, or wrong in regard to their safe keeping. Brissac *v.* Lawrence, 2 Blatchf. (U. S.) 121.

A collector who had seized property on account of a supposed forfeiture under the revenue laws is not liable to an action for damages therefor until a final decree has been rendered in the suit brought to enforce the forfeiture. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246.

This right of action is probably not affected by the law of 1890. See 26 Stat. at Large 141, § 25.

5. Wedemeyer *v.* Lancaster, 30 Fed. Rep. 670; Richardson *v.* Curtis, 3 Blatchf. (U. S.) 385.

Thus where the excess of the duties collected over the amount legally due has been repaid to the importer without interest, he cannot afterwards maintain a suit for the interest. Riley *v.* Maxwell, 4 Blatchf. (U. S.) 237.

And where an importer deposited with the collector a sum of money to cover the duties, and the collector, after finding that the deposit exceeded the amount of the duties, tendered the excess to the importer, it was held that the importer could not recover such excess from the collector by suit unless he showed that it was wrongfully withheld by the collector. Tremlett *v.* Adams, 13 How. (U. S.) 295.

be begun is regulated by the United States laws regardless of the State statutes of limitations.[1]

The burden of proof in such suits is on the importer;[2] and in order to recover he must prove that the duties paid by him were not authorized by law;[3] that he duly protested and appealed;[4] that he paid the duties in order to obtain possession of the goods,[5] and that his suit was begun within the time limited by statute.[6] The importer cannot set up any objections to the proceedings of the officers of the customs which he has not specified in his protest.[7]

1. Arnson *v.* Murphy, 109 U. S. 238. The statutory limitation of ninety days within which such suits may be brought begins to run from the time of the decision of the Secretary of the Treasury upon the importer's appeal and not from the time when the importer first learned of such decision. Chung Yune *v.* Shurtleff, 7 Sawy. (U. S.) 338.

The suit may be begun within ninety days after the decision of the Secretary, however long such decision may be delayed. Arnson *v.* Murphy, 19 U. S. 238.

Although such a suit may have been begun before the time required for appeal has elapsed, yet recovery may be had therein after the protest, appeal, and decision have been made, if the collector still refuses to refund. Moller *v.* Merritt, 29 Fed. Rep. 678; 24 Blatchf. (U. S.) 214.

2. Arthur *v.* Unkart, 96 U. S. 118. See 26 St. at Large 140, § 21.

The burden is on the importer because the presumption is that the collector imposed the proper duty. Weilbacher *v.* Merritt, 37 Fed. Rep. 85; Hagedon *v.* Seeberger, 38 Fed. Rep. 401; Fisk *v.* Seeberger, 38 Fed. Rep. 718; Walker *v.* Seeberger, 38 Fed. Rep. 724.

Where it is claimed that gunny bags are admissible as paper stock the burden is on importer to show that they are only fit for that use. Jessup etc. Paper Co. *v.* Cooper, 46 Fed. Rep. 186.

3. Drake *v.* Redfield, 4 Blatchf. (U. S.) 116.

4. Arnson *v.* Murphy, 24 Fed. Rep. 355; Bodart *v.* Schell, 33 Fed. Rep. 825.

A reliquidation made more than a year after settlement without protest and based only on a change in the rate and disallowance of a discount will not sustain an action to recover the excess. Beard *v.* Porter, 124 U. S. 437.

It is necessary to prove the signature to the protest, even though the protest has been accepted by the collector. Grandmange *v.* Schell, 32 Fed. Rep. 655.

The production of the protest from the proper repository gives rise to the presumption that it was duly served upon the proper officer on the day of its date, even though no record of the protest has been made by the officers of the customs. Schell *v.* Fauche, 138 U. S. 662.

5. An importer who has received his goods from the collector before he pays the duties which he alleges to be excessive cannot recover the alleged excess since the statute limits the right of recovery to cases where the duties are paid in order to obtain possession of the goods. Porter *v.* Beard, 124 U. S. 429; Grandmange *v.* Schell, 32 Fed. Rep. 655; Rossman *v.* Hedden, 37 Fed. Rep. 99.

The insertion by an importer of additional charges in the invoices in order to avoid penalties imposed by the appraisers for their omission renders payment of the duties involuntary, though the penalties were illegal. Robertson *v.* Frank Bros. Co., 132 U. S. 17.

Where duties are paid by third persons upon their withdrawing the goods from custody on the written authorization of the importer, it will be assumed in an action by the importer for the recovery of such duties that they were paid in his behalf. Simpson *v.* Schell, 14 Fed. Rep. 286.

6. Arnson *v.* Murphy, 115 U. S. 579.

7. Swanston *v.* Morton, 1 Curt. (U. S.) 294; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175.

Thus, where the protest only stated that the invoice value was correct, the protester cannot show that the appraisement was illegally made. Kriesler *v.* Morton, 1 Curt. (U. S.) 413.

Nor can he deny the accuracy of the appraisement, in the absence of fraud or impropriety on the part of the appraisers.[1]

The collector may defend the suit on the theory that the goods were subject to the duty exacted under another provision of the tariff laws than that on which he founded his assessment.[2]

It cannot be shown that the appraisers fixed the value of the goods at the time of exportation instead of at the time of manufacture, unless that fact is stated as a ground of protest. Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385.

A protest against the payment of duties on an increased valuation above the invoice price set out merely that the invoice was correct and just, and that no forfeiture or penalty had been incurred; and the protester was not allowed to show that the invoice value was the actual purchase price of the goods, since the only point raised by the protest was as to the difference between the appraised value and the market value of the goods. Tucker *v.* Maxwell, 2 Blatchf. (U. S.) 517.

And in a similar case where the protest only stated that the invoice showed the true value of the goods at the port of exportation, it was held that the only question raised was the agreement of the invoice values with the prices current at the port of exportation at the date of the invoice. Cornett *v.* Lawrence, 2 Blatchf. (U. S.) 512; Wilson *v.* Lawrence, 2 Blatchf. (U. S.) 514.

A protest "against the demand of the duties charged by the collector on the merchandise specified in the within entry" does not enable the protester to show that the collector did not order a reappraisement or that one of the examiners was hostile. Mailard *v.* Lawrence, 3 Blatchf. (U. S.) 378.

Where the protest speaks of the goods as consigned to the protester by the manufacturer, the protester cannot set up that the goods were owned and imported by the manufacturer. Warburg *v.* Maxwell, 3 Blatchf. (U. S.) 382.

Where the protest states that the goods are dutiable at a certain rate, the protester cannot show that the goods are on the free list. Legg *v.* Hedden, 37 Fed. Rep. 861.

A protest that goods should have been classified as bonnet trimmings instead of as beads does not allow the protester to object that they should have been classified as jet. Fisk *v.* Seeberger, 38 Fed. Rep. 718; Walker *v.* Seeberger, 38 Fed. Rep. 724.

A protest that merchandise classed as starch is sago flour and therefore free of duty does not allow the protester to show that the merchandise is anything else than sago flour. Chung Yune *v.* Kelly, 8 Sawy. (U. S.) 415; 14 Fed. Rep. 639. But a protest which claims that the goods are "seine twine" may be supported by proof that they are "gilling twine," under a statute which imposes a certain duty on "seine and gilling twine." McNab *v.* Seeberger, 39 Fed. Rep. 759.

Though the proof offered by the collector shows defects in his assessment of the duties, the importer cannot take advantage of such defects unless he has relied on them in his protest. Burgess *v.* Converse, 2 Curt. (U. S.) 216.

1. Auffmordt *v.* Hedden, 137 U. S. 310.

But it is competent for him to prove the appraisement void by showing that the merchant appraiser was not "familiar with the character and value of the goods in question" as required by statute, or that the appraisers did not examine the goods in the manner required by law. Oelbermann *v.* Merritt, 123 U. S. 356; Mustin *v.* Cadwalader, 123 U. S. 369.

It is not proper, however, to ask one of the appraisers whether he acted in accordance with the instructions of the Secretary of the Treasury, since such a question merely calls for the opinion of the witness. Auffmordt *v.* Hedden, 137 U. S. 310.

Where an appraisement is based upon the price of the goods at the time of shipment, and neither the protest, the invoice, nor the entry states when the goods were bought, the importer cannot show, in his suit to recover an excess of duties, that the goods were bought at any other time than the time of shipment. Crowley *v.* Maxwell, 3 Blatchf. (U. S.) 401.

Mere errors or mistakes of the collector or the appraisers are not reviewable in such suit. U. S. *v.* Thurber, 28 Fed. Rep. 56.

2. Herrman *v.* Arthur, 127 U. S. 363.

The question whether the collector acted within his statutory powers is for the court,[1] and the court is to interpret the non-technical words in the statutes;[2] but the question whether particular articles are included in some particular name used in the tariff laws is for the jury.[3]

The declaration in such a suit should show that the case comes within the provisions of the statute;[4] and the declaration must be supplemented by a bill of particulars.[5] The bill of particulars cannot be amended even by order of court,[6] nor can the court allow it to be served *nunc pro tunc* after expiration of the thirty days allowed by statute for that purpose.[7]

An importer who has been guilty of laches is not entitled to recover interest for the time during which his laches continued.[8]

But the orders of the Secretary of the Treasury fixing the time at which the value of imported goods is to be estimated are no justification to the collector as against third persons. Greely *v.* Thompson, 10 How. (U. S.) 225; Maxwell *v.* Griswold, 10 How. (U. S.) 242.

1. Badger *v.* Cusimano, 130 U. S. 39.

2. Marvel *v.* Merritt, 116 U. S. 11; Nix *v.* Hedden, 39 Fed. Rep. 109.

The construction of the tariff acts by the Treasury Department is not conclusive either upon the importer or the collector. Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Munsell *v.* Maxwell, 3 Blatchf. (U. S.) 364.

3. Wilkinson *v.* Greely, 1 Curt. (U. S.) 441; Weilbacher *v.* Merritt, 37 Fed. Rep. 85.

It has accordingly been held erroneous for the court to instruct the jury that ground chicory is the same thing as burnt chicory. Arthur *v.* Herold, 100 U. S. 75.

When a non-enumerated article resembles several enumerated articles, the question of similitude is for the jury. Herrman *v.* Arthur, 127 U. S. 363; Wills *v.* Russell, 100 U. S. 621.

Whether a certain importation of iron consists of "hammered iron" or of "axles" is for the jury. Ross *v.* Fuller, 17 Fed. Rep. 224.

And so is the question whether thermometers, barometers, and hygrometers are "philosophical apparatus." Robertson *v.* Oelschlaeger, 137 U. S. 436.

And so is the question whether certain goods are argols crude or refined. Recknagel *v.* Murphy, 102 U. S. 197.

4. Wedemeyer *v.* Lancaster, 30 Fed. Rep. 670.

But the declaration need not show that the action is brought within the time limited by statute, since that will be shown by the bill of particulars. Beard *v.* Porter, 124 U. S. 437.

Where the declaration alleged that the appeal had not been decided before the suit was brought, and the plea set up that the appeal had been decided more than ninety days before the suit was begun, it was held that a replication setting up that the collector was estopped from pleading that defense was not a departure from the declaration. John Shillito Co. *v.* McClung, 45 Fed. Rep. 778.

5. U. S. Rev. St., § 3012.

If the bill of particulars does not contain all the items required by the statute, the suit will be dismissed for want of prosecution. Sherman *v.* Hedden, 32 Fed. Rep. 757.

The sufficiency of the bill of particulars is to be determined at the trial and not upon motion to amend. Rickard *v.* Barney, 32 Fed. Rep. 581.

6. It was held in Pott *v.* Arthur, 15 Blatchf. (U. S.) 314, that a bill of particulars in such a suit was amendable; and this decision was followed in Dieckerhoff *v.* Robertson, 29 Fed. Rep. 781, and Rickard *v.* Barney, 32 Fed. Rep. 581. But in the subsequent case of Sherman *v.* Hedden, 32 Fed. Rep. 757, decided in the the same circuit, Judge Lacombe, after careful consideration, overruled Pott *v.* Arthur, 15 Blatchf. (U. S.) 314, and held that the service of a bill of particulars was a statutory limitation upon the right of recovery and that the court had no power to allow a bill of particulars in a suit against the collector to be amended.

7. Castner *v.* Magone, 32 Fed. Rep. 578, overruling Pott *v.* Arthur, 15 Blatchf. (U. S.) 314.

8. Stewart *v.* Schell, 31 Fed. Rep. 65.

2. Under the Act of 1890.—In 1890 Congress effected a radical change in the form of the importer's remedy against a collector for the exaction of excessive or illegal duties.[1] The right to bring a suit therefor directly against the collector is taken away.[2] The mode of reviewing the collector's liquidation of the duties is by giving him, within ten days, written notice setting forth distinctly and specifically the reason for the importer's objections thereto.[3] If the merchandise is entered for consumption, the importer must also pay the duties charged thereon. The receipt of this notice effects an appeal to the board of general appraisers, whose decision may be reviewed by the circuit court at the instance either of the importer or the government.[4]

3. Collection of Judgments.—Whenever judgment is rendered against a collector on account of acts done by him in the execution of his official duties or for money collected by him and paid over to the United States, the court may certify that there was probable cause for the act of the collector, whereupon the judgment is paid out of the United States treasury, and no execution can be issued thereon against the collector.[5] If it appears that the collector acted wrongfully and without probable

1. 26 St. at Large, ch. 407.

2. 26 St. at Large, 141, § 25.

But this does not take away the right to sue for duties illegally exacted before August 1, 1890. See 26 St. at Large 141, § 29.

3. 26 St. at Large 137, § 14.

This notice is merely the protest of the Revised Statutes under another name; and its sufficiency is to be tested by the rules applicable to protests. *In re* Downing, 45 Fed. Rep. 412.

In case of manifest clerical errors in the entry of liquidation, the Secretary of the Treasury may make a correction at any time within one year after the entry. 26 St. at Large 140, § 24.

4. 26 St. at Large 138, § 15.

The proper tribunal in which to institute such review proceedings is the circuit court of the district in which the merchandise is entered and the duties are liquidated, even where the decision to be reviewed has been rendered by the general appraisers in another district. *In re* Wyman 45 Fed. Rep. 369.

The board of general appraisers are required by the statute to return to the circuit court which reviews their decision a certified statement of the facts involved in the case. *In re* Sternbach, 44 Fed. Rep. 413. Where the return is not sufficient the court will order the board to make a further return. *In re* Downing, 45 Fed. Rep. 412; *In re* Dieckerhoff, 45 Fed. Rep. 235; *In re* Blumlein, 45 Fed. Rep. 236.

This proceeding for review by the circuit court is so much like the action of the importer against the collector authorized by U. S. Rev. St., § 3011 that it seems probable that the principles upon which suits under that statute have been decided will control the decisions in these review proceedings.

5. U. S. Rev. St., § 989.

A doubt respecting the law constitutes good reason for granting a certificate of probable cause. U. S. *v.* Riddle, 5 Cranch (U. S.) 311.

A reasonable ground of suspicion is reasonable cause for a seizure. U. S. *v.* Ship Recorder, 2 Blatchf. (U. S.) 119.

Probable cause is the same as reasonable cause. Frerichs *v.* Caster, 22 Fed. Rep. 637.

A certificate of probable cause may be granted by a different judge from the one before whom the case was tried. Cox *v.* Barney, 14 Blatchf. (U. S.) 289. It cannot be granted till after the trial. Andrae *v.* Redfield, 12 Blatchf. (U. S.) 407.

The payment of the judgment out of

cause, he is, of course, personally liable.[1] Where the judgment is merely for the return of duties illegally exacted, it is payable out of the United States treasury as a matter of course.[2]

REVERSE.—To set aside, to annul, or to vacate.[3] Reversal is the annulling or setting aside of a judgment, usually by an appellate court, for error or irregularity.

REVERSION.—(See also ESTATES, vol. 6, p. 895; LANDLORD AND TENANT, vol. 12, p. 658; REAL PROPERTY, vol. 19, p. 1028; REMAINDERS; RENTS; STATUTES.)

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VII. Relation of Reversioner and Owner of Particular Estate. See (LANDLORD AND TENANT), 348.
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I. DEFINITION.—A reversion is strictly the returning of land to the grantor or his heirs after the grant is over.[4] An estate in reversion, for which the term reversion is frequently used, is, then, the estate remaining in the grantor of one or more particular estates.[5]

II. REVERSION AFTER A TERM OF YEARS.—After a term of years, a reversion can be said to exist only in a limited sense. For, as there is no freehold in a term of years, the reversion in the lessor is strictly an estate of freehold in possession, although subject to the term. And this is in fact the proper denomination of such an interest rather than a reversion expectant upon the term of years.[6]

III. DISTINCTION BETWEEN REVERSION AND REVERTER.—While a reversion could not exist after the old fee simple conditional, this

the treasury is made without including interest. White *v.* Arthur, 20 Blatchf. (U. S.) 237; 10 Fed. Rep. 80. But where the Supreme court affirms a judgment against a collector, it will allow interest. Schell *v.* Cochran, 107 U. S. 625.

1. McLane *v.* U. S., 6 Pet. (U. S.) 404; Burke *v.* Trevitt, 1 Mason (U. S.) 96; Hoit *v.* Hook, 14 Mass. 210.

2. 26 St. at Large 138, § 15.

3. Laithe *v.* McDonald, 7 Kan. 254.

4. Co. Litt. 22, as cited in 2 Bl. Com. 176.

5. 2 Bl. Com. 176; And. L. Dict.; Bouv. L. Dict.

Challis' definition (Real Prop. 58) is: "A reversion without any express act of the grantor or settlor is left in him by the operation or construction of law, when he merely parts with less than his whole estate, retaining in himself a residue which awaits the determination of that with which he has parted, before it can become the estate in possession."

Washb., 2 Real Prop. 388: "What remains to the owner of an estate after he has parted with a portion of it, the possession of what thus remains being to return or revert to him, upon the determination of the period for which the portion so parted with was to be enjoyed." See Williams on Real Prop. *242.

6. See Challis on Real Prop., pp. 61, 77. But see 2 Bl. Com. 175. See also 1 Washb. Real Prop. *46. "When speak-

was changed by the statute *De Donis*, after which, in harmony with the common-law doctrine of estates, there remained an estate of reversion in the donor of an estate tail.[1] An estate in reversion cannot exist expectant upon an estate in fee. This follows from the theory of the common law as to the division of the ownership into estates.[2] There may, however, be a possibility remaining in the grantor of a qualified fee of a return of the fee. This is not a reversion nor an estate in reversion; it is properly called a possibility of reverter, or a reverter.[3] According to the latest and best opinion, qualified fees and with them possibilities of reverter have ceased to exist in *England* and in those States in which the statute of *Quia Emptores* is in force. In *Pennsylvania* and *South Carolina*, where the statute is not in force, possibilities of reverter may exist.[4]

IV. **Creation.**—An estate in reversion differs from one in remainder, in that the former is always created by law, not by act of parties.[5]

V. **Conveyance.**—With the exception of reversions subject to a term of years, reversions could be conveyed only by deed of grant. This followed from the lack of seisin in the reversioner, which precluded conveyance by feoffment with livery of seisin.[6]

ing of an estate in reversion, though it is what is called a vested one, the owner is said to be entitled to, and not to be seised of such estate, unless it be expectant upon a term of years, in which case the possession of the termor is the possession of the reversioner or remainderman, who has the seisin accordingly." *Citing* 1 Prest. Est. 216, 250; Plowd. 191.

1. Challis on Real Prop., pp. 63–65; Earl of Strafford *v.* Buckley, 2 Ves. Sen. 177; 2 Bl. Com. 175; Gray's Rule against Perp., § 18.

2. See 2 Bl. Com. 164, 165, 175; Challis on Real Prop., pp. 63, 64. The subject of limitations of common-law estates, wherein is involved the distinction between reversions and possibilities, will be found treated under Real Property, vol. 19, p. 1028.

3. See the distinction between possibilities of reverter and rights of entry for breach of condition, under Real Property, vol. 19, p. 1028.

See also Perpetuities, Rule Against, vol. 18, p. 335. Challis on Real Prop., 63; Gray's Rule against Perpetuities, § 13.

4. See Real Property, vol. 19, p. 1028; Perpetuities, Rule Against, vol. 18, p. 335; Gray's Rule against Perpetuities, §§ 31–42, where the most thorough and authoritative discussion may be found, including analysis of English and American cases in which possibilities of reverter are mentioned. In addition to these it must be remembered that the term is often applied loosely to rights of entry for breach of condition attached to the grant of a fee. See Nicoll *v.* New York, etc., R. Co., 12 N. Y. 134; so in 2 Washb. Real Prop. 390.

In Helm *v.* Webster, 85 Ill. 116, it was held that on conveyance to a city of land for a street, even without reservation in the deed, the land will, on vacation of the street, pass back to the grantor or assigns. So in Board of Education *v.* Inhabitants, 18 Ohio St. 221.

5. See 2 Washb. on Real Prop., *p. 389; Williams on Real Prop., *p. 242; 2 Bl. Com. 163.

It is this difference between remainders and reversions in their creation which gives rise to the second fundamental distinction between them, viz., between the reversioner and the grantee of the particular estate there is a relation of tenure, whence result a variety of incidents, which (including rents) will be found discussed under the title Landlord and Tenant, vol. 12, p. 658.

See Williams on Real Prop., *p. 250.

6. See Williams on Real Prop. 243; *citing* Co. Litt. 48*b*, n. (8); Shep. Touch. 230.

The old requirement of attornment, by the omission of which the tenant could prevent conveyance of the reversion, no longer exists.[1] A possibility of reverter cannot be transferred.[2]

An important restriction on the conveyance of reversions is the rule which forbids the conveyance of an existing reversion *in futuro*, except under the Statute of Uses. There is, however, no rule against the creation of an estate in reversion to begin at a future time.[3]

VI. Reversion a Vested Interest.—An estate in reversion is essentially a vested interest.[4] But there are reversionary interests which are for all practical purposes contingent, and are so regarded for certain legal purposes.[5] None of these, however,

1. Williams on Real Prop. *248; Rawle's note, *citing* Farley *v.* Thompson, 15 Mass. 18; Burden *v.* Thayer, 3 Met. (Mass.) 78; *New York* Rev. Stat., vol. 1, p. 739, § 146; Baldwin *v.* Walker, 21 Conn. 168; Coker *v.* Pearsal, 6 Ala. 542. See 2 Washb. Real Prop. *389.

2. See Real Property, vol. 19, p. 1028. See also Gray's Rule against Perp., § 13. See Scheetz *v.* Fitzwater, 5 Pa. St. 126, where it was held by the lower court, with the approval of the appellate court, that where A conveyed to B a milldam for the use of a mill and for no other purpose, A had conveyed a qualified fee determinable on the abandonment by B, his heirs, or assigns, of the use for which the conveyance was made, that "in conveying such limited fee he retained the reversion in himself; and that he could permit to descend, or sell to others." See, however, Methodist Church of Columbia *v.* Old Columbia Pub. Ground Co., 103 Pa. St. 608.

Reversion on Incorporeal Hereditament.—The chief ground for the classification of reversions as a species of incorporeal hereditament, by such authorities as Washburn and others, seems to be the fact that a deed of grant is required for their conveyance. See Williams on Real Prop. *239.

3. This rule is analogous to the familiar principle which forbids an estate of freehold in possession to be conveyed to commence *in futuro*. The grounds for this rule are stated with some variance by leading writers. Perhaps the clearest account is that of Professor Gray, Rule against Perp., § 17, where he says: " . . If land had been conveyed to G for life, remainder to M and his heirs, M could grant his remainder to I, but he could not grant I the remainder from and after M's death . . . ," and then quotes the reason from 1 Plowd. 155: "If a reversion might be granted at a day to come, from thence it would follow that the grantor would have a particular estate in it, in the mean time, of his own creation, which cannot be by the rule of law, that a man should be lessor to himself."

In Challis on Real Prop., p. 87, the reason is grounded on a strict analogy to the rule which forbids the granting of estates of freehold *in futuro*, since such limitations "only contemplate *ab initio* the possible abeyance of the freehold, but also . . . are such that they could not possibly take effect as estates in possession without the occurrence of such an interval of abeyance." In support are cited Barwick's Case, 5 Rep. 93; 10 Vin. Abr. 206; Estate B, pl. 9; 1 Prest. Est. 219. See 2 Washb. 801, *citing* Watk. Conv. 211, Coventry's Note; Jones *v.* Roe, 3 T. R. 93; Wms. on Real. Prop. 198, 199.

4. See 2 Washb. Real Prop, *389. See also Gray's Rule against Perp., § 113. But the statement that "all reversions are vested interests" must be considered as qualified by the remark in § 452, as to which see the succeeding note.

5. In section 452 of Gray's Rule against Perpetuities, it is shown that while a remainder after an estate tail is not void for remoteness (because it may at any time be destroyed by the tenant in tail), the grant of the reversion after an estate tail may be bad, as, for example, the grant of the reversion, after an estate in tail male, to take

is of any modern importance except the possibility of reverter after a qualified fee.[1]

VII. Relation of Reversioner and Owner of Particular Estate.[2]

VIII. Incidents Depending Upon the Seisin of the Reversioner

—1. Dower and Curtesy.—Actual seisin, or seisin in possession, is a requisite both of dower and of curtesy, except, however, in a reversion subject to a term of years, as has been explained, there is no seisin in an estate in reversion. There can therefore be no dower or curtesy in a reversion except in one subject to a term of years, where the possession of the tenant of the particular estate is the possession of the reversioner.[3]

2. Adverse Possession.—The period of adverse possession, or of the limitation of the right to make entry or bring action, cannot begin to run against the owner of an estate in land until the right of such owner actually accrues. It follows that the right of the reversioner can in nowise be affected by adverse possession until the determination of the preceding particular estate.[4]

IX. Descent.[5]

effect on failure of issue generally which is too remote. See Perpetuities, Rule Against, vol. 18, p. 335. See also Marsden on Perp. 144; Bankes *v.* Holme, 1 Russ. 394.

Purely theoretical is the reversion in the grantor or devisor and his heirs, which is said to support a remainder in fee during its contingency. See Gray's Rule against Perp., § 11, n. 2, *citing* Purefoy *v.* Rogers, 2 Wm. Saund. 382 and note; Egerton *v.* Massey. 3 C. B. N. S. 338; Co. Litt. 191*a*, Butler's note.

1. The question of the application of the Rule against Perpetuities to possibilities of reverter will be found treated under Perpetuities, Rule Against, vol. 18, p. 335.

2. All the incidents of the relation of landlord and tenant will be found treated under Landlord and Tenant, vol. 12, p. 658.

3. See Dower, vol. 5, p. 893, where the law is accurately stated with a list of cases. See also Curtesy, vol. 4, p. 958. See further, Washb. Real Prop., vol. 1, *154; vol. 2, *392; Scribner on Dower (2nd ed.), vol. 1, pp. 229, 230.

4. See Limitations of Actions, vol. 13, p. 720; Adverse Possession, vol. 1, p. 237. See also Angell on Limitations, §§ 371, 415.

In Winters *v.* De Turk, 133 Pa. St. 359, the court, approving the decision in Hall *v.* Vandegrift, 3 Binn. (Pa.) 374, said: "It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry and support an action. . . . But if a party has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor until the death of the tenant in tail without issue."

See also Shepley *v.* Lytle, 6 Watts (Pa.) 500; Poe *v.* Foster, 4 W. & S. (Pa.) 355; Marple *v.* Myers, 12 Pa. St. 125.

So in a recent New York case, Clute *v.* New York, etc., R. Co., 120 N. Y. 267, it was held: "Until the precedent estate is terminated giving the remainderman the right of possession, no possession can be adverse to the remainderman." See also Christie *v.* Gage, 71 N. Y. 193; Grout *v.* Townsend, 2 Hill (N. Y.) 554; Clarke *v.* Hughes, 13 Barb. (N. Y.) 147.

As to adverse possession of the tenant, also on the question of how far the neglect of the tenant affects the rights of the reversioner, see Landlord and Tenant, vol. 12, p. 658. See also Angell on Limitations, § 371.

5. The subject of the descent of estates in reversions, involving the discussion of the principle, *seisina facit stirpem, non jus*, will be found treated under Succession.

REVERTER.—Reversion *q. v.* A possibility of reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate.[1]

REVIEW.—A second examination with a view to amendment; reconsideration; revision. Used more particularly to designate the examination of a cause by an appellate court, and the second examination of a proposed public road by a jury of viewers or, as they are sometimes called, a "jury of review." In the first sense it signifies any of the different modes by which a judicial act may be revised, as appeal, writ of error, re-hearing, etc.[2]

REVIEW, BILL OF.—See BILL OF REVIEW, vol. 2, p. 262; EQUITY PLEADINGS, vol. 6, p. 771; EXECUTORS, vol. 7, p. 445.

REVISE—(See also STATUTES).—To review, alter, and amend.[3]

REVIVAL (Of action).—(See ABATEMENT, vol. 1, p. 13; EXECUTORS, vol. 7, p. 413; SCIRE FACIAS (of judgment); JUDGMENTS, vol. 12, p. 1508; SCIRE FACIAS (of a debt barred by the Statute of Limitations); LIMITATION IN ACTIONS, vol. 13, p. 748.

REVIVE.—(See also the references under the title REVIVAL).—The word "revive" means to bring again to life, to reanimate, to renew, to bring into action after a suspension; as to revive a project or scheme which has been laid aside.[4]

REVIVOR, BILL OF.—See BILL OF REVIVOR, vol. 2, p. 269.

REVOCATION.—(Of agent's authority) See AGENCY, vol. 1, p. 444; (of a power) POWERS, vol. 18, p. 898; (of partner's authority) PARTNERSHIP, vol. 17, p. 997 *et seq.;* (of proposals) CONTRACTS, vol. 4, p. 850; (of submissions to arbitration) ARBITRATIONS, vol. 1, p. 664; REFEREES; (of a will) CODICILS, vol. 3, pp. 296, 299; LEGACIES AND DEVISES, vol. 13, p. 70; WILLS.

1. 1 Washb. Real Prop. 63.

2. In view of its comprehensiveness no attempt is here made to treat the subject of review, and the different modes should be sought under their appropriate titles.

3. Webst. Dict., *followed* in Vessant *v.* Knox, 27 Ark. 272. In that case it was held, that a power to "revise and re-arrange the statute law of the State" could not be held to include power to "originate" laws for adoption by the legislature.

4. Webster's Dict., *followed* in Lindsey *v.* Lyman, 37 Iowa 207. In that case the court, by Day, J., said of this word: "It is the word which has been generally employed in judicial decisions to express the effect of an admission of the existence of indebtedness or of a promise to pay a debt otherwise barred by the Statute of Limitations. There is nothing in the meaning of the word, as thus employed which renders it necessary that the reanimating, renewing influence of the promise or admission shall begin to be exerted the instant the admission or promise is made. If the debt is already barred at the time of the admission or new promise, it at once restores it. But if the debt is not then barred its operation is suspended until the time elapses when the remedy for the enforcement of the debt but for the admission or promise would be gone, and then it reanimates or revives the debt. Or, more properly speaking, by its life-sustaining energy, it preserves life in that which was about to die, and which but for it, would have been dead."

REVOCATION (PROBATE AND ADMINISTRATION)—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 161).

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I. DEFINITION.—The mode of terminating the authority of an executor and administrator is either by a proceeding for his removal, or by a proceeding leading to the revocation of the letters testamentary or letters of administration granted to him. Wherever the authority of an executor to act is by statute made to depend upon a grant of letters by a court and not upon the appointment in the will alone, he is removed by a revocation of such letters; where, however, the executor may proceed under the authority conferred by the will without any further authority from a court, the proceeding is more in the nature of a prayer for his removal from office. The authority of the administrator depending upon the appointment by the court is terminated by a revocation of the authority granted.

II. JURISDICTION TO REMOVE AND REVOKE LETTERS.—In most of the States the power to remove an executor and administrator by revocation of the letters testamentary or the letters of administration granted them is by statute exclusively vested in the probate courts,[1] superior courts exercising appellate jurisdiction

1. The jurisdiction of orphans, probate, surrogate, and like courts is defined by constitutional or statutory provisions. Stimson Stat. Law, § 556; JURISDICTION, vol. 12, p. 269; PROBATE AND LETTERS OF ADMINIS-

only.[1] In some States the court of equity exercises this power,[2]

TRATION, vol. 19, p. 162; Watson *v.* Glover, 77 Ala. 323; Marston *v.* Wilcox, 2 Ill. 60; Succession of Williams, 26 La. Ann. 207; Raborg *v.* Hammond, 2 Har. & G. (Md.) 42; Dalrymple *v.* Gamble, 66 Md. 298; Waters *v.* Stickney, 12 Allen (Mass.) 1; Delany *v.* Noble, 3 N. J. Eq. 559; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; Hood *v.* Hood, 2 Dem. (N. Y.) 583; 98 N. Y. 363; 104 N. Y. 103; Corn *v.* Corn, 4 Dem. (N. Y.) 394; Taylor *v.* Biddle, 71 N. Car. 1; County Court *v.* Bissel, 2 Jones (N. Car.) 389; Chew *v.* Chew, 3 Grant's Gas. (Pa.) 289; Yeaw *v.* Searle, 2 R. I. 164; Wilson *v.* Frazier, 2 Humph. (Tenn.) 30; Schouler Exrs. & Admrs., § 154; Woerner Am. Law of Exrs. & Admrs., § 267; Croswell Exrs. & Admrs., § 299; Redfield on Wills, vol. 3 (3d ed.), *117.

The court of chancery has no power to remove an executor; that power belongs exclusively to the orphan's court, and perhaps in some cases to the ordinary. Where an executor is also trustee, and the matters in his charge as trustee can be separated from those confided to him as executor, this court may remove or supersede him as trustee; but he will be left to execute and perform any duty devolving upon him as executor. In proper cases the court of equity will enjoin him from proceeding further in the execution of his duties as executor, and will appoint a receiver, and direct him to pay over the estate in his hands to the receiver, to be administered under the direction of the court. But in such case he is not removed or superseded as executor. Leddel *v.* Starr, 19 N. J. Eq. 159.

In Emery *v.* Hildreth, 2 Gray (Mass.) 231, Thomas J. said that the validity of a decree of the probate court, appointing an administrator, if objected to by any one of the parties entitled to administer, on the ground that he had no notice could be tried only in the probate court, or in this court sitting as the supreme court of probate.

Although there be no statutory provision authorizing the probate court, upon a mere motion, to remove an administrator, or revoke his letters, it is an inherent power in every judicial tribunal to correct an error which it may have committed when no positive rule of law forbids it. McCabe *v.* Lewis, 76 Mo. 296.

In *North Carolina*, where the office of probate judge is abolished, the clerks of superior courts have jurisdiction of proceedings for the removal of executor and administrators. Edwards *v.* Cobb, 95 N. Car. 4.

The power conferred on the surrogate to remove executors and administrators is wholly independent of any other power which he may exercise. The precise ground upon which he may move and the manner of proceeding are prescribed specifically by statute, and must in all cases be strictly observed. People *v.* Hartman, 2 Sweeny (N. Y.) 576.

It was held in Wilson *v.* Frazier, 2 Humph. (Tenn.) 30, that the circuit court had no power to repeal letters of administration granted by the county court, unless the party seeking the repeal of them had appeared in the county court and contested the grant. The proceeding to repeal the grant must originate in the county court.

1. Ledbetter *v.* Lofton, 1 Murph. (N. Car.) 184; Wilson *v.* Frazier, 2 Humph. (Tenn.) 30. See *infra*, this title, *Who May Apply for Removal.*

Where an executor with the will annexed, became a trustee in the place of an executor, refusing to qualify, he is responsible as such and amenable to the jurisdiction of the chancellor who may remove him as trustee of a devise and appoint another. Clemens *v.* Caldwell, 7 B. Mon. (Ky.) 171.

2. This is the case, says Mr. Woerner, in his work on the Am. Law of Administration, § 267, where the court of equity obtains jurisdiction over the executor or administrator under the well-known rule, that, where a court of equity obtains jurisdiction for one purpose, it will retain it until full and satisfactory justice is rendered to all the parties concerned.

See also Walker *v.* Morris, 14 Ga. 323; Wallace *v.* Walker, 37 Ga. 265; 92 Am. Dec. 70; Chappell *v.* Akin, 39 Ga. 177; Clemens *v.* Caldwell, 7 B. Mon. (Ky.) 171; Wilkins *v.* Harris, Winst. Eq. (N. Car.) 41; Walters *v.* Hill, 27 Gratt. (Va.) 388. In Long *v.* Wortham, 4 Tex. 381, it was held that by article 4, § 15, of the constitution the district court conferring original jurisdiction over executors includes

but in general equitable assistance is only there granted where the lower court is without the power to accomplish justice.[1]

III. WHO MAY APPLY FOR REMOVAL.—The court may upon the suggestion of an *amicus curiæ*, or at its own instance, make a motion to revoke the authority granted,[2] otherwise it is generally determined by statute who has the right to apply for removal or revocation of letters.[3] These statutes usually provide

suspension of the authority of the executor.

In Cooper *v.* Cooper, 5 N. J. Eq. 498, it was said that it is within the jurisdiction of the court of chancery to restrain an executor or other trustee who abuses his trust from further interfering with the estate. See also Randle *v.* Carter, 62 Ala. 95.

A court in one State cannot revoke letters granted in another. Chapman *v.* Fish, 6 Hill (N. Y.) 554.

If a probate court does actually revoke letters of administration it must be presumed that the same court granted them until the contrary appear. State *v.* Johnson, 7 Blackf. (Ind.) 529.

In *Louisiana*, a contest involving the removal of an executor or administrator of a succession, and the appointment of another, is a mere incident in the settlement of the succession, and not a distinct and separate suit; neither does it fall in the designation of cases at law or in equity between the parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts. Succession of Burnside, 34 La. Ann. 728.

1. If the interposition of equity is demanded it must be for some purpose auxiliary to relief being sought in courts of probate. Holbrook *v.* Campau, 22 Mich. 288; Leddel *v.* Starr, 19 N. J. Eq. 159.

2. Gasque *v.* Moody, 12 Smed. & M. (Miss.) 153; Clark *v.* Niles, 42 Miss. 460; Curtis *v.* Williams, 33 Ala. 570; Broughton *v.* Bradley, 34 Ala. 694; 73 Am. Dec. 474; Koger *v.* Franklin, 79 Ala. 505; Territory *v.* Bramble, 2 Dak. 193; Jefferson R. Co. *v.* Swayne, 26 Ind. 477; Barber *v.* Converse, 1 Redf. (N. Y.) 330.

The power to revoke letters irregularly granted may be exercised by probate courts in proper cases, *ex mero motu*, without application being made for such purpose by any one. Watson *v.* Glover, 77 Ala. 323.

It was held in County Court *v.* Bissell, 2 Jones (N. Car.) 389, that letters testamentary issued to two executors named in a will, one of whom was made sole executor by a codicil, might be revoked as to the other by the county court of probate of its own motion at a subsequent term.

Independently of statute the surrogate was authorized to call in and revoke letters of administration which had been irregularly and improperly obtained, upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration. Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302; Cornish *v.* Cornish, 1 Lee Eccl. 14; Burgis *v.* Burgis, 1 Lee Eccl. 121; Oglevie *v.* Hamilton, 1 Lee Eccl. 357; Smith *v.* Cary, 1 Lee Eccl. 418; Trimlestown *v.* Trimlestown, 3 Hagg. Eccl. 243.

Thus in *Texas* it is provided by probate act of 1876 that an executor may be removed by the county judge of his own motion. Wright *v.* McNatt, 49 Tex. 425.

But where a surrogate made an order under Act of May, 1837, requiring an administrator to give further security within a specified time, and the administrator immediately appealed from such order and perfected his appeal before the expiration of the time limited by the order for the giving of such further security, the surrogate has no authority, pending the appeal, to make the further order, directed by statute, revoking the letters of administration until the appellate court shall have authorized further proceedings before the surrogate upon the order appealed from. Vreedenburgh *v.* Calf, 9 Paige (N. Y.) 128.

3. The persons who may make an application for removal of administrator are all accurately defined and pointed out in 22d section 2 Rev. Stat. 1876, 502, of *Indiana*. Vail *v.* Givan, 55 Ind. 59.

In *Rhode Island* the statute provides, that for the removal of any executor or administrator, a complaint shall first be made in writing to such court of probate by an heir, devisee, legatee, ward, creditor, or surety in the administration

that the application may be made by an heir,[1] devisee, legatee,[2] the assignee of a devisee or legatee,[3] ward,[4] creditor,[5] surety in

bond, who may have been injured or exposed to injury, or by any person interested in the same. Yeaw *v.* Searle, 2 R. I. 164.

In *New York*, § 2685 of Code Civ. Proc., enacts that a creditor or person interested may present a petition.

1. Brown *v.* Ventress, 24 La. Ann. 187; Reed *v.* Crocker, 12 La. Ann. 445.

2. Hake *v.* Stott, 5 Colo. 140.

3. The assignee of the interest of a residuary devisee under a will has a right to petition the court of probate for a decree removing the executor of said will, and, if aggrieved by the order, decree or determination, to appeal therefrom. And, where pending, an appeal from a decree of the court of probate refusing to remove an executor, the appellant assigns his interest in the estate of the testator in trust for the benefit of his creditors, said appeal will be dismissed, the assignee being the proper party to represent his interest in courts of law and equity. Yeaw *v.* Searle, 2 R. I. 164.

In Yeaw *v.* Searle, 2 R. I. 164, it was held that although appellant did not come within the literal description of the persons specifically named in the statute, yet he being the assignee of a devisee, and having a legal interest in the estate of the testator, had a right to make a complaint and an appeal under an equitable construction of the statute.

The representative of a minor heir has such right. Yerkes *v.* Broom, 10 La. Ann. 94.

4. A parent, as natural guardian, is not a person authorized to apply for revocation of letters. Quin *v.* Hill, 6 Dem. (N. Y.) 39.

5. **Creditors and Debtors.**—*New York* Code Civ. Proc., § 2685; Succession of Decuir, 23 La. Ann. 166; Rogers *v.* Morrison, 21 La. Ann. 455; Succession of Winn, 27 La. Ann. 687; Wildridge *v.* Patterson, 15 Mass. 148; Brackett *v.* Williams, 110 Mass. 549; Clark *v.* Niles, 42 Miss. 460; *In re* Stern, 29 N. Y. St. Rep. 216; Hartnett *v.* Wandell, 60 N. Y. 346; 19 Am. Rep. 194.

A motion may be made by a creditor for the removal of an administrator who was appointed in contravention of the creditors' right within the time during which they have priority over strangers. Ward *v.* Cameron, 37 Ala. 691.

The surrogate has jurisdiction to determine whether the petitioner is a creditor. Estate of Gillingham, 10 N. Y. St. Rep. 864; *In re* Wheeler, 46 Hun (N. Y.) 64.

Where one had a controversy with the estate and it was yet undecided and uncertain whether he was a debtor or creditor of the estate, the considerations should be weighty to induce the court to remove the executor on the application of one situated like him. Wiley *v.* Brainerd, 11 Vt. 107.

To maintain an action by a creditor to remove an executrix from office, the party must allege that he is a creditor of the succession. The allegation that he is a creditor of the executrix or the heirs is not sufficient. Carroll *v.* Huie, 21 La. Ann. 561.

Where the removal of curators of vacant estates and absent heirs, and that of testamentary executors or other administrators of successions may be prayed for by any heir, creditor, or other person concerned, etc., Code of Prac., art. 1018 and articles 1016 and 1019 authorize the judge, when made acquainted with any facts sufficient to justify removal to direct the subrogated tutor, or the curator *ad lites*, or the counsel of the absent heirs to institute a suit in their name to obtain the removal, it was held that judgment creditors of the heirs or the widow of the deceased, or those who had only a residuary interest, had not sufficient interest in the succession to authorize a suit. Carroll *v.* Huie, 21 La. Ann. 561.

In Donaldson *v.* Lewis, 7 Mo. App. 403, it was contended that there was no provision of the law authorizing the debtors of an estate to move to revoke a grant of letters. The court by Bakewell, J., said: "We are aware of no provision of law to that effect, nor do we think it necessary. It has been held that qualification under the statute protects the debtor in dealings with the administrator. Nevertheless, one cannot be bound to pay to one not really administrator of the estate; and if the debtor has the right not to pay to a pretended and *prima facie* claimant, we do not know how he is to assert that right in a case of this kind, unless by a proceeding of this nature he must proceed by a direct attack. It would not be permitted to him to show, in an

the administration bond,[1] or by any person interested in the estate.[2] Those entitled to administer have the right to petition,

action by the administrator against him, that letters were improvidently granted. The debtor is interested in seeing that his creditor is paid, and it is no answer to say that he may safely pay another, and thus relieve himself from his liability to his real creditor. He has such an interest in the matter, therefore, as to give him a standing in court."

Where the appellee insisted that it was not shown that the railroad company had any interest in the damages that might be recovered against it, nor in the proper administration of the estate of the intestate, and, therefore, could not be permitted to present to the court the question of the legality of the grant of letters of administration, "it is true that the railroad company would not have been the recipient of any portion of the damages that might be recovered against it for causing the intestate's death, yet it had a direct legal interest in the event of that suit, not as the claimant of the damages, but as the defendant against whom they are sought to be recovered. It is shown by the petition, and also by affidavit, that the only object in procuring the letters of administration was the recovery of damages against the railroad company for causing the intestate's death, by the prosecution of suit or otherwise. Upon the institution of such a suit, it was the undoubted right of the railroad company to inquire into the authority upon which the administrator acted. If the letters of administration were illegally granted, as the appellant insisted, and were for that reason void, they could not confer on him the power to prosecute such a suit, and a recovery by him would have been no bar to a subsequent suit by a legal administrator upon the same cause of action. Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

But as payment to a *de facto* administrator, though his appointment be erroneous and voidable, will bind the estate and discharge the debtor, one against whom the administrator has begun an action for the recovery of money cannot sue for such removal on the ground that he would not be safe in paying a judgment to the administrator. No one is "interested in the estate" as contemplated by section 2497 of the Code, unless he have a right to benefits from the estate, which prompts him to act for preserving its assets, increasing their value, and directing their disposition and appropriation. Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343.

Debtor to the estate was held not interested. Drexel *v.* Berney, 1 Dem. (N. Y.) 163.

1. Hardaway *v.* Parham, 27 Miss. 103; Allen *v.* Sanders, 34 N. J. Eq. 203; De Lane's Case, 2 Brev. (S. Car.) 167; Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16.

When a surety on an administrator's bond applies to be released from further responsibility thereon, the fact that the surety and his relatives are indebted to the estate and that his object in making the application is in order to procure the administration to be transferred to a person who will refrain from enforcing payment of such debts from him and them, is not a ground for refusing the application. Lewis *v.* Watson, 3 Redf. (N. Y.) 43.

2. Watson *v.* Glover, 77 Ala. 323; Edwards *v.* Cobb, 95 N. Car. 4; Gasque *v.* Moody, 12 Smed. & M. (Miss.) 153; Brackett *v.* Williams, 110 Mass. 549.

Any person interested in the estate may prosecute for removal independently of others having a like interest, unless the county court directs such other parties to be brought in. Kimball's Appeal, 45 Wis. 391.

It was held that under the statute authorizing the court to remove an executor or administrator upon failure to return an inventory, the petition must be presented by some one interested in the estate, and not by one coexecutor or administrator against the other. Dowdy *v.* Graham, 42 Miss. 451.

A remainderman may move. Fernbacher *v.* Fernbacher, 4 Dem. (N. Y.) 227.

A legatee and executor under a will which has been declared void, has, pending an appeal from the decree, such an interest as will allow him to apply for the removal of an administrator appointed in the estate. Newhouse *v.* Gale, 1 Redf. (N. Y.) 217.

One whose appointment as administrator is void because an administrator had already been appointed by

provided they have not already renounced or waived their right to administer.[1] Upon the question of interest a mere allegation

a court whose appointment was voidable but not void, has no such interest in the estate as to enable him to move for revocation of the voidable appointment. Coltart *v.* Allen, 40 Ala. 155.

1. *California* Code Civ. Proc., §§ 1303, 1386; Estate of Wooten, 56 Cal. 322; Mullanphy *v.* St. Louis Co. Ct., 6 Mo. 563; Muirhead *v.* Muirhead, 6 Smed. & M. (Miss.) 451; Edmundson *v.* Roberts, 1 How. (Miss.) 322; Williams' Appeal, 7 Pa. St. 259.

An illegitimate son has no right to apply for the removal of his mother as administratrix, on the ground that she was not lawfully married to the intestate, because he would have no right to administer. Myatt *v.* Myatt, 44 Ill. 473.

Where letters of administration have been issued to a competent person they will not be revoked upon the subsequent claim of one who was incompetent at the time of the grant. Sharpe's Appeal, 87 Pa. St. 163.

Where notice in the manner prescribed by law has been given of an application for letters of administration, and upon the hearing no opposition is made, and letters are issued to the applicant, who is not within the degrees of consanguinity mentioned in the statute, the only parties who can obtain a revocation of the letters as an absolute, unqualified right, are the wife, child, father, mother, or brother of the intestate, and they are only authorized to have the letters revoked by presenting a petition praying the revocation, and that letters may be issued to him or her. *In re* Carr, 25 Cal. 585.

As a non-resident has no right to letters of administration he is incompetent to petition to have them revoked if granted. Frick's Appeal, 114 Pa. St. 29.

The widow, having a right to administer, may move for revocation. Mills *v.* Carter, 8 Blackf. (Ind.) 203; Pace *v.* Oppenheim, 12 Ind. 533; Evans *v.* Buchanan, 15 Ind. 438; Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302.

Where the decree of revocation is sought by a widow of the intestate who has assigned her interest in the estate as widow, by the procurement of the administrator, though she alleges fraud in such procurement of the administrator, the proceedings will be dismissed, the surrogate court being unable to set aside the instrument for fraud, until which is done, the petitioner is excluded from the class of persons interested in the estate, as defined by *New York* Code Civ. Proc., § 2514. Woodruff *v.* Woodruff, 3 Dem. (N. Y.) 505.

Where the intestate was domiciled at the time of his death in *Massachusetts*, his widow, if entitled to personalty, will obtain it there and according to the laws of that State, and the wrong, if any is being done to her, is done there and by respondent in his capacity of principal administrator, and not here in this mere ancillary proceeding. The impropriety of the widow coming to *Michigan* from *Massachusetts*, where she has her home, where her right to claim anything from him in his representative capacity is a right given and measured by and enforceable under the laws of *Massachusetts* and its courts, seems too obvious to be enlarged upon. If real estate shall be discovered, belonging to the estate in *Michigan*, the widow will be entitled to dower in it; but she makes no allegation that there is such estate, and if there were any she is under no necessity of awaiting the proceedings of the administrator to have dower assigned to her in it. His proceedings do not delay her in any way. The widow shows or indicates no interest of her own to be subserved by the proposed order for removal of the administrator. White *v.* Spaulding, 50 Mich. 22.

It was held in Edmundson *v.* Roberts, 1 How. (Miss.) 322, that a motion to revoke letters of administration *de bonis non* because the administrator was not the next of kin, could only arise at the instance of the next of kin, no other person having the right to question the grant of administration on that ground.

Where a person other than the one designated by statute is appointed administrator, although such person has not renounced, such appointment may be set aside in favor of the person entitled, and the only person who can complain of such appointment is the person who is entitled to administer. Garrison *v.* Cox, 95 N. Car. 353.

of interest in the petition is not sufficient to establish the fact, even for the purpose of a petition without some *prima facie* showing in support of the claim.[1] No preliminary proof of interest is required unless the fact is disputed.[2] The better practice seems to be to allow the parties to give evidence of a reasonable case of interest at the hearing, and it is then for the court to determine upon all the evidence, as well as the status of the petitioner, as to the justice and propriety of affording him the relief which

Where a stranger and the next of kin filed applications for letters of administration, and the latter withdrew his application, whereupon the former was appointed, it was held that the next of kin thereby waived his right, and could not come in afterwards and have the first appointee removed and himself substituted. Coe *v.* Dial, 12 Tex. 100. And though entitled he may lose his right because he did not apply in proper time. Edwards *v.* Bruce, 8 Md. 387.

In Estate of Keane, 56 Cal. 407, it was held that where one who is entitled to administer upon an estate, waives his right, or refuses to make application, and the court appoints some one else, it is not error to refuse to revoke the grant of letters on the application of him who has waived his right or refused to make application in the first instance.

Where a person entitled to be appointed administrator in preference to others, loses the appointment by failing to give the security required and another person is appointed, the preference is thereby lost; and the surrogate cannot, on a subsequent application of the former, revoke the latter appointment and appoint the former merely because the former has become able to give such security. Williams' Case, 18 Abb. Pr. (N. Y.) 350.

Where letters are granted prematurely they will not be revoked unless the party entitled applies within the prescribed time. Sowell *v.* Sowell, 41 Ala. 359; Markland *v.* Albes, 81 Ala. 433.

Executor named in after-approved will may move. Paton's Appeal, 31 Pa. St. 465.

Where letters of administration have been granted, as in case of intestacy, and a will is afterwards produced and proved, the statute in *Alabama* makes it mandatory on the court to revoke such letters on the application of the person named as executor. Watson *v.* Glover, 77 Ala. 323; 1 Williams on Exrs. (Perkins' ed.) 387, 643, 644, note; County Court *v.* Bissell, 2 Jones (N. Car.) 387.

The public administrator has no authority in law to provoke the removal of an executor or administrator of a succession. Succession of Burnside, 34 La. Ann. 728. See EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 171, 174, 182, 197; PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 188.

1. In Vail *v.* Given, 55 Ind. 59, it was held that where the petitioner alleged that he had obtained a judgment against the estate for —— dollars and —— cents, the allegation was too vague and indefinite, to show that he had any interest in the estate.

The mere allegation, in a petition for the removal of an administrator, that the petitioner is a creditor, is not enough to establish the fact, even for the purposes of a petition, without showing by what instrument or contract he became so, or making some *prima facie* showing in support of the claim. White *v.* Spaulding, 50 Mich. 22.

An apparent interest, positively sworn to, will be sufficient to justify the order, and the validity of the claim will not be tried on such an application. Cotterell *v.* Brock, 1 Bradf. (N. Y.) 148; Merchant's Will, 1 Tuck. (N. Y.) 17.

2. In Biddison *v.* Mosely, 57 Md. 89, it was held that the practice required no preliminary proof of interest in the parties.

Application for revocation can only be made by some one interested in the estate, but may be made by an attorney-at-law for such person, and no preliminary proof of interest is required, unless the fact is disputed; but the respondent in such case cannot, by merely denying the interest, preclude a hearing upon the question of his removal, and if the whole evidence at the hearing upon the application for removal

he asks.[1] Mere intruders have no business to interfere in the management of estates, and are not concerned with the shortcomings of those to whom the administration has been committed. They have no right to provoke the removal of an executor or administrator.[2]

IV. Proceedings for Removal.—The mode by which the removal of an executor and administrator may be lawfully procured is defined and pointed out by statute in most of the States.[3] In the first place an appeal will lie from the order appointing him, and secondly he may be removed in a direct proceeding for the purpose,[4] or by revocation of probate.

1. By Appeal.—It was settled at common law that a grant of letters testamentary and of letters of administration may be revoked upon appeal. And the appeal may be taken by one entitled to have the order appointing the administrator or granting letters reversed.[5] How this appeal is to be taken is now a

shows that the applicant has no interest, the application may be dismissed. Croswell on Exrs. and Admrs., § 304.

1. Where a person alleging himself to be entitled as legatee under a testator's will, or as the assignee of a legatee, files a petition wherein he prays for the removal of the executor, the executor cannot deprive the surrogate of jurisdiction by disputing the petitioner's interest. It is for the surrogate to determine upon all the evidence as well as the status of the petitioner as to the justice and propriety of affording him the relief which he asks. Susz *v.* Forst, 4 Dem. (N. Y.) 346.

The better practice seems to be to allow the parties to give evidence at the hearing both upon the interest and on the general question of removal, and for the court to decide whether the applicant has made out a reasonable case of interest, and, if this appears, the court will also allow him to prevail if he makes out a proper case for removal. Croswell Exrs. & Admrs., § 305; Woodruff *v.* Woodruff, 3 Dem. (N. Y.) 505.

2. White *v.* Spaulding, 50 Mich. 22.

3. *Indiana*, 2 Rev. Stat. 1875, 512; Vail *v.* Givan, 55 Ind. 59.

4. It is contended that if administration is granted improperly, the only remedy is by appeal; but the law cannot be laid down so broadly. A grant of letters testamentary, or of letters of administration follows a decision of the court upon the matters alleged in the petition upon which the proceedings are founded, and the matters relied upon in answer to the petition. Such decision is binding and conclusive upon the parties to the proceedings and their privies, that is upon all who appear and take part in the proceeding, and upon all who were duly notified and had a right to be heard and to take an appeal, as to all matters directly in issue upon the hearing, while they are not concluded as to any matter not in issue, or not necessarily involved in the proceeding, or as to any matter of which they could not avail themselves because it did not then exist, or was unknown to the parties interested. Morgan *v.* Dodge, 44 N. H. 255; 82 Am. Dec. 213. In some cases, however, the objections may, perhaps, be more effectually made on appeal. Lehr *v.* Tarball, 2 How. (Miss.) 905.

5. 2 Bac. Ab. Exrs. 12; 1 Wms. Exrs. 463; Toller Ex., b. 1, ch. 2, § 8; Croswell Exrs. & Admrs., § 292; Schouler Exrs. & Admrs., §§ 150, 151; Woerner Am. L. of Administration, § 266; Dexter *v.* Brown, 3 Mass. 32; Morgan *v.* Dodge, 44 N. H. 255; 82 Am. Dec. 213; Coope *v.* Lowerrie, 1 Barb. Ch. (N. Y.) 45.

The *California* Statutes, 1855, p. 301, authorized an appeal from an order revoking letters of administration. Estate of Pachero, 2 Cal. 224, but an order refusing to revoke letters of administration is not appealable under § 969, *California* Code Civ. Proc. Estate of Montgomery, 55 Cal. 210; Estate of Kean, 56 Cal. 407.

Where there is no appeal from the order refusing to revoke letters there is no appeal from an order made upon a motion to review or vacate a final or-

matter of statutory regulation in most of the States.[1] In the same manner the refusal to revoke letters and the removal of the executor and administrator are judicial acts subject to revision by the court on appeal.[2] It is also usually provided that, pending

der or judgment which is unappealable; it is not permitted in law to do indirectly what is forbidden to be done directly. Estate of Kean, 56 Cal. 407.

Where the case became one for the exercise of a sound discretion on the part of the court removing the administrators all presumptions in such cases are taken in favor of the action of the court below, and upper court will not revise the exercise of such a discretion unless it be affirmatively shown that it has been improperly exercised. McFadden *v.* Røss, 93 Ind. 134; Whitehall *v.* State, 19 Ind. 30; Deck *v.* Sherke, 6 Cal. 666.

In *Ohio*, the question whether the removal of an executor is proper or not must be sued by writ of error and not by appeal, and the decree of the court of common pleas in such a case will be utterly invalid. 4 W. L. M. 32. *In re* Estate of Still, 15 Ohio St. 484.

A judgment of probate court, ordering that letters of executorship be delivered to the petitioner on his being sworn and complying with the requisites of law, does not impose upon the heirs the necessity of prosecuting an appeal from such judgment or of rescinding it by action of nullity, before bringing a direct suit to remove the executor, on the ground that he has not complied with the legal requisites. Yerkes *v.* Broom, 10 La. Ann. 94.

1. Donaldson *v.* Lewis, 7 Mo. App. 403.

Where it appears that the person who undertook to appeal from the original decree did not prove that he was a person entitled to appeal, and for that reason only failed in his appeal, the decree of the upper court in legal effect merely dismissed his appeal, without passing upon the merits of the cause, and the decree below stood as if not appealed from. Cleveland *v.* Quilty, 128 Mass. 578.

In *Texas*, the law gave an appeal to the supreme court to any party who considered himself aggrieved, as a matter of right, without bond; but such an appeal did not ordinarily suspend the order without an appeal bond. It was not intended to allow an administrator who was required to give a new bond, to suspend such order by merely giving notice of appeal. Bills *v.* Scott, 49 Tex. 430. And an administrator failing to perfect a suspensive appeal, cannot, by injunction, prevent the enforcement of an order removing him from the administration. Bills *v.* Scott, 49 Tex. 430.

The operation of a decree revoking letters testamentary cannot be prevented pending an appeal taken therefrom, by any undertaking given upon such appeal. To make the appeal effectual for any purpose, an undertaking in the sum of $250 must be filed as prescribed by Code Civ. Proc., § 2577. Fernbacher *v.* Fernbacher, 4 Dem. (N. Y.) 227.

Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will has been found and admitted to probate, the circuit court cannot on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will as the validity of a will duly proven can be contested only in a proceeding instituted for that purpose. *In re* Duty's Estate, 27 Mo. 43.

An appeal lies from the decision of the county court revoking letters of administration, and if a party be so determined he may appeal, although there is a certainty of ultimate defeat. Such appeal does not operate as *supersedeas*. Mullanphy *v.* St. Louis Co. Ct., 7 Mo. 563.

2. An appeal lies from the action of the probate court refusing to revoke letters, or to vacate the administration where no letters are granted, as in the case of the public administrator. Donaldson *v.* Lewis, 7 Mo. App. 403.

The removal of an administrator by the county court is a judicial act which is subject to revision by the court of appeals. Murray *v.* Oliver, 3 B. Mon. (Ky.) 1.

A refusal to revoke letters of administration by the register's court, may be corrected in supreme court on appeal. Patton's Appeal, 31 Pa. St. 465.

And pending an appeal from an order or revocation, the surrogate will

the appeal from an order appointing an administrator, he has no right to administer, but pending an appeal from the order revoking his authority as executor or administrator it is provided that he shall proceed in the execution of his duties until the court directs otherwise.[1]

2. By Proceedings in the Probate Court.—The proceedings taken in the probate court for removing an executor and administrator are original proceedings. An application must generally be made by those entitled by a petition or motion in writing or by a formal complaint. The office of this petition is to initiate the proceedings in court and to induce the issuance of a citation. The petition is not to be regarded as evidence of the facts it contained, but should allege the reasons for removal and may be supported by one or more affidavits.[2] In some States, such a petition must in some cases be filed within a certain time after the petitioner has knowledge that letters have been granted.[3]

not entertain a second application for the removal of the administrators. Angevine's Estate, 1 Tuck. (N. Y.) 245.

1. *Massachusetts* Gen. Sts., ch. 94.

Pending an appeal by an administrator from an order of an orphan's court revoking his letters of administration, the appellant remains the administrator. Any proceeding in the court below which displaces him pending such appeal, and takes the funds of the estate from his hands is unwarranted under § 74, art. 71, Rev. Code. Biddison *v.* Story, 57 Md. 96.

An appeal will suspend the order of revocation of the orphan's court and the letters of administration are left in full force and effect pending the appeal. It was held, therefore, that C was the administrator while the application for a revocation of the letters was pending in the orphan's court and while his appeal from the order of that court was pending, he continued to be administrator, possessing all the powers and bound to perform all the duties of an administrator. State *v.* Williams, 9 Gill (Md.) 172.

2. In *North Carolina*, the application may be made by petition or motion in writing, or formal complaint, setting forth and alleging the grounds of the application, supported by one or more affidavits. Edwards *v.* Cobb, 95 N. Car. 4.

One seeking to procure the removal of an executor or administrator for failure to pay over income bequeathed to the former by the testator, must wait until the expiration of the year specified in § 2717 subd. 2 *New York* Code Civ. Proc. Atkinson *v.* Striker, 2 Dem. (N. Y.) 261.

It was held in Wilson *v.* Hoss, 3 Humph. (Tenn.) 142, that the county court having granted administration, *prima facie* the person to whom it was granted was entitled thereto. The court should not have removed the administrator and recalled his letters without evidence that he was not entitled to administration, and that the applicant was. The petition of the party applying cannot be regarded as evidence of the facts it contained. Its only office was to initiate the proceedings in court and to induce the issuance of a citation. When the cause came on, the facts necessary to induce the court to act, should have been made to appear by other proof, none having been offered, the court was right in refusing the application.

The petition must allege the reasons for which the removal is sought. Carpenter *v.* Gray, 32 N. J. Eq. 692.

An application for the removal of an administrator under the *Indiana* statute, § 2245, Rev. Stat. 1881, may be verified by the oath of the applicant or any competent person. McFadden *v.* Ross, 93 Ind. 134; Williams *v.* Tobias, 37 Ind. 345.

The acceptance by the court of a resignation of an administrator is equivalent to a removal. Marsh *v.* People, 15 Ill. 284.

3. Letters of administration were granted to the widow of a deceased party on the 15th of March, 1853, and on the 27th of that month a petition

The court cannot remove an executor or administrator without giving him due notice that an application for that purpose has been made to the court. He must, in most of the States, be cited to appear to show cause why his authority shall not be revoked.[1]

was filed by a party named as executor therein asking probate of a paper presented as the will of the deceased, revocation of the letters granted to the widow, and the grant of letters testamentary to him. On this petition issues were framed and sent to the circuit court for trial contesting the validity of the paper as a will. Afterwards on the 17th of April, 1855, but before the case upon the issues was decided and before any final action upon the prayer for the revocation of the letters, the same party filed another petition asking for a revocation of these letters and the grant of letters *pendente lite*. It was held that as the first application for the revocation of the letters of administration had never been finally acted upon, and as the petitioner having knowledge of the grant of such letters as early as the date of his first application, his second petition was too late and must be dismissed. Edelen *v.* Edelen, 10 Md. 52.

In Edwards *v.* Bruce, 8 Md. 387, it was held that an application to the orphans court to revoke letters of administration could only be made within the same time after the party applying had knowledge that letters had been granted, as that provided by law, within which an original application for letters should be made.

But under the *California* Code Civ. Proc., §§ 1383, 1386, a prior right to letters may be asserted at any time against one who obtained a grant of letters by virtue of a secondary right. Estate of Wooten, 56 Cal. 322.

1. Croswell Exrs. & Admrs., § 304; Schroeder *v.* Superior Court, 70 Cal. 343; Wingate *v.* Wooten, 5 Smed. & M. (Miss.) 245; Barber *v.* Converse, 1 Redf. (N.Y.) 330; Garrison *v.* Cox, 95 N. Car. 353; *In re* Bieber's Appeal, 11 Pa. St. 157; Morgan *v.* Dodge, 44 N. H. 261; 82 Am. Dec. 213.

It was held in Hanifan *v.* Needles, 108 Ill. 403, that a county court had no power or jurisdiction to revoke the letters of an executor or administrator until he had first been cited to appear and show cause why his letters should not be revoked, and where the citation did not contain the slightest intimation that he was charged with waste or mismanagement of the estate but simply directed him to appear, it was improper to grant a revocation.

On a citation from the county court served on an administratrix to appear before that court and show cause why she should not pay a certain claim of a creditor of the estate to which she fails to answer or appear, the county court has no jurisdiction until further notice to administratrix, to adjudge that she be removed and her letters revoked. It is expressly provided by statute that the court shall summon the person charged to be in default, not to show cause why he should not pay a certain claim, but to show cause why such revocation should not be made. Munroe *v.* People, 102 Ill. 406.

In *Indiana*, § 23, act of June 17th, 1852, enacted that "On filing of such application, or upon order of the court, the clerk shall issue a citation to the person complained against, requiring him to appear and answer, which citation shall be served on him ten days before the hearing of the cause." McFadden *v.* Ross, 93 Ind. 134.

In *Maryland*, an executor or administrator can only be removed after citation and an opportunity to be heard in opposition to the motion. Levering *v.* Levering, 64 Md. 399.

Where the record of the removal in the case, does not show either a citation to, or any appearance by the administrator or the administratrix, who have been removed by an order sought to be reversed, the order must be deemed erroneous and void. Murray *v.* Oliver, 3 B. Mon. (Ky.) 1.

If it be said that the order appointing a special administratrix operated a removal of the executrix the conclusive answer is, that she has never been cited to appear, nor did she appear, to show cause why her letters should not be revoked. Schroeder *v.* Superior Court, 70 Cal. 343.

Revocation of letters cannot be had without due notice to the person to whom letters have been improperly granted. In the case, although notice was directed to be given to G, the

And, upon a hearing, the petitioner must establish his case by proper evidence.[1]

record shows that it was not served upon him, but upon his counsel, which is insufficient. For this reason decree reversed. Gasque *v.* Moody, 12 Smed. & M. (Miss.) 153.

The appearance of an administrator improvidently appointed, and the submission of the matters in dispute to the county court, is a waiver of the necessity of such citation. Wilson *v.* Hoss, 3 Humph. (Tenn.) 142.

In *Mississippi*, the revocation was held proper, without notice, where, upon the complaint of his surety, citation issued to the administrator, which could not be served because he was a non-resident of the State. Hardaway *v.* Parham, 27 Miss. 103.

In *Alabama*, notice by publication is sufficient to a non-resident executor or administrator. Crawford *v.* Tyson, 46 Ala. 299.

Citation was not deemed necessary in M'Laurin *v.* Thompson, Dudley (S. Car.) 335, the appointment of another being held a sufficient revocation of the authority of an administrator who left the State.

1. Where the objections to the administrator were that before his appointment, he had by words and acts manifested a spirit of hostility to the petitioner, a person interested in the estate, and the disposition to obtain undue advantages for himself, but was appointed, and no appeal taken from the decree appointing him, and there was nothing in the evidence to show that his previous state of feeling and purpose had continued, or had been manifested in any manner since the appointment, the court held that there was no legal presumption that he intended anything inconsistent with his duty, and that very slight evidence of the present existence of his former disposition might have been sufficient in connection with the proof of what had occurred before his appointment, to have justified his removal. But no evidence whatever having been introduced, a sufficient cause was not held to have been established. Drake *v.* Green, 10 Allen (Mass.) 124.

It is said in Phelps *v.* Martin, 74 Ind. 339, that, § 188, 2 *Indiana* Rev. Stat. 1876, p. 556, granting a right to a trial by jury "in all cases where there is an issue of fact" implies the right in an administrator to put a case against him concerning the settlement of decedent's estates, in shape for trial by special pleas or by answer in denial, tendering or forming issues of fact to be tried as such.

But in McFadden *v.* Ross, 93 Ind. 134, it was said that in *Indiana* the statute contemplates a filing of an answer where an application to remove an executor or administrator is made the formation of issues, and a trial by the court upon evidence, in the exercise of its probate jurisdiction, in a manner more summary but still somewhat analogous to ordinary civil actions, and by § 2246 *Indiana* Rev. Stat. 1881, an answer and other pleading necessary to form an issue are required, and a trial by the court without a jury.

Section 25, act June 17, 1852, provided that "at the term of court next after notice has been given, the court shall proceed to hear the proofs and allegations of the parties and upon such hearing may examine such executor or administrator on oath.

Where the answer to an application for removal of administrator admits a failure as charged and sets up matters in excuse, no evidence is necessary on behalf of the applicant, and the court may consider the sufficiency of the excuse and adjudge the case thereon. McFadden *v.* Ross, 93 Ind. 134.

The right of sureties to be relieved from responsibility for the future acts or defaults of the administrator is absolute and must be granted. Where, however, the sureties do not appear on the day set by the courts for the hearing, their application may be treated as abandoned, and may be dismissed. Allen *v.* Sanders, 34 N. J. Eq. 203.

Upon petition of one having a prior right to administer, an allegation of mal-administration upon the part of administrator raises an immaterial issue, the cause of action of the petitioner being complete upon proof of the facts required by the statute. Estate of Wooten, 56 Cal. 322.

While it is the general practice to defer the determination of an application for the removal of executors, made pending accounting, until the termination of such proceeding, still where no injustice will be done by the immediate removal of the executors, that will in a

Proceedings for the removal of an executor and administrator are often framed in the alternative, that is, that he shall be removed if he does not give sufficient security against his apprehended actions, or that he give such security upon penalty to be removed if he does not.[1]

Until set aside in a direct proceeding or upon appeal, the finding and judgment of the court must be deemed conclusive, and it cannot be impeached collaterally. Whenever the decree is void, however, for want of proper jurisdiction it may be questioned in any proceeding.[2]

3. By Revocation of Probate.—See REVOCATION OF PROBATE, *infra.*

V. CAUSES FOR REMOVAL—1. In General.—The executor deriving his authority by reason of a trust committed to him by the testator in his will, and the administrator obtaining his appointment from a court after due deliberation and upon consideration of the interests of all those concerned, their position, in either case, is peculiarly one of personal trust and confidence, and they should not be removed from office without a sufficient cause.[3] It is, therefore, provided in many States that an executor and administrator can only be removed for the specific causes enumerated in the statutes.[4] In general, it may be said, however,

proper case be done. Fernbacher *v.* Fernbacher, 4 Dem. (N. Y.) 227.

1. Croswell Exrs. & Admrs., § 300.

2. Sadler *v.* Sadler, 16 Ark. 628; Hart *v.* Bostwick, 14 Fla. 162; Bryan *v.* Walton, 14 Ga. 185; Barclay *v.* Kimsay, 72 Ga. 725; McCleland *v.* Bideman, 5 La. Ann. 564; Succession of Boyd, 12 La. Ann. 611; Succession of Lee, 28 La. Ann. 23; Morgan *v.* Locke, 28 La. Ann. 806; Riley *v.* McCord, 24 Mo. 265; Quidort *v.* Pergeaux, 18 N. J. Eq. 472; Plume *v.* Howard Sav. Inst., 46 N. J. L. 211; Kelly *v.* West, 80 N. Y. 139; James *v.* Adams, 22 How. Pr. (N. Y.) 409; Buehler *v.* Buffington, 43 Pa. St. 278; Pleasants *v.* Dunkin, 47 Tex. 343. But see Wernse *v.* Hall, 101 Ill. 423.

Where the order of the court removing the administrator recites all the facts necessary under the statute to give the court jurisdiction, the propriety and regularity of its action is to be presumed. All the facts necessary to confer jurisdiction thus appearing affirmatively on the face of the proceeding, the judgment of removal stands upon the same footing of unquestionable verity as do judgments of courts of general jurisdiction, and the finding and judgment of the court until set aside, must be deemed conclusive. Scott *v.* Crews, 72 Mo. 261.

3. The power of revocation is not an arbitration or capricious power, but only to be exercised upon a state of facts which would warrant it. Dalrymple *v.* Gamble, 66 Md. 298; Hawkins *v.* Robinson, 3 T. B. Mon. (Ky.) 144; Morgan *v.* Dodge, 44 N. H. 255; 82 Am. Dec. 243.

4. In *Maryland*, an executor or administrator can only be removed for legal and specific causes. Levering *v.* Levering, 64 Md. 399; Vail *v.* Givan, 55 Ind. 59.

The county court, in the absence of statutory authority, has no power to remove an administrator or to revoke letters of administration, after the administrator has accepted and qualified and entered upon his duties. The statute authorizes the removal of administrators, and the revocation of letters for divers causes mentioned therein. Until some one of the causes mentioned in the statute is placed before the court for action, the court has no power to act at all in this regard; it has no jurisdiction to act. Munroe *v.* People, 102 Ill. 406.

At common law the ordinary could revoke administration at pleasure and it was held in Thompson *v.* Hucket, 2 Hill (S. Car.) 347, that there was nothing in the statute to divest him of that power in relation to strangers, although

that the same reasons which would prevent the appointment of an executor or administrator, if they had been made to appear at that time, will operate as a ground for removing him, and the same causes, though occurring after the appointment, furnish a reason for a revocation of the authority granted. The particular causes for removal may be classified as arising in the following manner: First. Cases where the court granting the letters acted without authority in the premises; or where the grant was improper and irregular, or induced by fraud and mistake. Second. Cases where the executor or administrator has become disqualified for his office, either because others enjoy prior rights to act, or because he has become personally incompetent and unfit, or otherwise unsuitable and irresponsible for the office; or, having qualified, he has neglected in part or in whole to fulfill the duties required; or, having elected to act, is guilty of mismanaging and wasting the estate committed to his hands.

2. Letters Improperly Granted.—A frequent cause for removal arises from the fact that the authority has been improperly granted. Though the executor or administrator would be personally competent to attend to the duties, the manner of the grant or appointment has been sufficiently irregular to be a ground for removal.

a. THE COURT ACTING WITHOUT AUTHORITY IN THE PREMISES.—Whenever a grant of letters is void because the court acted without jurisdiction, a formal revocation is not necessary, but it is the duty of the court to declare null its appointment, in order to correct the record and prevent further mischief from being done.[1] When such letters are held voidable only, they are conclusive until revoked or vacated on a direct proceeding for that purpose.[2]

the temporal courts might control him in the exercise of it by judging of the sufficiency of the grounds on which he proceeds. Toller's Law of Exrs. 121.

1. Woerner Exrs. & Admrs., §§ 266, 268; Schouler Exrs. & Admrs., § 160.

2. The jurisdiction of probate, surrogates, orphans, and the like, courts, is a matter of statutory construction. See on this point JURISDICTION, vol. 12, p. 269; PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, pp. 162, 184, where the necessary elements of jurisdiction are separately treated. Schouler Exrs. & Admrs. p. 215.

It has been held that letters were improperly granted where there was no estate to administer, and the probate court had the power to revoke them. *In re* Huckstep, 5 Mo. App. 582.

In Townsend *v.* Pell, 3 Dem. (N. Y.) 367, it was held, that where there were no unadministered assets belonging to testator's estate within the jurisdiction of the court, at the time of the granting of letters testamentary, the surrogate was without authority in the premises and the letters issued must be revoked.

A debtor who can show that his creditor was alive within the period of limitation for the debt, would seem to have a right in a proceeding to remove the public administrator, who took charge of the estate of the absentee, within a period less than seven years since such absence, to require some proof of the death of the alleged intestate. In the absence of any such proof a motion to vacate the administration will be sustained. Donaldson *v.* Lewis, 7 Mo. App. 403.

The case of Roderigas *v.* East River Sav. Inst., 63 N. Y. 360; 20 Am. Rep. 555, went so far as to hold, that letters granted by the surrogate, the supposed

b. THE GRANT BEING INDUCED BY FRAUD, MISREPRESENTATION AND MISTAKE.—Whenever it is proved that the letters were obtained by fraud, they will be revoked. In any State either by statute or by common law, fraud always vitiates a grant of letters, and the same is true where the court or officer was induced to act upon false representations or where the grant was made by reason of some mistake or error.[1] It must appear, however, that the fraud was practiced upon, and the misrepresentations were made to the tribunal by which the letters were granted.[2]

c. IRREGULARITY IN GRANTING THE AUTHORITY.—The proceedings governing the appointment of an administrator or the granting of letters testamentary, or letters of administration are defined by statute and must be strictly construed. Whenever the statutory requirements have not been complied with and the court has proceeded to act prematurely before the time allotted by statute for such grant has elapsed, or without issuing the proper citation, such irregularities furnish sufficient cause for the revocation of the authority granted.[3]

intestate being alive at the time, were voidable only, the letters having been revoked for this reason But this case has been severely criticized. See PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 185.

1. *Illinois* Coth. Ann. Sts. 3, § 26; *New York* Code Civ. Proc., § 2685; Croswell Exrs. & Admrs., § 301; Woerner Am. Law of Administration, § 268; Schouler Exrs. & Admrs., § 153; Broughton *v.* Bradley, 34 Ala. 694; 73 Am. Dec. 474; *In re* West, 40 Hun (N. Y.) 291; Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302.

Where it appeared that an administrator had obtained letters by fraudulently representing that he was a creditor of the intestate when in truth he was not, the letters were revoked. Marston *v.* Wilcox, 2 Ill. 60; Wernse *v.* Hall, 101 Ill. 423.

Where a will was admitted to probate through fraud or error. Hamberlin *v.* Terry, 1 Smed. & M. Ch. (Miss.) 589.

Where letters of administration are granted on a mistake of facts, this may be brought within the spirit of misrepresentation under which a surrogate could revoke them. Perley *v.* Sands, 3 Edw. Ch. (N. Y.) 325.

A surrogate may revoke letters of administration to a pretended wife on proof that she was not the wife. Kerr *v.* Kerr, 41 N. Y. 272; Oram *v.* Oram, 3 Redf. (N. Y.) 300; Stanley *v.* Stanley, 4 Dem. (N. Y.) 416.

In McCabe *v.* Lewis, 76 Mo. 298, it was held an inherent power in every judicial tribunal to correct an error which it may have committed, and where it was made to appear to the probate court that the pending administration was without authority of law it was held the duty of that court to revoke the authority claimed by the administrator and to stay further proceedings.

2. In order to justify a revocation of letters of administration, or of general guardianship, upon the ground that the same were obtained by a false suggestion of a material fact, it must be made to appear that the suggestion was made to the tribunal by which the letters were granted. Corn *v.* Corn, 4 Dem. (N. Y.) 394.

3. A second grant of administration without revoking the first grant by regular proceeding, is erroneous and reversible on the complaint of the first administrator. White *v.* Brown, 7 T. B. Mon. (Ky.) 448.

When letters were granted in the wrong county, by reason of the last residence of the decedent in another county of the same State, the court of rightful jurisdiction should require a revocation of the former letters before granting letters. Coltart *v.* Allen, 40 Ala. 155.

Though as a general rule the position is correct that the probate having made an appointment of administrator, can-

3. The Executor or Administrator Becoming Disqualified.—The person appointed executor or administrator must be removed whenever he has no right to act, or has otherwise become incompetent to attend to the office with that degree of care which the security of the trust must necessarily demand.

a. OTHERS HAVING THE RIGHT TO LETTERS—(1) *Priority of Right.*—The right to apply for letters of administration is by statute given to certain persons or class of persons.[1] The appointment of a stranger or of one entitled under the statute in derogation of the prior right of a party first entitled to the grant of such letters is deemed sufficient cause to have the grant revoked.[2]

not remove the incumbent unless for some defined statutory cause, this position was held unavailable where the appointment is shown to have been premature. Muirhead *v.* Muirhead, 6 Smed. & M. (Miss.) 451.

Where letters are granted prematurely they will not be revoked unless the party entitled, applies within the prescribed time. Sowell *v.* Sowell, 41 Ala. 359; Markland *v.* Albes, 81 Ala. 433.

A grant of letters of administration by a probate judge to his own son, is irregular, erroneous, and voidable, and may be revoked upon application of any person having an interest, by the register in chancery, sitting as probate judge *pro hac vice.* Koger *v.* Franklin, 79 Ala. 505.

Where letters of administration are granted by the surrogate to the public administrator, without a personal service of the citation upon the widow and relatives of the decedent, or the publication of a notice in the manner directed by statute, it was held that such grant was irregular, and the letters of administration could be revoked. Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302.

A failure to cite the widow of the deceased is an irregularity for which the letters are to be revoked. Kelly *v.* West, 80 N. Y. 139.

Or where letters of administration have been irregularly issued to one having no interest in the estate, without citing the public administrator, they will be revoked. Public Administrator *v.* Peters, 1 Bradf. (N. Y.) 100.

Thus where letters of administration were granted to A and B who had the prior right, but were revoked on their failure to give new securities, and the letters were subsequently granted to C, who was next entitled to them, it was held that although A and B had been removed there was nothing to prevent their reappointment, and letters having been irregularly issued without citing them will be revoked. Barber *v.* Converse, 1 Redf. (N. Y.) 330.

1. This subject is fully treated under PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 188; EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 171, 174, 182.

2. Thus it was held in Mullanphy *v.* St. Louis Co. Ct., 6 Mo. 563, that a county court had no right to grant letters of administration to a stranger, before an opportunity was afforded, within the time prescribed by the statute to those entitled to administer, to take out letters; and where the court had thus improvidently granted such letters to a stranger, the letters were properly revoked on the application of those entitled to administer.

Two of the sons of the testator, who were his executors, having renounced, the register at their request granted letters of administration to a stranger, to which a third son and two of the daughters assented. A fourth son, and a daughter, having petitioned for a revocation, it was held that the register was bound to revoke the letters, and grant administration to the son who consented to act. Williams' Appeal, 7 Pa. St. 259; Thompson *v.* Hucket, 2 Hill (S. Car.) 347.

Letters granted to persons not entitled will be revoked. Wilson *v.* Hoss, 3 Humph. (Tenn.) 142; McCaffrey's Estate, 38 Pa. St. 331; *In re* Pacheco, 23 Cal. 476; Estate of Wooten, 56 Cal. 322; *California* Code Civ. Proc., §§ 1383, 1386; Mills *v.* Carter, 8 Blackf. (Ind.) 203; Rinehart *v.* Rinehart, 27 N. J. Eq. 475.

The failure of a widow and tutrix of her children to comply with an

And where one executor has a priority of right as against another, the latter will be removed.[1]

(2) *Subsequent Probate of Will.*—Upon similar reasoning if it appear that an administrator was appointed to administer the estate of a supposed intestate and the will is thereafter found and admitted to probate, the court may, and in some States must, in either case, whether an executor be named in the will or not, revoke the appointment and grant letters testamentary or letters of administration with the will annexed to those entitled.[2]

order of the court calling on her to decide within ten days whether she would qualify as administratrix of the succession, was held not to forfeit her right to claim its administration; and in such case where the widow is present in the State, the public administrator had no right to the administration of the succession. Succession of Dietrich, 32 La. Ann. 127.

Where one entitled to administration has renounced and recommended another who has been appointed administrator, and it afterwards appears, to the satisfaction of the orphans' court, that such renunciation was executed by mistake, the court canceled the appointment and restored the first party to the right of administration. Thomas *v.* Knighton, 23 Md. 318; 87 Am. Dec. 571.

Obviously where two persons are equally entitled by law to administer upon an estate, and one of them is appointed, the mere fact that the other may desire the appointment will afford no ground for revoking the letters of the appointee. Tillman *v.* Edwards, 27 Mo. App. 492.

But at any time before the public administrator takes charge of an estate the probate court may appoint an administrator, who cannot be removed on the sole ground that the public administrator's rights to administer are superior. Tillman *v.* Edwards, 27 Mo. App. 492.

1. It was held in County Court *v.* Bissell, 2 Jones (N. Car.) 389, that letters testamentary issued to two executors named in a will, one of whom was made sole executor by a codicil might be revoked as to the other by the county court of probate of its own motion at a subsequent term.

The order of a county court granting an administration with the will annexed, before the renunciation of the executor named in the will is voidable upon the application of the executor, if made within the proper time. Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16.

2. *Arkansas* Dig. Sts., § 30; *Alabama* Code, §§ 2414, 2415; *California* Code Civ. Proc., § 1423; *Illinois* Coth. Ann. Sts., ch. 3, §§ 28, 29; *Maryland* Code, art. 50, § 48; *Michigan* Ann. Sts., § 5862; *New York* Code Civ. Proc., § 2684; *Ohio* Rev. Sts., § 6019; Croswell Exrs. & Admrs., § 302; Schouler Exrs. & Admrs., § 153; Woerner Am. L. of Administration, § 268; Rebhan *v.* Mueller, 114 Ill. 343; 59 Am. Rep. 869; Dalrymple *v.* Gamble, 66 Md. 298; Kittredge *v.* Folson, 8 N. H. 98; Bulkley *v.* Redmond, 2 Bradf. (N. Y.) 281; *In re* Nesmith, 14 N. Y. St. Rep. 375.

Where letters of administration have been granted as in cases of intestacy, and a will is afterwards produced and proved, the statute in *Alabama* makes it mandatory on the court to revoke such letters. Watson *v.* Glover, 77 Ala. 323.

It was held within the discretion of the court to revoke letters previously granted and to grant new letters with the will annexed upon the discovery of a will in Dalrymple *v.* Gamble, 66 Md. 298.

Where, on a feigned issue directed by the register's court, there was a verdict against the alleged will, whereupon letters of administration were granted upon the estate of decedent; but on a writ of error to common pleas their judgment was reversed, and the will established; the letters of administration must be treated as raising an administration *pendente lite;* and they must be revoked, and letters testamentary granted to the executors named in the will. Patton's Appeal, 31 Pa. St. 465.

The position that as soon as the probate and order of execution took place, the authority of the administrator expired is untenable. The capac-

b. PERSONAL INCOMPETENCE.—Insanity, weakness of mind,[1] or protracted ill health[2] are causes which tend to make an executor or administrator personally unfit to attend to the duties imposed upon him, and which render his further continuance in office a source of actual danger to the interests committed to his care. If he is an improvident person or of habitually intemperate habits he may be removed as incompetent for the position.[3]

ity of the administrator, for the purpose of prosecuting an existing suit, could not cease until a successor was duly installed in his stead. An executor is not bound to accept the executorship. Where nearly three years had elapsed since the probate of will and the executor therein named was silent during this entire period, there was no call by him, upon the administrator, for an account; no demand of the assets, not even a notice to the probate judge that he was willing to accept the appointment. If the administrator was ousted by the mere order of probate and execution then the succession was under charge of no one; and all the provisions of the law, framed for the preservation of successions, which require administrators to account before they are discharged, and to continue in office until the estate is wound up, must be disregarded. Dwight *v.* Simon, 4 La. Ann. 490.

And an administrator being once appointed the court cannot revoke his appointment because a contest regarding the will is afterwards begun, and place the estate in the hands of a temporary administrator pending the contest. Elwell *v.* Universalist Church, 63 Tex. 220.

When administration had been granted and an existing will, or a will lost or fraudulently destroyed, are alleged but not proved, it was improper to revoke the letters. Holland *v.* Ferris, 2 Bradf. (N. Y.) 334.

Upon the production of a will for probate, the court of probate acquires full jurisdiction of the case; and if there be no express appointment of an executor that court will have the exclusive right in the first instance to determine whether there has been a constructive appointment or not; and if the court should err in its decision, its judgment cannot be attacked in a proceeding instituted by a distributee and revoke letters testamentary granted to one whom the court has adjudged to be executor by construction, and to procure a grant of letters of administration with the will annexed to the petitioner. Grant *v.* Spann, 34 Miss. 294.

1. *Alabama* Code, § 2386; *Illinois* Coth. Ann. Sts., ch. 3, § 30; *Iowa* Rev. Code, § 2496; *Maine* Rev. Sts., ch. 64, § 21; *Massachusetts* Pub. Sts., ch. 132, § 14; *Michigan* Ann. Sts. §§ 5843, 5858; *New Hampshire* Gen. Laws, ch. 195, § 10; *New York* Code Civ. Proc., § 2685; *Ohio* Rev. Sts. § 6017; *Pennsylvania* Bright. Purd. Dig. Deced. Est., § 253; *Rhode Island* Pub. Sts., ch. 184, § 24; *Vermont* Rev. Laws, § 2074; Croswell Exrs. & Admrs., § 297; Schouler Exrs. & Admrs., § 154; Woerner Am. L. of Administration, § 269; Bac. Abr. Exrs. A. 5; 1 Wms. Exrs. 238; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 172.

2. *Alabama* Code, § 2386; *New Hampshire* Gen. Laws, ch. 195, § 10; Crosw. Exrs. & Admrs., § 297; Babbitt *v.* Babbitt, 26 N. J. Eq. 44.

3. The term improvidence refers to habits of mind and conduct which become part of the man, and render him generally and under all circumstances, unfit for the trust or employment in question. Emerson *v.* Bowers, 14 N. Y. 449; Freeman *v.* Kellogg, 4 Redf. (N. Y.) 218.

That a man is a professional gambler is presumptive evidence of improvidence. McMahon *v.* Harrison, 6 N. Y. 443.

Habitual intemperance or gross drunkenness is sufficient cause. *Alabama* Code, § 2386; *Illinois* Coth. Ann. Sts., ch. 3, § 30; *New York* Code Civ. Proc., § 2685; *Pennsylvania* Purd. Dig. Deced. Est., § 253; Croswell Exrs. & Admrs., § 297.

Habitual drunkenness is a cause for the removal of an administrator without an affirmative showing that the administrator had thereby become incapable of discharging his duties. Gurley *v.* Butler, 83 Ind. 501; *In re* Cady, 36 Hun (N. Y.) 122.

A person convicted of an infamous crime should be removed.[1]

Non-residence will in some States constitute a cause for revocation of letters, and removal from the State or protracted absence is sometimes deemed sufficient cause.[2]

In *Pennsylvania*, a person duly declared by inquisition to be an habitual drunkard may be removed by the Orphan's Court on proper application under act of 1832, § 26, P. D. 216, ed. 1853. Sill *v.* McKnight, 7 W. & S. (Pa.) 244.

1. *Illinois* Coth. Ann. Sts., ch. 3, § 30.

It was held in Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45, that no degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration, as the next of kin, unless such person has been actually convicted of an infamous crime and his appointment will not be reversed upon such grounds. See Coggshall *v.* Green, 9 Hun (N. Y.) 471.

2. Croswell Exrs. & Admrs., § 298; Schouler Exrs. & Admrs., § 154; Woerner Am. L. of Administration, § 269.

Absence of the executor from the State not sufficient ground. Griffith *v.* Frazier, 8 Cranch (U. S.) 25.

The fact that the executor or administrator is a non-resident is cause for removal in *Alabama*. *Alabama* Code, § 2386; Harris *v.* Dillard, 31 Ala. 191; Crawford *v.* Tyson, 46 Ala. 299; Hooper *v.* Scarborough, 57 Ala. 510; *California* Code Civ. Pro., § 1436; *Illinois* Coth. Ann. Sts. ch. 3, § 31.

Removal from the State does not *eo instanti* vacate the letters, but requires the action of the court on motion. Yarborough *v.* Ward, 34 Ark. 204, and though it would have been more regular to revoke the letters granted directly in the order appointing an administratrix, on account of the absence of the executor, his letters were by such appointment revoked by implication. Berry *v.* Bellows, 30 Ark. 198.

In *Georgia*, it is held that the removal of either an executor or administrator from the State after appointment is not a sufficient ground to revoke his authority. Walker *v.* Torrence, 12 Ga. 604; Brown *v.* Strickland, 28 Ga. 387.

Where it appeared that the executrix was not a resident of the State, and that she had not given a power of attorney duly recorded as required by law, to any one to represent her, these were held sufficient grounds for destituting her from her trust. Yerkes *v.* Broom, 10 La. Ann. 94; Succession of Winn, 27 La. Ann. 687.

A testamentary executor, after he was duly qualified and had charge of the estate, by refusing to take the oath of allegiance required by the government of the United States and going beyond the jurisdiction of the proper authorities became *functus officio* and lost all right to administer. Succession of Vogel, 20 La. Ann. 81.

But the absence for a time of an executor or administrator was held no cause for removal unless the estate shall have suffered thereby. Succession of McDonogh, 7 La. Ann. 472. But where the only evidence tending to show a change of domicil of the executor to the State of *Louisiana* is found in a written declaration of an intention to change his domicil, which is contradicted by all the acts of the executor, it could not avail him to evade the law. Yerkes *v.* Broom, 10 La. Ann. 94.

Non-residence of the administratrix could not of itself work a revocation of her letters of administration. An order or judgment of county court of some kind was held necessary to produce that result. State *v.* Rucker, 59 Mo. 17; *Michigan* Ann. Sts., §§ 5842, 5858; Hardaway *v.* Parham, 27 Miss. 103.

The final settlement of a co-administrator during the non-residence of the administratrix, and the order of the court approving the same and completely ignoring her, and the order of distribution in the absence of any appeal from the settlement, and in a collateral proceeding, will have the force and effect of an order of revocation for non-residence of such administratrix. State *v.* Rucker, 59 Mo. 17.

In Trumble *v.* Williams, 18 Neb. 144, non-residence was held sufficient cause. Absence is cause by *New Hampshire* Gen. Laws, ch. 195, § 10, and *New Jersey* Rev. Orphans' Court, § 127.

When letters have been issued to a non-resident executor they cannot be

An infant cannot act as executor and administrator, and if appointed should be removed.[1]

Marriage of an administratrix or executrix terminates her authority, and she should then be formally removed by proceedings instigated for the purpose.[2]

c. EVIDENT UNSUITABLENESS.—The statute in many States provides for removal where the executor or administrator is an evidently unsuitable person. By this is not meant a clear case of absolute unsuitableness equivalent to insanity or incapability. The causes for removal are both physical and moral. Insanity is a cause for removal arising from bodily disease, and the incapability of discharging a trust is similar when arising from defect of memory, want of physical ability, or other like infirmity.

revoked merely because of his continued non-residence. Postley *v.* Cheyne, 4 Dem. (N. Y.) 492.

Under § 2685 of the Code Civ. Proc., the letters of an executor who has removed from the State, must be revoked, removal from the State not being one of the cases specified in § 2687, where the surrogate may in his discretion, allow the letters to remain unrevoked notwithstanding an objection has been established against the executor. Estate of Sohn, 1 N. Y. Civ. Pro. Rep. 373.

If an administrator removes from the State, the orphans' court may vacate his letters on the application of any person interested. *Pennsylvania* Bright. Purd. Dig. Deced. Est., § 254; Frick's Appeal, 114 Pa. St. 29.

In *Texas*, the statute gives the chief justice power to remove an administrator when he absents himself from the State for a period of three months without the permission of the court. Hall *v.* Monroe, 27 Tex. 700.

Absence.—*Vermont* Rev. Laws, § 2074.

But a court of probate should not remove executors living out of the State, and grant administration to another, when the fact of their living out of the State was known at the time of granting the letters testamentary, when such executors have commenced suit to recover a claim, and the application for their removal is made by the person sued. Wiley *v.* Brainerd, 11 Vt. 107.

In *Wisconsin*, a statute which provides that the county court may remove an executor for certain causes, removing from the State is to be construed as giving a discretionary power of removal and is not compulsory upon the court even though one of the causes may exist. Cutler *v.* Howard, 9 Wis. 309.

See also PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 198; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 171.

1. If, through mistake or inadvertence, the appointment has been conferred upon an infant, it may be revoked by the surrogate. Carow *v.* Mowatt, 2 Edw. Ch. (N. Y.) 57; Abbott *v.* Abbott, 2 Phillim. 578; PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 198.

2. Marriage of the sole executrix, in the absence of statutory provision to the contrary, is cause of removal. Kavanaugh *v.* Thompson, 16 Ala. 817.

Under the statute in *California* the authority of an executrix ceases by her marriage, and she may be proceeded against for suspension and removal. Teschemacher *v.* Thompson, 18 Cal. 11; 79 Am. Dec. 151; Schroeder *v.* Superior Court, 70 Cal. 343. See *Massachusetts* Gen. Sts., ch. 101, § 4; St. 1874, ch. 184, § 4.

In State *v.* Rucker, 59 Mo. 19, it was held that by statute the marriage of any executrix or administratrix *ipso facto* extinguished her power, though as a matter of direction an order of revocation was required.

The marriage of sole executrix will not determine her powers in *Ohio*. Cadwallader *v.* Evans, 1 Disney (Ohio) 585.

Newhouse *v.* Gale, Redf. (N. Y.) 217; Duhme *v.* Young, 3 Bush (Ky.) 343; Yarborough *v.* Ward, 34 Ark. 204; Roberts *v.* Place, 18 N. H. 183; *New Hampshire* Rev. Stat., ch. 158, § 9.

But unsuitable implies no want of capacity or mental infirmity, but an unfitness arising out of the situation of the person in connection with the estate of which he is an administrator, either by reason of his being indebted to it or having claims upon it, or in the interest he has under a will, or his situation as an heir at law.[1]

1. Thayer *v.* Homer, 11 Met. (Mass.) 104.

It is said by Mr. Croswell in his work on Exrs. & Admrs., § 299, that "a broad discretion is given in many States to the judge of probate to remove any executor or administrator whenever he becomes unsuitable to perform the duties of the office; either because his character or relations, business or social, have become such as to render it improbable that he can fulfill the duties of his office as they should be performed," *citing Massachusetts* Pub. Sts., ch. 132, § 14; *Georgia* Code, § 2511; *Iowa* Rev. Code, § 2496; *Maine* Rev. Sts., ch. 64, § 21; *Michigan* Ann. Sts., §§ 5842, 5858; *Ohio* Rev. Sts., § 6017; *Rhode Island* Pub. Sts., ch. 184, § 24; *Vermont* Rev. Laws, § 2074.

Where the prosecution of the individual claims of the executor on the estate of the testator would conflict with his duties as executor, it was held that the judge may accept his resignation and remove him as evidently unsuitable, within the meaning of the statute. Thayer *v.* Homer, 11 Met. (Mass.) 104.

Where an executor by false representation sought to purchase the interest of a residuary legatee for one-fourth its value, it was held that in so doing he was guilty of such an abuse of the trust and confidence reposed in him as to justify his removal. Lett *v.* Emmett, 37 N. J. Eq. 535.

Where his conduct has been such as to show a want of honesty, or of reasonable fidelity he must be pronounced unfit for the due execution of his office and must accordingly be deprived of it. *In re* Petrie, 5 Dem. (N. Y.) 352.

Where an administrator had an adverse personal interest in an action against himself as administrator, and made no defense to the same, it was held that he should be removed upon proof of the existence of a defense, or of a *bona fide* belief of its existence in the distributees. Simpson *v.* Jones, 82 N. Car. 323.

Where the manifest interest of the administrator is not in harmony with the interest of the legal representatives there would be not only incongruity but hazard of delay, mistake, or wrong, in leaving him to represent a claim to which his business relations render him directly adverse. Nothing but some controlling necessity would justify his retention in his position. Kellberg's Appeal, 86 Pa. St. 129.

It was held in Bieber's Appeal, 11 Pa. St. 157, that administration should not be committed to an heir who has an interest in opposition to other heirs of the estate.

Where at the time of the filing of the petition for removal there was an acrimonious and hostile feeling between the appellant and the respondent, which intercepts and prevents such a management and husbanding of the estate as prudence, sound policy and the interest of the devisees and creditors require, the executor should be removed. Kimball's Appeal, 45 Wis. 391.

But the refusal by the executors to account for large sums of money received by them as general business agents of their testatrix, more than twenty years before her death, which were left unaccounted for in two settlements with her in her lifetime, and the fact that almost her whole estate consisted of debts due from the executors, were held insufficient causes for their removal, as evidently unsuitable for discharging their trust under *Massachusetts* Rev. Sts., ch. 63, § 7; Hussey *v.* Coffin, 1 Allen (Mass.) 354.

The owing of a debt by the executor, or his declining to account for it, is no cause for removing him from the office under the statute. A determination to resist payment of such debt until compelled by judgment of court may, in some cases, be deemed a sufficient cause for removal, it being unsuitable that he who represents the estate, and without whose agency a suit cannot be conducted, should remain in office when such suit may be necessary to coerce the payment of the debt. But it may not always be necessary to take this step. For as the executor has given bond for the faithful execution of his trust, and, as he must be supposed

The unsuitableness must exist at the time the petition for removal is heard.[1]

d. INABILITY TO FURNISH SECURITY.—The executor and administrator are generally required to give a bond in order to secure the estate against all improper conduct on their part, and their failure or neglect to furnish this bond or additional security, when such is demanded, or a new bond when the security has greatly depreciated or lost its value, is a cause for removing them from office.[2] The sureties may apply for a release from the bond

actually to have received for the purposes of his trust a debt due from himself so that he and his sureties will be responsible on their bond for such security, the interest of the estate may require that such security should be preserved by continuing the executor in office, rather than those entitled under the will to be deprived thereof. The statute gives a very broad discretion to the judge, evidently intending not to define or limit the disabilities which should be the causes of removal, but to leave room for the application of the power to all cases which may occur to render the execution of a will or the administration of an estate perplexed or difficult. Winship *v.* Bass, 12 Mass. 198; Malony's Estate, 5 Pa. L. J. 139.

When an executor, who is unfit to be such, is sued on his administration bond in a case in which execution is to issue without expressing that it is for the use of any particular person, the judge of probate should remove him and appoint an administrator *de bonis non* with the will annexed, who will be entitled to the money that may be received on such execution. Newcomb *v.* Williams, 9 Met. (Mass.) 525.

Where it was apparently true that the executrix had but a slight knowledge of the English language, the estate did not seem to have suffered or to have been likely to have suffered any evil results from that cause. Hassey *v.* Keller, 1 Dem. (N. Y.) 577.

In Gregg *v.* Wilson, 24 Ind. 227, the charge of incompetency was supported merely by the evidence that the administrator could neither read nor write. The court held that though these qualifications would be very useful, it could not deem them absolutely essential, as such persons often possessed, nevertheless, very considerable business capacity. As a general rule, however, it might be better if those wholly uneducated were not appointed to such positions of trust and responsibility.

It was said in Becker *v.* Lawton, 4 Dem. (N. Y.) 341, that as the surrogate had ample power to adjust the equities, it would not revoke an executor's letters at his own request upon allegations that he had interests as surviving partner of the decedent antagonistic to his duties as executor.

Conflicting interest will not furnish ground for removal except in a clear and extreme case. Randle *v.* Carter, 62 Ala. 95.

It is held that an administrator may accept the office of probate judge without vacating the trust of administrator. But it seems he should resign or be removed if the trust is within the same county jurisdiction, and remains unfulfilled. Whitworth *v.* Oliver, 39 Ala. 286.

1. It was held in Drake *v.* Green, 10 Allen (Mass.) 124, that an executor or administrator will not be removed as evidently unsuitable for the discharge of his trust simply on the proof that he was unsuitable at the time of his appointment and without proof that he continues to be so.

But when the administrator at the time of an application for his removal possessed the same capacity as he did when appointed, the court refused to remove him for want of capacity, although his appointment might have been injudicious. Lehr *v.* Tarball, 2 How. (Miss.) 905.

2. *Alabama* Code, §§ 2385, 2387; *California* Code Civ. Proc., §§ 1400, 1405; *Illinois* Coth. Ann. Sts., ch. 3, § 32; *Iowa* Rev. Code, § 2496; *Maine* Rev. Sts., ch. 64, § 49; *Maryland* Code, art. 50, § 68; *New Jersey* Rev. Orphans' Court, § 126; Croswell Exrs. & Admrs., § 295; Schouler Exrs. & Admrs., § 154; Woerner Am. L. of Administration, § 268; Davenport *v.* Irvine, 4 J. J. Marsh. (Ky.) 60; Succession of De Flechier, 1 La. Ann. 20; National Bank *v.* Stanton, 116 Mass. 435; Barber *v.* Converse, 1 Redf. (N. Y.) 330; *In*

because endangered by the conduct of the executor or administrator, and have him removed for this purpose;[1] and in some States insolvency operates as a ground for revocation.[2]

re Brinson, 73 N. Car. 278; Garrison *v.* Cox, 95 N. Car. 353; Cohen's Appeal, 2 Watts (Pa.) 175; Tome's Appeal, 50 Pa. St. 285; Bills *v.* Scott, 49 Tex. 430.

1. Upon application of a surety to be released the practice is generally to allot a specified time to the executor or administrator in which to give new surety, and if he fail so to do his letter will be revoked. Lewis *v.* Watson, 3 Redf. (N. Y.) 43; Allen *v.* Sanders, 34 N. J. Eq. 203.

Where the securities of an administrator conceived themselves in danger of suffering from the conduct of the administrator as such, it was adjudged that the judge of the court of ordinary was authorized to relieve them, revoking the letters of administration. De Lane's Case, 2 Brev. (S. Car.) 167; Hardaway *v.* Parham, 27 Miss. 103.

By statute in *Tennessee*, Act of 1825, ch. 62, executors like administrators might be revoked on application of the securities, if they mismanage the estate, or if for other reasons the securities become unwilling longer to be responsible. Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16.

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2. Where the dative executor claimed the benefit of the insolvent laws for his property and one of the sureties had gone into bankruptcy and the other owned no property, this, coupled with other causes, held to be sufficient ground for removal. Brown *v.* Ventress, 24 La. Ann. 187.

In *Pennsylvania*, insolvency has been held sufficient cause for revoking. Edward's Estate, 5 W. N. C. (Pa.) 431.

In Estate of Greentree, 12 Phila. (Pa.) 10, two executors were removed by the orphan's court on the ground that one was largely insolvent, and the acts of the other were "of a character so doubtful that we feel that the estate would be subject to risks at his hands from which it should be relieved."

But though bankruptcy and insolvency may be a good cause for the removal of an administrator it was not held *ipso facto* to impair his official authority. Edward's Estate, 12 Phila. (Pa.) 85; Loxley's Estate, 14 Phila. (Pa.) 317; McFadgen *v.* Council, 81 N. Car. 195.

In Dwight *v.* Simon, 4 La. Ann. 490, it was held that the capacity to exercise the office of administrator does not cease *ipso facto* by the bankruptcy of the individual. The administration was a trust held for the benefit of heirs and creditors, and not to be blended with the personal condition of the administrator. Insolvency might be a ground for his removal; and of itself did not impair his official authority.

Insolvency or pecuniary irresponsibility is, however, not held a ground for removal in Freeman *v.* Kellogg, 4 Redf. (N. Y.) 218, though the executor may be asked to give additional security. See also Schanck *v.* Schanck, 7 N. J. Eq. 146; Hendrickson *v.* Anderson, 6 N. J. Eq. 594. See Holmes *v.* Cock, 2 Barb. Ch. (N. Y.) 426.

Poverty is not a sufficient cause for removal. Shields *v.* Shields, 60 Barb. (N. Y.) 56.

And the fact that the executors were men of inconsiderable means, not transacting or having any place of business, did not show that their circumstances are such that they do not afford adequate security for the due administration of the estate. Postley *v.* Cheyne, 4 Dem. (N. Y.) 492.

In Collier *v.* Kilcrease, 27 Ark. 10, it was held error to revoke letters of administration upon the ground of insolvency, without requiring the administrator to give additional bond, and without any showing that his securities were not ample.

It was held in Shields *v.* Shields, 60 Barb. (N. Y.) 56, that where the statute provides for the removal of an executor for the reason that his circumstances are so precarious as not to afford adequate security for the administration of said estate (2 *New York* Rev. Stat. 72, § 82), that the circumstances of an executor are precarious only within the meaning and intent of the statute when his conduct and character present such evidence of improvidence or recklessness in the management of the trust estate or of his own, as, in the opinion of prudent and discreet men, endanger its security. Poverty is not such precariousness. For though bankruptcy might furnish

e. REFUSAL TO DO THE DUTIES OF THE OFFICE.—An executor or administrator must attend to the duties of his trust. He must file a bond,[1] inventory the estate[2] and furnish an annual or final account.[3] He will be removed for refusing to administer

a reason for removal, poverty does not. If the mere chance that property committed to a trustee might be lost would render his circumstances precarious, there is not an executor occupying that place that could not be removed. Executors are more generally, and doubtless more appropriately, selected from those possessing integrity of character, habits of economy and industry, and having moderate estates acquired by honest industry. Such persons it may be said are in circumstances less precarious than many who possess far greater wealth. The selection of a trustee is the indication of the highest degree of personal confidence and character, rather than pecuniary responsibility, controls the selection. And although this decision was criticised in Freeman *v.* Kellogg, 4 Redf. (N. Y.) 225, as limiting the meaning of the word circumstances to personal character rather than to pecuniary condition, it is said in Martin *v.* Duke, 5 Redf. (N. Y.) 597, that the statute was by no means designed to restrict a person named as executor from acting as such even without a bond simply because the testator was a richer man than himself. Thrift, integrity, good repute, business capacity, and stability of character, for example, are circumstances which may be very appropriately considered in determining the question of adequate security.

1. See preceding section. EXECUTORS AND ADMINISTRATORS, vol. 7, p. 207.

2. *Alabama* Code, § 2386; *Georgia* Code, § 2523; *Iowa* Rev. Code, § 2496; *New Jersey* Rev. Orphan's Court, § 126; *Ohio* Rev.Sts., § 6017; *Pennsylvania* Bright. Purd. Dig., Deced. Est., §§ 249, 257; Croswell Exrs. & Admrs., § 296; Schouler Exrs. & Admrs., § 154; Woerner Am. L. of Administration, § 269; Oglesby *v.* Howard, 43 Ala. 144; Hubbard *v.* Smith, 45 Ala. 516; Pace *v.* Oppenheim, 12 Ind. 533; Dowdy *v.* Graham, 42 Miss. 451; Richards *v.* Sweetland, 6 Cush. (Mass.) 324.

Laches in not making an inventory within the time limited, and of not submitting a report at the end of the year, either with a view of making final settlement or of procuring an extension of time in which to make such a settlement were held sufficient ground for removal in McFadden *v.* Ross, 93 Ind. 134.

But the failure of one co-executor to return in his inventory of debts a note due from himself to the estate, and which is in the possession of the other executors, and returned in their inventory is no ground for his removal. Dowdy *v.* Graham, 42 Miss. 451.

The failure by the administratrix to include in the inventory a mortgage which, as it subsequently appeared, she claimed as her own property, although it was alleged that her ownership, if existent, was the result of dishonest practices, was not enough to justify her removal. *In re* Moulton, 32 St. Rep. (N. Y.) 631.

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3. Failure to account as to administration or in general failure to obey an order of the court in regard to administration. Croswell Exrs. & Admrs., § 296; *citing*, *Alabama* Code, § 2386; *Georgia* Code, § 2511; *Iowa* Rev. Code, § 2496; *Maine* Rev. Sts., ch. 64, § 21; *Maryland* Code, art. 50, § 212; *Michigan* Ann. Sts., §§ 5842, 5858; *Massachusetts* Pub. Sts., ch. 132, § 14; *New Jersey* Rev. Orphan's Court, § 126; *Ohio* Rev. Sts., § 6017; *Rhode Island* Pub. Sts., ch. 184, § 24; *Vermont* Rev. Laws, § 2074; *Pennsylvania* Bright. Purd. Dig., Deced. Est., §§ 249, 257; Taylor *v.* Biddle, 71 N. Car. 1; Armstrong *v.* Stowe, 77 N. Car. 360; Collins *v.* Hollier, 13 La. Ann. 585.

Neglect on the part of an administrator to file an account for nearly a year after the time fixed by the court for that purpose, he having money in his hands belonging to the estate, and not paid over according to law, is sufficient of itself to authorize his removal. Evans *v.* Buchanon, 15 Ind. 438.

The failure to make a settlement is a cause for removal; but where the heirs divided the whole estate among themselves, there being no debts, this was held a good administration, and

the estate or neglecting the duties of his office,[1] or violating the plain terms of the will.[2]

f. MISMANAGEMENT.—An executor and administrator will be removed if, after electing to act, he disobeys the orders of the

that the failure to make returns, where there was no occasion for them, was not a sufficient cause for revocation. Harris *v.* Teal, 29 Ga. 585; Hussey *v.* Coffin, 1 Allen (Mass.) 354.

If the administrator is derelict in his duty in filing an account he may be ordered to do so, and if he disobey the order the creditors may demand his removal. But where there is not any evidence the cause will not constitute sufficient ground where it is not alleged or proved that the administrator has disobeyed the order of the court. Succession of Head, 28 La. Ann. 800.

The forfeiture contemplated by the act of March 13, 1857, does not take place *ipso facto*, by the omission to file an account. It is a matter to be acted upon by the court in the matter of his succession. McClelland *v.* Bideman, 5 La. Ann. 563.

The probate court does not lose the power of revoking the letters of a delinquent administrator who fails to make settlement after being duly cited, by omitting to exercise the power at the term to which the citation is returnable. It may continue the settlement to a subsequent term, and if he is still in default, may then revoke them. Scott *v.* Crews, 72 Mo. 261.

EXECUTORS AND ADMINISTRATORS, vol. 7, p. 421.

1. Croswell Exrs. & Admrs., § 300; *New York* Code Civ. Proc., §§ 2807, 2817.

It was held that if an executor qualify as such and totally neglect his duties he should be removed, although he has committed no positive act of wrong. Lucich *v.* Medin, 3 Nev. 93; 93 Am. Dec. 376.

In Marsh *v.* People, 15 Ill. 284, the refusal of an administrator to perform the duties of his trust was held sufficient cause for revoking his authority.

Upon representation of a refusal to administer an estate and satisfactory proof thereof, to the judge of probate, it was held that he had the authority, and would be bound to execute it, to remove such administrator and appoint another. Wildridge *v.* Patterson, 15 Mass. 148.

Where one became a soldier and became, therefore, unable to give proper attention to the estate, the court held "that non-management by absence as a soldier in a field remote from the estate might be as disastrous as mismanagement, and his letters were revoked. Berry *v.* Bellows, 30 Ark. 198.

An executor will not be removed because he failed to sell lands where the direction to sell was imperative in the will, but the time of sale was in the discretion of the executor, and his judgment was exercised in good faith. Haight *v.* Brisbin, 96 N. Y. 132.

It was held no ground for removing an executor or requiring him to give security for assets in his hands, that he paid a premium in investing certain funds in government bonds, all the interest collected having been paid over to the legatee. Carpenter *v.* Gray, 32 N. J. Eq. 692.

It is the duty of an administrator to contest doubtful claims against the estate of the deceased, and he is not liable to be removed for the reasonable delay in administration caused by the discharge of this duty. It was held that a delay of five months to petition for a new trial on a judgment, rendered against the estate, was not an unreasonable delay. Andrews *v.* Carr, 2 R. I. 117.

It is also not a ground for removal that doubtful claims are not prosecuted, especially if the estate be small. Myrick Prob. 97.

It is no cause for the removal of an administrator that he declines to inventory, or commence proceedings to recover certain real estate formerly belonging to the deceased, but which had been set off on execution against him in his lifetime, issued upon a judgment alleged by the heirs to have been recovered by the fraud of the plaintiff therein. Richards *v.* Sweetland, 6 Cush. (Mass.) 324.

EXECUTORS AND ADMINISTRATORS, vol. 7, p. 301.

2. Hood *v.* Hood, 2 Dem. (N. Y.) 583; 98 N. Y. 363.

court,[1] or mismanages the affairs of the estate in such a manner that waste and loss have resulted or are sure to occur, or is guilty of fraud and embezzlement.[2]

1. Territory *v.* Bramble, 2 Dak. 193. Upon failure to obey an order of the court requiring the executor named in the will to give a bond, a rule was entered, directing him to show cause why letters testamentary which had been issued to him should not be revoked. The executor, still refusing or neglecting to give bond, the orphans' court made an order removing him. Aldridge *v.* McClelland, 34 N. J. Eq. 237; Clark *v.* Nilos, 42 Miss. 460.

An executor will be removed from office if it be shown that he has disobeyed orders of the court directing him to file an account within a given time, or that he has otherwise neglected or refused to discharge the duties imposed upon him as testamentary executor. Brown *v.* Ventress, 24 La. Ann. 187.

An administrator may be removed where he fails to obey the order of the court requiring the sale of land, although the administrator claimed that the order was illegal because including the homestead. Wright *v.* McNatt, 49 Tex. 425.

The county court has no power, in any case, to remove an executor or administrator upon a mere citation to appear and settle his accounts. The power of removal is not incident to the proceeding under such a citation, and hence any attempted removal was unauthorized. The only legal consequences which attach to one's failure to appear and make settlement of his accounts is, that he subjects himself to an attachment, as in case of a contempt, and in such case it is made the duty of the court to order an attachment for his arrest, and when brought before the court, if he still neglects or refuses to make settlement of his accounts, the court is then required to deal with him as for a contempt, and forthwith remove him. The removal is required not only in the interest of the estate, but is doubtless also intended as a punishment for the contempt. Hanifan *v.* Needles, 108 Ill. 403.

The removal of an administrator for the reason that he had not complied with an order to execute a new bond, the chief justice being of the opinion that the bond executed by the attorney in fact of the administrator was not binding, was held error, there being no reason why an administrator might not execute a bond by an attorney in fact. Hall *v.* Monroe, 27 Tex. 700.

2. *California* Code Civ. Proc., § 1436; *Connecticut* Laws 1885, ch. 110, § 28; *Georgia* Code, § 2511; *Illinois* Coth. Ann. Sts., ch. 3, § 30; *Iowa* Code, § 2496; *Maine* Rev. Sts., ch. 64, § 21; *New Hampshire* Gen. Laws, ch. 195, § 10; *New York* Code, Civ. Proc., § 2685; *Pennsylvania* Bright. Purd. Dig., Deced. Est., §§ 249, 257; Crosswell Exrs. & Admrs., § 300; Deck *v.* Gherke, 6 Cal. 666. The statute makes waste or mismanagement a cause for removal in *Colorado*. Hake *v.* Stott, 5 Colo. 140; Travis *v.* Insley, 28 La. Ann. 784; Newcom *v.* Williams, 9 Met. (Mass.) 525; Price *v.* Price, 23 N. J. Eq. 428; *In re* Hood, 98 N. Y. 363; Lichtenberg *v.* Herdfelder, 103 N. Y. 302; *In re* Hutchinson, 10 N. Y. St. Rep. 10; Reynolds *v.* Zink, 27 Gratt. (Va.) 29.

The remedy against an administrator for past acts of maladministration, is on his bond; but inasmuch as the bond affords only an ultimate indemnity, where injury to the estate may be reasonably apprehended, the probate court may remove the administrator to prevent it. Lehr *v.* Tarball, 2 How. (Miss.) 905.

Where the executor had not transacted the business of the estate in a correct business manner, and had not kept the funds belonging to the estate separate and distinct from his own funds and estate, but had mixed and blended them together, and had not kept strict and accurate book accounts of his transactions with the estate, the trust fund having no separate and distinct existence, it was held that he might be removed. Hake *v.* Stott, 5 Colo. 140.

Where an administrator showed by his report that he had given an unauthorized preference to creditors in the payment of assets, it was held sufficient to justify his removal. Foltz *v.* Prousse, 17 Ill. 487.

Where an administrator lent money of the estate while there were debts to pay, without an order of the probate court, and the money was not repaid,

he was held guilty of waste, and was removed. State *v.* Johnson, 7 Blackf. (Ind.) 529.

Where the evidence showed that the executor had been recreant to his trust, and had administered the estate with a total disregard of the interests of the creditors and heirs, he was removed from office. Rogers *v.* Morrison, 21 La. Ann. 455.

Selling a portion of a certain plantation belonging to the succession by private sale. Succession of Winn, 27 La. Ann. 687.

The act of an executor in having transferred to himself individually on the books of a bank, shares of stock of such bank belonging to the estate of his decedent, and selling the same without authority from the orphans' court, it was held such a dereliction of duty to justify the revocation of his letters of administration. Levering *v.* Levering, 64 Md. 399.

The fact that an executrix had refused to defend suits brought against her as executrix, although she had been notified by the petitioners that the demands made in the suits were unjust and were not properly chargeable against the estate, and that she had colluded with the persons bringing the suits to defraud the petitioners of their respective interests in the testator's estate, was sufficient to justify the court in removing the executrix. Cox *v.* Chalk, 57 Md. 569.

If the creditors of an intestate estate represented insolvent, request the administrator to inventory certain real estate alleged to have been fraudulently conveyed by the intestate, accompanying the request with an offer of indemnity, the refusal of the administrator to inventory the same will be a sufficient cause for removing him from the trust, without proof that the conveyance was fraudulent. Andrews *v.* Tucker, 7 Pick. (Mass.) 250.

The refusal to redeem property at the request of a creditor held sufficient ground for removal. Glines *v.* Weeks, 137 Mass. 547.

Where an executor had wasted and misapplied the estate, or some part thereof, and had abused the trust and confidence reposed in him as executor, he should be removed. Gray *v.* Gray, 39 N. J. Eq. 332.

Where administratrix, by reason of misconduct in the execution of her office, had become unfit for the due execution of the office, her letters were properly revoked. *In re* West, 40 Hun (N. Y.) 291.

The indemnification of the sureties in the executor's bond not being one of the purposes contemplated by the power of sale contained in the will, the act of the executor was illegal and improper, and the act complained of being within the statute—*held*, that the prayer of petition for revocation should be granted. Fleet *v.* Simmons, 3 Dem. (N. Y.) 542.

Upon petition for the removal of executrix and executors, upon the ground of their misconduct in having wasted, misappropriated and improvidently managed the estate, it appearing that respondents had intentionally omitted from the account items of assets with which they should have charged themselves; falsely stated the sum for which testator's business was sold, and neglected to realize the same; and that the executors other than the widow had surrendered to the latter, without security, possession of all the property, knowing her to entertain a design, which she in fact effectuated, to waste the fund at the expense of the remaindermen, it was held that the application should be granted. Fernbacher *v.* Fernbacher, 4 Dem. (N. Y.) 227.

The fact that an executor is illiterate and of small pecuniary means, and that he has been guilty of misconduct or mismanagement of the trust, in intrusting all the business of the estate to his attorney, without keeping himself informed in relation to it, and in applying moneys belonging to the estate to his own use, does not authorize the surrogate to supersede the letters testamentary issued to him on the ground that he is incompetent to service "by reason of improvidence." The kind of improvidence the legislature had in view refers to habits of mind and conduct which become a part of the man and render him generally, and under all circumstances, unfit for the trust or employment in question. If he was possessed of such general qualities of mind and conduct as to render him fit to be intrusted with the office for which the testator selected him, but has nevertheless mismanaged the trust, he is to be proceeded against for such mismanagement instead of being declared incompetent from improvidence. Emerson *v.* Bowers, 14 N. Y. 449.

Where the finding of the referee that the mismanagement of the estate had

VI. EFFECT OF REMOVAL.—With the final decree removing him, the authority of the executor or administrator terminates and he cannot prosecute a suit or otherwise act as executor or administrator.[1] It becomes his duty, when so removed, to deliver to his successor all goods, chattels, moneys, and effects in his hands; he must settle his account and turn over the balance due.[2] He must pay over all the estate, and the court may enforce the payment by order, and in case the order be not obeyed, by attachment for

inured to the benefit of the estate, was unsupported by evidence, the court held that if it were, it could not avail. An executor could not be heard to defend against a removal on the ground that his violation of duty had benefited the estate. Hake *v.* Stotts, 5 Colo. 140; Crump *v.* Williams, 56 Ga. 591.

Nor can the fact found "that the executor had not acted fraudulently" avail him, since his mismanagement had all the effects of a fraud. Hake *v.* Stotts, 5 Colo. 140.

It is no defense against removal that the legatees had an action at law on the bond for waste and mismanagement of the estate; the policy of the law is to arrest it by removal. Hake *v.* Stotts, 5 Colo. 140.

Where the defendant was found insolvent and incompetent and had made no proper returns of assets in his hands or how he had disbursed the same, and in effect had mismanaged the estate, this was held good and sufficient cause for an order of removal. Edwards *v.* Cobb, 95 N. Car. 4.

And the refusal of an executor to permit his coexecutors to inspect and examine the papers belonging to the estate has been held sufficient cause for removal. Chew's Estate, 2 Pars. Eq. Cas. (Pa.) 153.

But to enable a creditor to have an administrator of a succession removed from office, it must be alleged and shown that the creditor has been injured by the misappropriation or maladministration by the administratrix of the property or funds of the succession. Succession of Decuir, 23 La. Ann. 66.

An error of judgment not amounting to malfeasance was held no ground for removal. Succession of Sparrow, 39 La. Ann. 696.

In Webb *v.* Dietrich, 7 W. & S. (Pa.) 401, it was held that the purchase by the executor at the sale of the property is not in itself proof of waste or mismanagement and not a ground for his removal.

Though the payment by an administrator of his own debt out of the estate is such a breach of trust, for which he may be removed, yet if the sum is small in comparison with the funds remaining in his hands and the interest of those concerned has not been imperiled by the amount used and no improper or dishonest motives can be imputed to him, he will not be removed. Killam *v.* Costley, 52 Ala. 85.

An executor may commit errors in his accounts, make mistakes in his construction of the will; these the court will correct, but will not remove the executor unless there is willful misconduct, waste or improper disposition of the assets. Witherspoon *v.* Watts, 18 S. Car. 396; McFadgen *v.* Council, 81 N. Car. 195.

1. Davenport *v.* Irvine, 4 J. J. Marsh. (Ky.) 60.

2. Upon the removal of an executor, it is his duty to immediately deliver to the administrator with the will annexed, all goods and chattels, moneys and effects, in his hands, belonging to the estate. Section 130 of the orphan's court act directs that the removed executor shall settle his account at the next term of the court, and pay over the balance to his successor within sixty days, and is not inconsistent with that part of the same section, which directs that he shall immediately after removal deliver the moneys then in his hands. The object of the statute is at once to get all property of the estate out of the hands of the removed executor into those of his successor; to get out of his hands all he then has, the balance, if any, at a later time. Aldridge *v.* McClelland, 34 N. J. Eq. 237; Marsh *v.* People, 5 Ill. 284.

Upon the removal of the executor, all the moneys in his hands as executor became due and payable from him to his successor, the administrator with the will annexed, who, as soon as he was appointed, became the sole representative of the estate, though the time for

contempt.[1] The executor or administrator cannot be held liable for waste or other mismanagement of the estate occurring after he has been removed from office, and in which he has taken no part.[2]

The effect of removal or revocation upon previous acts of the executor or administrator depends upon whether the authority under which he has proceeded was void or voidable only. If void, all acts under it are a nullity and it cannot be said that a revocation for the purpose of correcting the record or preventing further mischief can in any way affect his past actions, and the person acting under void letters may be treated as executor *de son tort*.[3] Where the grant is voidable, however, it is valid for all purposes until set aside, and it has been held that all acts done in accordance with proper administration will be binding and that *bona fide* purchasers will be protected. Throughout this country this is generally made the subject of statutory enactments.[4]

the payment of such moneys to the persons ultimately entitled to receive them had not yet arrived. Pinney *v.* Barnes, 17 Conn. 420.

1. Croswell Exrs. & Admrs., § 304; *Massachusetts* Pub. Sts., ch. 156, §§ 15, 31; Biddison *v.* Story, 57 Md. 96; Kelly *v.* Weddle, 1 Ind. 550; Denson *v.* Denson, 33 Miss. 560; Davis *v.* Cheves, 32 Miss. 317.

In Tome's Appeal, 50 Pa. St. 285, it was held that the orphan's court had power to enforce, against the person of a dismissed executor, by the process of attachment, a decree that he should pay and deliver over to his executor all the goods and chattels and effects of the estate in his hands.

2. One of several administrators is liable for the acts done by either, while they all continue in office. This liability ceases to attach to such of them as are removed from office for all acts done after the removal. Marsh *v.* People, 15 Ill. 284.

3. See EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 102, 186.

4. The county court having had jurisdiction the order appointing administrator with the will annexed, may have been voidable, and the executor have had the right to cause it to be set aside, had he come in time, as the next of kin may; an administration may be granted to a stranger, and until revoked, the acts of the administrator are binding. Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16.

Where subsequently to the grant of letters of administration a will is found and the letters are revoked, acts done and rights acquired under the letters will be entitled to protection. Rebhan *v.* Mueller, 114 Ill. 343; 59 Am. Rep. 869; Bigelow *v.* Bigelow, 4 Ohio 138; 19 Am. Dec. 591.

In Allen *v.* Dundas, 3 T. R. 125, the court held that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards avoided in the ecclesiastical court; on the principle that the debtor could not have controverted the title of the executor so long as the probate was unrepealed and might well pay when he could make no defense. See also 8 East 189; Bac. Abr. Executors, etc., 13.

An administration granted by competent authority upon a proper case made, can with no propriety be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. Kittredge *v.* Tolson, 8 N. H. 98.

An attempt to draw a distinction between a grant of administration in derogation of the right of the executor, and one in derogation of the right of the next of kin, holding the former void, and the latter only voidable, is not well sustained. The judge of probate has jurisdiction to allow a will, if one is presented, and if not, to grant administration. He may well grant the latter when there is no evidence that the former has any existence, and his act in doing so is not to be held entirely void, because in derogation of the right of an executor who has, perhaps, occasioned the act by his own neg-

VII. Revocation of Probate—1. Definition.—Revocation of probate is the recalling of the probate of a will by a competent court, for sufficient cause, as, for instance, upon proof of a subsequent will.[1]

2. Revocation of Probate and Revocation of Letters Testamentary Distinguished.—An attentive consideration will show that a very marked distinction exists between the revocation of probate and the revocation of letters testamentary, and that they are attended with consequences quite different—though this seems to have escaped the notice of most of the authorities.

Revocation of probate constitutes a judicial declaration that the will never existed, and operates, therefore, the destruction of its validity; while, on the other hand, revocation of letters testamentary is attended with the same consequences that follow upon the death or misconduct of the executor; the will is left intact, except, of course, the nomination of the person who is to carry out its provisions. Again, while revocation of probate carries with it, as a necessary incident, the revocation of letters testamentary,[2] the latter by no means involves the former.[3]

3. Jurisdiction—*a.* GENERALLY.—Frequent applications have been made to courts of chancery to revoke the probate of wills, but except where such jurisdiction has been exercised by virtue of statutory authority,[4] it has been almost uniformly disavowed by chancery, both in *England* and the *United States*.[5] And in

lect. An administration granted by the judge of probate, as upon an intestate estate, where the domicile of the deceased was within his jurisdiction, is not a mere nullity and absolutely void; notwithstanding a will be afterwards presented and approved and the administration revoked. Acts in which third persons have an interest, done under a grant of administration which is subsequently revoked by finding of a will, in the due course of administration, before the production and probate of the will, are generally valid, and bind the executor. Kittredge *v.* Folsom, 8 N. H. 98.

It is often provided by statute, as in *Massachusetts*, that when an executor or administrator is removed, or when letters of administration are revoked, all previous sales, whether of real or personal estate, lawfully made by the executor or administrator, and with good faith on the part of the purchaser, and all other lawful acts done by such executor or administrator, remain valid and effectual. *Massachusetts* Pub. Sts., ch. 132, § 15; Croswell Exrs. & Admrs., § 303.

1. Abb. L. Dict.

2. Clagett *v.* Hawkins, 11 Md. 381; 1 Woerner's American Law of Administration, p. 569, n. 6.

3. 1 Woerner's American Law of Administration, p. 569, n. 6.

Revocation of Administration and Revocation of Letters of Administration Distinguished. — The former circumstance implies that there is no estate liable to be administered, and therefore, that no one is clothed with the power and authority of administrator; while the latter merely recalls the authority of the administrator, in whose place another may be substituted. 1 Woerner's American Law of Administration, p. 569, *n.* 6.

4. Walters *v.* Ratliff, 5 Bush (Ky.) 575; Renn *v.* Samos, 33 Tex. 760.

5. Webb *v.* Claverden, 2 Atk. 424; Kerrich *v.* Bransby, 7 Bro. P. C. 437; Allen *v.* MacPherson, 1 Phil. Ch. Cas. 133; 1 H. L. Cas. 191; Adams *v.* De Cook, 1 McAll. (U. S.) 253; Tompkins *v.* Tompkins, 1 Story (U. S.) 547; Gould *v.* Gould, 3 Story (U. S.) 537; Ellis *v.* Davis, 109 U. S. 485; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190; Heyer *v.* Burgen, 1 Hoffm. Ch. (N. Y.) 1; Muir *v.* Leake, etc., Or-

phan House, 3 Barb. Ch. (N. Y.) 477; Bogardus *v.* Clarke, 1 Edw. Ch. (N. Y.) 266; Colton *v.* Ross, 2 Paige (N. Y.) 396; 22 Am. Dec. 648; Bogardus *v.* Clarke, 4 Paige (N. Y.) 623; 7 Paige (N. Y.) 397; Booth *v.* Kitchen, 7 Hun (N. Y.) 255; Wells *v.* Stearns, 35 Hun (N. Y.) 323; Hughey *v.* Sidwell, 18 B. Mon. (Ky.) 259; Howell *v.* Whitchurch, 4 Hayw. (Tenn.) 49; Burrow *v.* Ragland, 6 Humph. (Tenn.) 481; Townsend *v.* Townsend, 4 Coldw. (Tenn.) 70; 94 Am. Rep. 185; Woodruff *v.* Taylor, 20 Vt. 65; Ballow *v.* Hudson, 13 Gratt. (Va.) 672; Castro *v.* Richardson, 18 Cal. 478; State *v.* McGlynn, 20 Cal. 235; Slade *v.* Street, 27 Ga. 17; Lyne *v.* Guardian, 1 Mo. 410; 13 Am. Dec. 509; Trotters *v.* Winchester, 1 Mo. 413; Swain *v.* Gilbert, 3 Mo. 245; Ewell *v.* Tidwell, 20 Ark. 136; In M'Dowall *v.* Peyton, 2 Desaus. Eq. (S. Car.) 313, and Palmer *v.* Mikell, 2 Desaus. Eq. (S. Car.) 342, the expedient was resorted to of decreeing that the defendant's consent to a revocation of the probate, to enable the ordinary to try the will *de novo:* Holden *v.* Meadows, 31 Wis. 284; Archer *v.* Meadows, 33 Wis. 166; Sever *v.* Russell, 4 Cush. (Mass.) 513; 1 Am. Dec. 811; Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122.

An occasional exception, or rather, apparent exception, to this non-interference of courts of equity is found in the books; but these occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force. Thynn *v.* Thynn, 1 Vern. 296; Devendish *v.* Baines, Pre. Ch. 3. But the most prominent case in this class is that of Barnsley *v.* Powel, 1 Ves. 284, in which the court decreed the party claiming under a probated will to go into the probate court, and consent to the probate being set aside. It claimed to do this upon the ground that the probate was obtained by virtue of a deed of proxy fraudulently procured, and as the court of chancery had the power to set that deed aside, it would leave the probate without any foundation. At the same time that this novel proceeding was adopted, the court said it would be done "without interfering with any jurisdiction." Thus, it will be seen, that the probate was not set aside by the order or decree of the court of chancery operating upon the decree of probate, but by coercing the party to consent that the probate court should set aside its own decree.

And in the case of Gingell *v.* Horne, 9 Sim. 539, the vice-chancellor says: "The impression which has been fixed in my mind for several years is, that it is settled law that there is no method of escaping from the effect of probate when granted, unless in a case like that of Barnsley *v.* Powel (1 Ves. 284), in which Lord Hardwicke set aside the ground on which the probate was obtained."

In Tarver *v.* Tarver, 9 Pet. (U. S.) 180, one of the objects of the bill being to set aside the probate of a will, the court said: "The bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal from the court of probate, according to the provisions of the law of *Alabama*."

In Gaines *v.* Chew, 2 How. (U. S.) 619, Catron, J., said: "The argument that a fraudulent probate is a fraud on the living, and therefore chancery can give relief by setting aside such probate, is a mistaken idea of the chancery powers. Surely the probate of a fraudulent or forged paper is a fraud on the living as much as the suppression of the last will, and the causing to be proved a revoked one; still chancery has not assumed jurisdiction to set aside the probate of a will alleged to have been forged, or to be fraudulent, after the testator's death . . . although he who committed the fraud or forgery procured the probate to be had of the paper in the probate court."

And in Kieley *v.* McGlynn, 21 Wall. (U. S.) 503, Bradley, J., in delivering the opinion of the court, said: "It is undoubtedly the general rule, established both in *England* and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof." See also Fouvergne *v.* New Orleans, 18 How. (U. S.) 471.

Judge Story, speaking in reference to the concurrent jurisdiction of chancery in matters of fraud, admits that fraud in procuring the probate of wills constitutes an exception thereto. He says: "No other excepted case is known to exist; and it is not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority." 1 Story's Eq. Juris. (13th ed.), § 440.

Reason of the Rule.—One of the prin-

some jurisdictions a decree of probate cannot be reversed by the common-law courts by writ of error or *certiorari*.[1]

b. COURT OF PROBATE.—As indispensable to the administration of justice, a court of probate has the power to revoke its own decree admitting a will to probate;[2] and it will exercise such

cipal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts have all the power and machinery necessary to afford full and adequate relief. Kieley *v.* McGlynn, 21 Wall. (U. S.) 503.

Equity Reinstating Probate.—In *Tennessee* a court of equity will set aside a judgment had upon an issue *devisavit vel non* against a will, if it appear that such judgment was obtained through fraud; and if in such case the will had already been probated in common form, the court will reinstate such probate. Smith *v.* Harrison, 2 Heisk. (Tenn.) 230.

1. Peters *v.* Peters, 8 Cush. (Mass.) 529; Smith *v.* Rice, 11 Mass. 513; Dublin *v.* Chadbourn, 16 Mass. 441; Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122. In Peters *v.* Peters, 8 Cush. (Mass.) 536, Shaw, C. J., in delivering the opinion of the court, said: "This is the first attempt, as far as we know, to invoke the power of this court, as a court of general jurisdiction, and as such having a general supervising and controlling authority over other courts and tribunals, to interpose, either by *certiorari* or writ of error, to re-examine and annul the decrees of the probate courts of this commonwealth. It is a case of great importance, since, if this power were affirmed and freely exercised, it would effect an almost entire change in that important department of judicial proceeding which relates to wills, administrations and the settlement of estates. The fact that no authority is shown to warrant such practice, that no precedent is found either for or against it, when so many cases of strongest interest to the rights of individuals would have called urgently for its exercise, though not conclusive, leads to a strong belief that it does not exist, and should induce the most cautious examination."

2. Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122, is a most learned and elaborate discussion of the whole subject of the power of a court of probate to revoke the probate of a will, and in which a multitude of precedents and authorities are collected and examined.

"This power does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all probates and administrations. No decree admitting a later instrument to probate, or modifying or revoking a decree already granted, can be made without notice to all parties interested. Every party aggrieved by the action of the probate court has the right to appeal . . . and an application of this nature, when one will has already been proved, would never be granted except upon the clearest evidence. The new decree would not necessarily avoid payments made or acts done under the old decree, while it remained unrevoked." Mr. Justice Gray in Waters *v.* Stickney, 12 Allen (Mass.) 1. See also Gaines *v.* Hennen, 24 How. (U. S.) 567; 90 Am. Dec. 122; Vance *v.* Upson, 64 Tex. 266.

Nature of the Power.—The jurisdiction of courts of probate in this respect seems to be very similar to that exercised by courts of chancery upon bills of review, or bills in the nature of bills of review, brought to examine and reverse decrees made upon former bills; or like that possessed upon bills to impeach decrees upon the ground of fraud. This power of probate courts is of course not an unlimited one, but confined to cases of fraud, mistake, irregularity, want of jurisdiction and the like. Archer *v.* Meadows, 33 Wis. 166.

Revocation of Erroneous and Invalid Probate Distinguished.—In reference to the power of revocation of a court of probate, a distinction is taken between the case of a merely erroneous probate

power for the causes following: fraud, mistake or collusion;[1] when the probate has been decreed upon the mistaken supposition that the testator was dead;[2] want of jurisdiction;[3] failure of the

and one that is invalid: thus, in *Kentucky* it is held, in regard to the former, that unless the power is given by statute, it cannot be set aside by the probate court, after the expiration of the term at which it was granted; McCarty *v.* McCarty, 8 Bush (Ky.) 504; Taylor *v.* Tibbatts, 13 B. Mon. (Ky.) 181; while no lapse of time will bar an application for revocation, in the second case. Bailey *v.* Osborn, 33 Miss. 128; Clagett *v.* Hawkins, 11 Md. 381.

1. Prosser *v.* Wagner, 1 C. B. N. S. 295; 87 E. C. L. 295; Allen *v.* Dundas, 3 T. R. 121; Gaines *v.* Chew, 2 How. (U. S.) 641; Gaines *v.* Hennen, 24 How. (U. S.) 567; Campbell *v.* Thatcher, 54 Barb. (N. Y.) 386; *In re* Paige, 62 Barb. (N. Y.) 476; *In re* Fisher, 15 Wis. 511; Archer *v.* Meadows, 33 Wis. 166; Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122. See also the cases cited in note 2, under *Generally*, *supra*, this title, as they are to the effect that the reason assigned by chancery for not entertaining bills for the revocation of probate is, *that an adequate remedy can always be had in the court of probate.*

The power of revocation in such cases, in the absence of statutory authority, is equitable in its nature, and is to be exercised according to the principles governing courts of equity. Kieley *v.* McGlynn, 21 Wall. (U. S.) 503; Holden *v.* Meadows, 31 Wis. 284; Archer *v.* Meadows, 33 Wis. 166; Worthington *v.* Gittings, 56 Md. 542. *In re* Paige, 62 Barb. (N. Y.) 476, where the will was attended by the suspicious circumstances that it was made about the time the testator, who was an enlisted soldier, received his bounty money; that the executor in the will was his guardian, and received such money; that the will was drawn in the office of the guardian, who was an attorney; and by the clerk of the attorney; that his guardian was a legatee in the will; and that by its revocation the estate would go to the testator's next of kin; it was *held* that these circumstances justified the surrogate in revoking the probate of the will.

But where the probate of a will was sought to be revoked on the ground that the testator was not free and capable at the time of its execution; and there was no evidence to sustain the application except that he was addicted to the use of intoxicating liquors to a degree that produced feebleness of body, there was affirmative evidence that his mind was not affected by his habits, and that when the will was executed he was sober, it was *held* that the application was properly denied. *In re* Watson's will, 60 Hun (N. Y.) 579; *compare* M'Guire *v.* Kerr, 2 Bradf. (N. Y.) 244. An averment of a petition to set aside the probate of a will, that certain parties conspired and confederated with themselves and others in order to fraudulently procure the execution of said instrument, is a mere statement of conclusions, without any facts to show fraud. Brown *v.* Mitchell, 75 Tex. 9.

2. The reason is that the decease of the testator is the first prerequisite to the jurisdiction of a court of probate. Goods of Napier, 1 Phil. 83; Allen *v.* Dundas, 3 T. R. 125; Campbell *v.* Thatcher, 54 Barb. (N. Y.) 386; Morgan *v.* Dodge, 44 N. H. 259; 82 Am. Dec. 213; Peebles's Appeal, 15 S. & R. (Pa.) 42; Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122.

3. Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122; 1 Woerner's American Law of Administration, p. 497, § 227. But where an heir, who was an infant at the time of the probate of the will and subsequent proceedings touching the estate, joined in a petition to the probate court after she became of age, alleging want of notice of the time and place of probate by personal or due publication, but not the fact of her infancy and non-representation by guardian, as showing want of jurisdiction in the court to admit the will to probate, and after alleging various acts of fraud or undue influence to impeach subsequent proceedings of the executors, and denying the jurisdiction of the court of probate to make orders directing and confirming sales, etc., prayed that the probate of the will, and all orders and proceedings in the matter of the estate, might be set aside, and also for general relief. On the same day she joined in an action in the circuit court wherein the complaint set up the alleged fraudulent

court of probate to conform to some statutory requirement;[1] and the discovery of a posterior will.[2] But in this last case it is not necessary, in order that the later will may be probated, that the probate of the earlier one should be *first* revoked;[3] and if the two instruments are not entirely inconsistent with each other, the original decree may be so modified as to declare that both instruments, taken together, constitute the testamentary act.[4]

4. How Effected.—In order to revoke the probate of a will there must be a direct[5] proceeding, and notice must be given to all

dealings with the estate since the decree of probate, and without questioning the validity of the will or its proof, asked relief consistent only with a valid probate and the due appointment of executors. *Held*, that the petition and complaint operated as an assent by her to the probate and the appointment. O'Dell *v.* Rogers, 44 Wis. 136.

1. Roy *v.* Segrist, 13 Ala. 810; Sowell *v.* Sowell, 40 Ala. 243; Lawrence's Will, 7 N. J. Eq. 215. Where a will has been probated without notice, the parties interested are entitled to have the probate set aside, and the will re-propounded without in this application setting forth their reasons for objecting to the will. Randolph *v.* Hughes, 89 N. Car. 428.

But the probate of a will in common form cannot be set aside on the petition of the widow for a re-probate, merely on the ground that she was not cited in the original probate and that she desires a re-probate to enable her to enter her dissent within six months thereafter. Armstrong *v.* Baker, 9 Ired. (N. Car.) 109.

2. Gaines *v.* Hennen, 24 How. (U. S.) 553; Morgan *v.* Dodge, 44 N. H. 258; 82 Am. Dec. 213; Clagett *v.* Hawkins, 11 Md. 381; Schultz *v.* Schultz, 10 Gratt. (Va.) 358; 60 Am. Dec. 335; Bowen *v.* Johnson, 5 R. I. 119; 73 Am. Dec. 49; Peebles' Appeal, 15 S. & R. (Pa.) 39. In Wilkinson *v.* Robinson, 14 Jur. 72, the probate of a later will was decreed, notwithstanding an earlier one had already been admitted to probate, and the executrix named therein was out of the jurisdiction, and could not be cited.

In Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122, the court, by Gray, J., said: "A court of probate has no more power by a decree establishing one testamentary instrument, to preclude the subsequent probate of a later one never before brought to its notice, than by a decree approving one account to discharge an administrator from responsibility for assets not actually accounted for."

3. Gaines *v.* Hennen, 24 How. (U. S.) 566; Bowen *v.* Johnson, 5 R. I. 120; 73 Am. Dec. 49; Schultz *v.* Schultz, 10 Gratt. (Va.) 359; 60 Am. Dec. 335; Vance *v.* Upson, 64 Tex. 266. "To revoke," says the court in this latter case, "the probate of a will upon the claim that the testator had revoked the will itself, by the execution of a subsequent will, until the latter fact is legally established, would be folly; for it might be found ultimately that the subsequently executed paper could not operate a revocation of the probated will, either in whole or in part. It is certainly true that no one can be called upon in a court of justice to have done a given thing before he will be permitted to have another thing done, when, until the latter thing is done, there is no right to have the former thing done."

4. Goods of Harris, 18 W. R. 901; Campbell *v.* Logan, 2 Bradf. (N. Y.) 90; Clark *v.* Wright, 3 Pick. (Mass.) 67; Water *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122; Besancon *v.* Brownson, 39 Mich. 388.

5. Castro *v.* Richardson, 18 Cal. 478; *In re* Warfield, 22 Cal. 51; Bush *v.* Sheldon, 1 Day (Conn.) 170; Judson *v.* Lake, 3 Day (Conn.) 318; Brown *v.* Lanman, 1 Conn. 467; Laughton *v.* Atkins, 1 Pick. (Mass.) 535; Dublin *v.* Chadbourn, 16 Mass. 433; Wells' Will, 5 Litt. (Ky.) 273; Taylor *v.* Tibbatts, 13 B. Mon. (Ky.) 177; Hughey *v.* Sidwell, 18 B. Mon. (Ky.) 259; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436; Dower *v.* Seeds, 28 W. Va. 113; 57 Am. Rep. 646; Leatherwood *v.* Sullivan, 81 Ala. 458; Cochran *v.* Young, 104 Pa. St. 333; Kirk *v.* Bowling, 20 Neb. 260; Roberts *v.* Flanagan, 21 Neb. 503; Hubbard *v.* Hubbard, 7 Oregon 43; and in *Pennsylvania* the probate of a will is a judicial act which

parties interested; as, by an original proceeding, either in the court which decreed the original probate,[1] or in a superior court of law,[2] or in a court of equity,[3] as the statute may direct,[4] or by an appeal from the decree establishing the probate.[5] This latter

cannot be collaterally impeached in an action of ejectment, brought in the right of the heir at law to recover the real estate devised by the will. Wilson *v.* Gaston, 92 Pa. St. 207.

1. Franks *v.* Chapman, 61 Tex. 576; *In re* Kellum's Will, 50 N. Y. 298; *In re* Paige, 62 Barb. (N. Y.) 476; Bailey *v.* Stewart, 2 Redf. (N. Y.) 212; Estate of Rice, Myr. Prob. (Cal.) 183; Jones *v.* Dove, 6 Oregon 188; Hubbard *v.* Hubbard, 7 Oregon 43; Quidort *v.* Pergeaux, 18 N. J. Eq. 472; Ryno *v.* Ryno, 27 N. J. Eq. 522; *In re* Evans, 29 N. J. Eq. 571; Hotchkiss *v.* Ladd, 62 Vt. 209; *In re* Straub's Will (N. J. 1892), 24 Atl. Rep. 569; *In re* Sbarboro, 63 Cal. 5; and by the common law it may be done at any time within thirty years; Brown *v.* Gibson, 1 Nott & M. (S. Car.) 326; and in *South Carolina* an ordinary has the power to revoke the probate of a will allowed by his predecessor. Brown *v.* Gibson, 1 Nott & M. (S. Car.) 326; the probate of a will may be set aside after the term expires at which the probate was granted, and a second probate ordered by the same court. Dickenson *v.* Stewart, 1 Murph. (N. Car.) 99; Miller *v.* Miller, 5 Heisk. (Tenn.) 723. Under the laws of the territory of *New Mexico*, a judgment of a probate court, in 1867, admitting a will to probate, cannot be annulled by the same court, in a proceeding instituted by an heir more than twenty years after the judgment and more than four years after the heir became of age. Bent *v.* Thompson, 138 U. S. 114; *New York* Code Civ. Proc., § 2481, subd. 6, provides that a surrogate has power to open, vacate, or set aside a decree or former order of his court for frauds, newly discovered evidence, or other sufficient cause, and that this power must be exercised only in a like case, and in the same manner as a court of general jurisdiction exercises the same power. *Held*, that an application to set aside a decree probating a will of "personal and real property" must be made under the foregoing section and not under § 2647, which provides for setting aside a decree probating a will of "personal property." *In re* Hamilton's Will, 20 N. Y. Supp. 73.

2. Leighton *v.* Orr, 44 Iowa 679; Kelsey *v.* Kelsey, 57 Iowa 383; *In re* Middleton, 72 Iowa 424; Gregg *v.* Myatt, 78 Iowa 703. But after a will has been admitted to probate, letters testamentary granted, and proceedings had thereon to a final settlement of the estate, the propriety of the probate of the will cannot, for the first time, be raised in the supreme court of *Alabama*. Bothwell *v.* Hamilton, 8 Ala. 461.

3. Rogers *v.* Thomas, 1 B. Mon. (Ky.) 392; McCall *v.* Vallandingham, 9 B. Mon. (Ky.) 449; Lynch *v.* Miller, 54 Iowa 516. But where one interested in opposing the probate of a will appears in the county court, appeals to the circuit court, and then to the court of appeals, and fails in his opposition, he cannot thereafter file a bill in chancery to contest the will. Dale *v.* Hays, 14 B. Mon. (Ky.) 254; though, if one withdraws from the proceeding before the order of probate is made, he is not deprived of his remedy in equity; Dillard *v.* Dillard, 78 Va. 208; yet where a legatee is induced to withdraw her caveat to the probate of a will by false representations made to her by parties not interested in the estate, equity will not, upon a bill filed by her, set aside the probate. Kinney *v.* Emery, 38 N. J. Eq. 101; Johnston *v.* Glasscock, 2 Ala. 519; see also McArthur *v.* Scott, 113 U. S. 340, which contains an interesting and elaborate review of the *Ohio* cases.

Under 2 New York Rev. St. 61, §§ 29-31, a court of equity cannot, after one year, in a collateral action, set aside the probate of a will of personalty, except for fraud, in the proceedings in which it was procured, and this, though the will relates to realty. Post *v.* Mason, 26 Hun (N. Y.) 187.

4. Hughey *v.* Sidwell, 18 B. Mon. (Ky.) 259; Curry *v.* Bratney, 29 Ind. 195.

5. Scribner *v.* Williams, 1 Paige (N. Y.) 550; Rollwagen *v.* Rollwagen, 3 Hun (N. Y.) 121; on appeal from a decree admitting a will to probate, the presumption is in favor of the correctness of the probate. Estate of Sticknoth, 7 Nev. 223; Rollwagen *v.* Rollwagen, 3 Hun (N. Y.) 121; and on

right, however, being founded on statute, must be prosecuted in strict conformity thereto.[1]

5. Who May Institute Proceedings.—Proceedings to revoke the probate of a will may be instituted by any one interested;[2] but one receiving a beneficial interest under the will must relinquish the same before he can be a party to such proceedings.[3]

And an original action, mentioned in the foregoing section, cannot ordinarily be brought by one who was a party to the proceedings resulting in the probate as, such adjudication operates an estoppel as to him.[4]

an appeal from the decree of probate, the appellant must file objections thereto, to which the other party may plead. Howe *v.* Pratt, 11 Vt. 255; Havelick *v.* Havelick, 18 Iowa 414; Northampton *v.* Smith, 11 Met. (Mass.) 390; Ryno *v.* Ryno, 27 N J. Eq. 522; *In re* Evans, 29 N. J. Eq. 571.

The fact that an appeal is pending from that part of a decree admitting a will to probate which determines the disposition of lapsed legacies, does not bar an application to revoke the probate on the ground that the will is invalid. *In re* Bonnett's Will, 9 N. Y. Supp. 459. And in proceedings for the revocation of probate questions as to the construction of the will, not raised by the petition or proofs, or by requests for findings by the surrogate, and not passed upon by him, cannot be considered upon appeal from his decision. *In re* Watson's Will (N. Y. 1892), 30 N. E. Rep. 56.

1. *In re* Straub's Will (N. J. 1892), 24 Atl. Rep. 569; Dennison *v.* Talmage, 29 Ohio St. 433.

2. Hoyt *v.* Hoyt, 112 N. Y. 515; Miller *v.* Miller, 5 Heisk. (Tenn.) 723; Franks *v.* Chapman, 61 Tex. 576; Northampton *v.* Smith, 11 Met. (Mass.) 390. In this case, the testator bequeathed money to trustees, to be managed as an accumulating fund, for the term of sixty years, and then to be paid by them to the town of N, or its duly appointed agents, for the purpose of purchasing lands within the town for a pattern farm, to be so improved, in practical details, as to become a model to farmers generally. It was held that the town had such an interest in the will as to entitle it to an appeal from a decree of the judge of probate respecting the will.

If the question of the petitioner's lack of pecuniary interest in a proceeding to revoke the probate of a will is not raised before the surrogate, it will not be entertained on appeal from a judgment revoking such probate.

But a creditor of a succession has no interest to claim the setting aside of probate proceedings under a second will, by which the universal legatee qualified as executrix, when it appears that another and regularly probated will has already transmitted the succession to the universal legatee. State Nat. Bank *v.* Evans, 32 La. Ann. 464.

And a creditor of a testator, not being a proper party to proceedings for the probate of his will, cannot invoke the authority conferred upon the court by Code Civil Proc., § 2481, subd. 6, to open, vacate, etc., the decree admitting the will. Nor, *it seems*, can he ask for revocation of probate under § 2647, permitting such an application by "a person interested in the estate." Heilman *v.* Jones, 5 Redf. (N. Y.) 398.

3. Smith *v.* Smith, 14 Gray (Mass.) 532; Hyde *v.* Baldwin, 17 Pick. (Mass.) 303; Fulton *v.* Moore, 25 Pa. St. 468; VanDuyne *v.* VanDuyne 14 N. J. Eq. 49; Hamblett *v.* Hamblett, 6 N. H. 333; Benedict *v.* Montgomery, 7 W. & S. (Pa.) 238; 42 Am. Dec. 230; Weeks *v.* Patten, 18 Me. 42; 36 Am. Dec. 696; Smith *v.* Guild, 34 Me. 443. But an executor is not included in the will, notwithstanding he may have proceeded to act under the will. Gaither *v.* Gaither, 23 Ga. 521.

4. Rogers *v.* Thomas, 1 B. Mon. (Ky.) 392; Dale *v.* Hays, 14 B. Mon. (Ky.) 254; *compare* Hamilton *v.* Berry, 14 B. Mon. (Ky.) 31; Smith *v.* James, 74 Iowa, 462; but under *Iowa* Code, § 2353, providing that the probate of a will shall be conclusive until it is set aside in an original or appellate proceeding, such an original proceeding may be brought by one who was a party to the probate, but was only notified thereof by publication, and did not appear. Gregg *v.* Myatt,

6. Effect.—When a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, the former becomes inoperative, and the second is that under which the estate is to be administered without any formal declaration of the court that the first is annulled. And it makes no difference that part of the estate has been administered under the first probate; the part unadministered must be proceeded with under the second.[1]

And when the probate has been annulled subsequently to the entry of a decree of distribution, the heir may pursue the property in the hands of a distributee, but the rights of *bona fide* purchasers from a distributee are not affected.[2]

7. How the Right May be Lost.—In most of the States of the Union the proceedings for revocation are confined by statute to a prescribed period—after which the probate is conclusive and not subject to attack, except on the ground of fraud;[3] and even in

78 Iowa 703. "When," observed Beck, J., in delivering the opinion of the court, "and by whom may an original proceeding be prosecuted to set aside the probate of a will? By parties who are not estopped by the adjudication in the probate proceeding. When parties have not had notice of the probate proceedings, have not appeared therein and contested or waived their rights to contest the probate in the manner prescribed by law, they are not so estopped and may prosecute an original action to set aside the probate of a will." And in *California* parties represented upon the contest of a will by an attorney appointed by the court are not parties to the contest so as to be barred by the adjudication; but may, under Code Civil Proc., § 1327, within a year after the probate, contest the same. Estate of Cunningham, 54 Cal. 556.

1. Gaines *v.* Hennen, 24 How. (U. S.) 553. And when the probate of a will is revoked upon the discovery of a later will, the probate of which is decreed, the new decree will not necessarily avoid payments made or acts done under the old decree while it remained unrevoked. Allen *v.* Dundas, 3 T. R. 125; Kittredge *v.* Folsom, 8 N. H. 98; Bigelow *v.* Bigelow, 4 Ohio 138; Stone *v.* Peasley, 28 Vt. 720; Price *v.* Nesbit, 1 Hill Eq. (S. Car.) 445. The first executor has been held, in such cases, administrator *pendente lite*. Patton's Appeal, 31 Pa. St. 465. But where the executor under the first will sold goods of the testator, after notice of a subsequent will, it was held that the rightful executor (the one under the later will, which was admitted to probate), in an action of trover was entitled to recover the full value of the goods sold, and that the executor under the first will was not entitled, in mitigation of damages, to show that he had administered the assets to that amount. Woolley *v.* Clark, 5 B. & Ald. 744; 7 E. C. L. 249.

On a contest for the revocation of the probate of a will, where a verdict is rendered determining its invalidity, a judgment should be entered entirely annulling the probate and revoking the powers of the executors, and a judgment entered in pursuance of a stipulation of the parties to the contest, whereby the probate is annulled merely as to the contestant, and to the extent to which she is interested in the estate, is void. *In re* Freud, 73 Cal. 555. But where revocation of probate is had upon the application of one having been under disability, it will operate upon his interest only, and not in favor of others who are barred by lapse of time. Samson *v.* Samson, 64 Cal. 327.

2. Thompson *v.* Samson, 64 Cal. 330. But *compare* Hughes *v.* Burriss, 85 Mo. 660.

3. Post *v.* Mason, 26 Hun (N. Y.) 187. *In re* Becker, 28 Hun (N. Y.) 207; Pryer *v.* Clapp, 1 Dem. (N. Y.) 387; State *v.* McGlynn, 20 Cal. 234; 81 Am. Dec. 118; O'Dell *v.* Rogers, 44 Wis. 136. Though more than the year prescribed by *New York* Code Civ. Pro., § 2648, within which a petition

this case, if the plaintiff is guilty of unnecessary or unreasonable delay he will be concluded by the probate.[1]

8. Pleading and Practice.—Under the Code of Civil Procedure of *New York*, all persons affected by a will, and duly cited by publication in proceedings for the probate thereof, are precluded, in a petition subsequently filed for the revocation of the probate, from raising questions as to the validity of the provisions of the

for the revocation of probate of a will may be filed has elasped, interested persons may be made parties to a petition already filed within the year expired. *In re* Liddington's Will, 51 Hun (N. Y.) 638. In *Georgia* a proceeding to set aside probate, if instituted after the three years prescribed by statute, must fail, unless sufficient reason be shown for not having instituted it within that time. Speer *v.* Speer, 74 Ga. 179.

In *Ohio* the probate of a will may be set aside by a suit in equity, brought within two years, and the verdict is final as between the parties. But afterborn devisees are not bound by the decree. McArthur *v.* Scott, 113 U. S. 340. Nullities of form in the probate of a will are barred by the prescription of five years in *Louisiana*. Porter *v.* Hornsby, 32 La. Ann. 337; Miller *v.* Miller, 32 La. Ann. 437; Miller *v.* Ober, 34 La. Ann. 592. But it suffices if the proceedings are *begun* within the time. *In re* Sbarboro, Myr. Prob. (Cal.) 255; 63 Cal. 5; Stewart *v.* Harriman, 56 N. H. 25; 22 Am. Rep. 408. And under *California* Code Civ. Pro., § 1327, presenting the petition to the judge out of court for the purpose of having a citation issued upon it is not enough. It must be filed with the clerk, and if not so filed prior to the expiration of the year, the decree becomes conclusive and absolute; an order subsequently made by the court directing the clerk to file it as of a day within the year cannot be sustained. *In re* Sbarboro, 63 Cal. 5. Where revocation of probate is had upon the application of one having been under disability, it will not operate in favor of others who are barred by lapse of time. Samson *v.* Samson, 64 Cal. 327.

The word "absent," as employed in *Illinois* Rev. St., ch. 148, § 7, providing that a bill to set aside the probate of a will may be filed within three years after the probate, and that persons "absent from the State" have the like period after the removal of their disabilities, refers only to persons who have been present, and not to non-residents. Wheeler *v.* Wheeler, 35 Ill. App. 123; *affirmed* in 134 Ill. 522.

Proving Codicil After Probate of a Will.—Offering a codicil subsequently to the probate of a former will is held to be, in effect, the offering of a later will for probate, and in those States where there are statutes to the effect that the *status* of a will cannot be contested after a specified time, it is held that the offer of a codicil for probate is tantamount to a contest *pro tanto*, and must be made within the time prescribed. Estate of Adsit, Myr. Pro. (Cal.) 266; Hardy *v.* Hardy, 26 Ala. 524. But the case of Waters *v.* Stickney, 12 Allen (Mass.) 1; 90 Am. Dec. 122, holds that the probate court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a codicil to the same will, written upon the back of the same leaf upon which the will was written, if such codicil escaped attention and was not passed upon at the time of the probate of the original will. Mr. Justice Gray, in delivering the opinion of the court, said: "The lapse of time since the death of the testator and the probate of the will should lead the court closely to scrutinize the evidence offered, but is no positive bar. If no will had yet been proved, the lapse of time would not prevent both will and codicil from being proved now. The fact that a will has been already proved affords no reason for imposing stricter limitations upon the proof of a codicil, whether the omission to prove it sooner has been occasioned by ignorance of its existence, by fraudulent suppression of it, or by an innocent but mistaken belief that it has been already proved." See also opinion of Dixon, C. J., in Archer *v.* Meadows, 33 Wis. 166.

1. Holden *v.* Meadows, 31 Wis. 284; Estate of Holden, 36 Wis. 98; Worthington *v.* Gittings, 56 Md. 542. The same negligence that would bar a remedy in a court of equity on the ground of fraud

will or their construction.[1] And when a petition for revocation omits a legatee, it is discretionary with the surrogate to dismiss such petition, or allow the amendment thereof by making the omitted legatee a party;[2] he may also, on motion, strike out allegations contained in a petition for revocation, as irrelevant and redundant.[3]

would do so in a court of probate. Kieley *v.* McGlynn, 21 Wall. (U. S.) 509; Worthington *v.* Gittings, 56 Md. 542.

1. *In re* Ellis' Will, 4 N. Y. Supp. 180; 1 Con'l Sur. (N. Y.) 206.

2. *In re* Phalen, 51 Hun (N. Y.) 208; 16 Civ. Pro. Rep. (N. Y.) 292.

Amendment of Citation.—In a special proceeding instituted under *New York* Code Civ. Pro., § 2647, for the revocation of probate, a citation was directed to the executors in their individual names, without designation of their representative character. It was *held* that the court had power, under §§ 721–730 and 2538, to amend by the insertion of a description of the executors as such. *In re* Soule, Dem. (N. Y.) 137.

3. Henry *v.* Henry, 3 Dem. (N. Y.) 322.

Other Matters.—By *New York* Code Civ. Pro., § 2481, Subd. 6, the surrogate is authorized to open, vacate, modify or set aside a former decree of his court, or to grant a new hearing for fraud, etc., in cases in which a court of general jurisdiction exercises such powers. Sections 2647, *et seq.*, provide that a person interested in the estate of a decedent may, within one year after the probate of a will of personalty, present a written petition, duly verified, containing allegations against the validity of the will, or the competency of the proof thereof, and praying a revocation of the probate. Testator's only daughter filed a petition less than one year after the probate, alleging that, for some time prior to his death, she, though sane, was confined in an insane asylum, and while in custody was served with a citation, but was not allowed to respond thereto, at the instance of her uncles, executors and legatees under the will, and in order that she might not contest it. She further alleged that testator was mentally incompetent, and that it was procured by the fraud and circumvention of the said executors. She prayed for a decree opening her default, and that the devisees and legatees named in the will and all other parties to the probate proceedings be cited to show cause why her default should not be opened and the probate and letters revoked. The proceeding was understood and treated throughout as one for revocation of probate according to the statute, until the hearing was concluded, when the petitioner contended that the petition was to vacate the probate for fraud under the statute first named above, and that the court could not pass on the validity of the will. It was *held* that the surrogate properly treated the petition as brought under the latter statute, and tried the case *de novo* on its merits. Hoyt *v.* Hoyt, 112 N. Y. 493.

In proceedings taken under *New York* Rev. St. (2 Rev. St. 61, § 30, *et seq.*) for the revocation of the probate of a will of personalty, the contestant is not confined to matters which were not investigated and tried when the will was admitted to probate, but the whole case is left open and he has the right to have the questions then litigated and determined tried, the same as if no adjudication had been had thereon. And it is not necessary to have a citation issue within the year; it will suffice if the requisite allegations are filed within that time. (*Reversing In re* Gourand, 28 Hun (N. Y.) 560; *In re* Gourand, 95 N. Y. 256.) And it *seems* that the rule is the same under the Code Civil Pro. (§ 2647, *et seq.*), save that a petition in the form prescribed is required to be filed within the year instead of allegations.

Service of Citation.—By *New York* Code Civil Pro., § 2517, it is provided that "the presentation of a petition is deemed the commencement of a special proceeding" if duly served, etc., "upon the adverse party, or upon one of two or more adverse parties who are jointly liable, or otherwise united in interest." It was *held*, in a proceeding for the revocation of probate, that an executor was not "united in interest" with the other parties to the proceedings, and that service on him

REWARDS—(See also CONTRACT, vol. 3, p. 846; FINDER OF PROPERTY, vol. 7, p. 977; ILLEGAL CONTRACTS, vol. 9, p. 879; LIENS, vol. 13, p. 574; LOST PAPERS, vol. 13, p. 1059; MUNICIPAL CORPORATIONS, vol. 15, p. 949; PENALTIES, PENAL AND QUI TAM ACTIONS, vol. 18, p. 269; SALVAGE; SEAMEN; SHERIFF.)

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I. DEFINITION.—A reward is a recompense or premium offered by the government, or an individual, in return for special or extraordinary services to be performed.[1]

II. OFFER OF REWARD—1. Who May Offer.—Any person capable of making a binding contract, whether interested or not, may offer a reward, and will be liable when the terms of the offer are complied with.[2]

alone was not sufficient. Fountain *v.* Carter, 2 Dem. (N. Y.) 313.

Petition Multifarious.—A petition seeking to vacate a decree admitting a will to probate under *New York* Code Civ. Pro., § 2481, and also to revoke the probate, as provided in title 3, art. 2, ch. 18, is multifarious. *In re* Hopkins' Will, 3 N. Y. Supp. 661.

Necessary Parties.—Where land is devised to executors in trust, they are necessary parties to a suit to set aside the probate of the will, and notwithstanding they have resigned and no successors have been appointed, a decree setting aside the probate is void as against after-born devisees, for want of an executor or administrator as a party to the suit. McArthur *v.* Scott, 113 U. S. 340.

1. Black's Law Dictionary. In State *v.* Church, 5 Oregon 377; 20 Am. Rep. 746, the court, quoting Burrill's Law Dict., defines it to be "a compensation or remuneration for services; a sum of money paid or taken for doing or forbearing to do some act." Bouvier defines it as "an offer of recompense given by authority of law for the performance of some act for the public good, which, when the act has been performed, is to be paid. The recompense actually so paid." Bouv. Law Dict.

The reward may be for the arrest of any one committing a crime in the future, or for his conviction or the like. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338. And a suggestion that an offer is void, as against public policy, because for conviction of offenses afterwards to be committed, cannot be sustained. Wilmoth *v.* Hensel (Pa. 1892), 25 Atl. Rep. 86.

Object of Reward.—"They (rewards) are voluntary offers and adapted to what the party making the offer deems to be the necessity and urgency of the occasion. The object is to awaken public attention to the subject; excite vigilance and call forth extraordinary efforts for the accomplishment of the end proposed to be gained." City Bank *v.* Bangs, 2 Edw. Ch. (N. Y.) 95; Loring *v.* Boston, 7 Met. (Mass.) 413.

2. Furman *v.* Parke, 21 N. J. L. 310;

Lee *v.* Flemingsburg, 7 Dana (Ky.) 29; Marking *v.* Needy, 8 Bush (Ky.) 22.

Power of Municipalities to Offer Rewards.— See MUNICIPAL CORPORATIONS, vol. 15, p. 1053; Cornwall *v.* Nissonis, 25 U. C. C. P. 9; Martin Co. *v.* Pipher, 98 Ind. 124.

Where a statute allowed the selectmen of a town to offer a reward not to exceed $200, and they offered a reward of $500, the offer was held good for the legal amount of $200, and the excess rejected. *In re* Kelly, 39 Conn. 159.

District of Columbia.—It is the duty of the Federal government to provide for the trial, conviction and punishment of murder committed in the District of Columbia, and the board of aldermen and board of common council of the city of Washington have no authority to pass an act offering a reward for the arrest and conviction of a criminal, though the charter of the city gives it the right to do all acts that natural persons may do, and to make all laws for the preservation of order and the safety of persons. Baker *v.* Washington, 7 D. C. 134.

Offer by a County Court.—The county court of a county has no more right than the board of supervisors to bind the county by an offer of a reward. Mountain *v.* Multnomah Co., 16 Oregon 279.

Offer by a Railroad Company.—It is within the implied power of a railroad company for the protection of its property to issue a printed circular offering a general standing reward "for the arrest, with proof to convict, of any person for the malicious obstructing of" its tracks, and such offer is binding on the company; and a railroad superintendent may bind the company by issuing such circular, though no authority to do so has been granted him by the board of directors, such an act being within the scope of his general duties, and the contract is the contract of the company and not of the superintendent personally. Central R., etc., Co. *v.* Cheatham, 85 Ala. 48; 37 Am. & Eng. R. Cas. 282; 7 Am. St. Rep. 48. And in Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552; 19 Am. Rep. 80, the power seems to have been taken for granted.

What County Liable.—Where a statute offers a reward for the arrest of any one guilty of murder, payable by the county in which the homicide occurred, it is payable by the county in which the fatal injury is inflicted, without regard to the place of death. Newton Co. *v.* Wells, 67 Miss. 151.

Construction of Offer.—Where an act provided that county boards might offer awards for the arrest and conviction of any person guilty of stealing "any horse, mare, colt, mule, ass, or neat cattle, or any other property exceeding $50 in value," the limitation as to value was held to apply only to other property than that specified. Butler *v.* McLean Co., 32 Ill. App. 397.

Liability of Municipal and Other Officers on Offer of Reward.—In Lee *v.* Flemingsburg, 7 Dana (Ky.) 29, the court said it would not go into the question of the authority of the trustees to bind their corporate fund by an offer of a reward, because they would, perhaps, be personally liable if they made a contract they had no authority to make. But in Huthsing *v.* Bosquet, 2 McCrary (U. S.) 152, where a reward was offered by the board of supervisors of a county, without authority, and acted upon, all parties supposing the board had authority, it was held that the fact that they had in law no authority, did not make them personally liable.

Where the selectmen of a town only had authority to offer a reward of $500, and offered one of $2,500, they were held personally liable, although they signed the offer with the addition to their signatures of the words "Selectmen of Milton." Brown *v.* Bradlee (Mass. 1892), 30 N. E. Rep. 85. And where the mayor of a city, without authority, officially offered a reward for the apprehension of a fugitive municipal officer, he was held personally liable, since the doctrine that an agent who exceeds his authority binds himself personally is applicable to public agents in *New Jersey*. Tinken *v.* Tallmadge (N. J. 1891), 22 Atl. Rep. 996.

An officer of the peace has no power to offer a reward for an escaped criminal, and if he does will be personally liable. Murray *v.* Kennedy, 15 La. Ann. 385; 77 Am. Dec. 189. In this case a United States marshal offered a reward for the arrest of a fugitive from justice. It was held that he acted as principal, and, although he signed the offer with the addition of the words "United States Marshal," he could not avoid liability; that as marshal of the district it was his duty to take the necessary steps to arrest the fugitive, and in pro-

2. To Whom Made.—The offer of reward may be either to a particular person, or class of persons, or to any and all persons complying with its terms.[1]

3. How Made.—The offer may be in writing to a particular individual,[2] or may be made public by oral statement, as well as by hand-bill, poster or newspaper. The latter mode has the advantage of being likely to make the offer more generally known, but it is no more binding than a public offer, orally made.[3]

4. Nature of Offer—Consideration.—The offer of reward is conditional only, until accepted by the performance of the service,

claiming a reward to further this object he was acting as principal.

But where an officer of the United States army offered a reward for the apprehending of a deserter, it was held that he acted in his official capacity and as an agent of the government, and could not be held personally liable on the offer. The service performed in apprehending the deserter was not for the individual benefit of the officer, but an act in presumption of law beneficial to the United States. Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375; 20 Am. Dec. 621.

The court of claims, in Gibbs *v.* U. S., 14 Ct. of Cl. 544, said that if a government agent offers a reward, and it is reasonable, the government will be bound.

1. Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Butler Co. *v.* Leibold, 107 Pa. St. 407; Pierson *v.* Morch, 82 N. Y. 503; Marking *v.* Needy, 8 Bush (Ky.) 22.

If a dispatch which reads "Stolen—a mare—a reward of $50 will be paid for her recovery," be sent to a sheriff, it is a general offer, and any person complying with its terms may recover. Cummings *v.* Gann, 52 Pa. St. 484.

2. Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Gilkey *v.* Bailey, 2 Harr. (Del.) 359.

3. Hayden *v.* Souger, 56 Ind. 46; 26 Am. Rep. 1; Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Symmes *v.* Frazier, 6 Mass. 344; 4 Am. Dec. 142.

In Wilson *v.* McClure, 50 Ill. 366, the offer was made by an oral declaration in a public meeting; and in First Nat. Bank *v.* Hart, 55 Ill. 62, by printed circulars sent out by mail; and in Cummings *v.* Gann, 52 Pa. St. 484, by a telegram sent to a sheriff.

In Reif *v.* Paige, 55 Wis. 496; 42 Am. Rep. 731, the defendant, standing in the midst of a crowd in front of a burning hotel, shouted, "I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive," and it was held a sufficient offer, and the plaintiff allowed to recover.

When the governor of a State officially signs a proclamation offering a reward for the apprehension and delivery to the proper jailer, of a fugitive from justice, and it is entered on the executive journal, the offer is complete without further publication. Auditor *v.* Ballard, 9 Bush (Ky.) 572; 15 Am. Rep. 728.

Where an offer of reward is made in a newspaper without authority, the alleged promisor is not estopped from denying his liability, although he knew of the publication and did not object to it, unless he knew that some one was ignorantly relying upon it. Hugill *v.* Kinney, 9 Oregon 250; 42 Am. Rep. 801.

Where a party, who was laboring under the effect of severe wounds received from the same persons who had killed his son, observed, when their arrest was spoken of, that he would give $200 to have them arrested, and to a remark of one of the company that he did not want any of his money, said he did not intend it for them, it was held that he made no public offer, and that his remarks were nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him; that no contract could be made out of such expressions, and that they were only evidence of strong excitement and not of contracting intention. Stamper *v.* Temple, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296.

when a binding contract results,[1] such performance furnishing a sufficient consideration.[2]

5. Revocation of Offer.—The offer of a reward is, as we have seen, a proposal merely and not a contract, and therefore may be with-

1. Pierson *v.* Morch, 82 N. Y. 503; Harson *v.* Pike, 16 Ind. 140; Patton *v.* Hassinger, 69 Pa. St. 311; Cummings *v.* Gann, 52 Pa. St. 484; Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Briggs *v.* U. S., 15 Ct. of Cl. 48; Morrell *v.* Quarles, 35 Ala. 544; Bull *v.* Talcot, 2 Root (Conn.) 119; 1 Am. Dec. 62; Gilkey *v.* Bailey, 2 Harr. (Del.) 359; Besse *v.* Dyer, 9 Allen (Mass.) 152; 85 Am. Dec. 747; Loring *v.* Boston, 7 Metc. (Mass.) 411; Reif *v.* Page, 55 Wis. 496; 42 Am. Rep. 731; Janvrin *v.* Exeter, 48 N. H. 83; 2 Am. Rep. 185; Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372; Williams *v.* Carwardine, 4 B. & Ad. 621; 24 E. C. L. 126.

In Freeman *v.* Boston, 5 Met. (Mass.) 57, the court by Shaw, C. J., said: "Until the performance, the offer of a reward is a proposal merely." And in Williams *v.* Carwardine, 4 B. & Ad. 623; 24 E. C. L. 126, Park, J., said: "There was a contract with any person to perform the condition mentioned in the advertisement."

Where the condition is complied with, he who performs it becomes the promisee; the legal interest becomes vested in him, and he has a right to claim the reward. Gilmore *v.* Lewis, 12 Ohio 281.

Notice of Acceptance.—It is not necessary that notice should be given to the party offering the reward that his proposal is being acted upon. Harson *v.* Pike, 16 Ind. 140; Reif *v.* Paige, 55 Wis. 496; 42 Am. Rep. 731; Patton *v.* Hassinger, 69 Pa. St. 311.

Cumulative Offers.—The governor offered a reward of $600 for the arrest of a fugitive murderer. The statute allowed $200 to any one arresting a fugitive from justice. It was held that the offer of $600 was intended as a full and complete compensation, and not as cumulative with the statutory reward. Jones *v.* Gibbs, 51 Miss. 401.

Offer by State.—A State statute offering a reward for criminals refers to offenses against the State and not against the *United States*. Sias *v.* Hallock, 14 Nev. 332.

2. Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Gilmore *v.* Lewis, 12 Ohio 281; Rea *v.* Smith, 2 Handy (Ohio) 193; Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372; Morrell *v.* Quarles, 35 Ala. 544; Lochart *v.* Barnard, 14 M. & W. 674; England *v.* Davidson, 11 A. & E. 856; 39 E. C. L. 254; Thatcher *v.* England, 3 C. B. N. S. 254; 54 E. C. L. 254; Lancaster *v.* Walsh, 4 M. & W. 16; Tarner *v.* Walker, 6 B. & S. 871; 118 E. C. L. 871; Williams *v.* Cawardine, 4 B. & Ad. 621; 24 E. C. L. 126; Bent *v.* Wakefield, etc., Bank, 4 C. P. Div. 1.

In Wentworth *v.* Day, 3 Met. (Mass.) 352; 37 Am. Dec. 145, Shaw, C. J., said: "But if, before it [the offer of reward] is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service because something is done which the party is not bound to do, and without such offer might not have been done."

It is a good consideration, even though the offerer had no interest in the performance of the service. Furman *v.* Parke, 21 N. J. L. 310. And an objection that an offer of reward, made by the chairman of a State political committee, for the conviction of any one violating the election laws at a certain election, was without consideration, for the reason that every citizen had an equal interest in preserving the purity of elections, cannot be sustained. Wilmoth *v.* Hensel (Pa. 1892), 25 Atl. Rep. 86.

The doing of that which a person is already bound to do is not a sufficient consideration to support a promise of reward. Smith *v.* Whildin, 10 Pa. St. 39; 49 Am. Dec. 572; Rea *v.* Smith, 2 Handy (Ohio) 193; Day *v.* Putnam Ins. Co., 16 Minn. 408; Davies *v.* Burns, 5 Allen (Mass.) 349. And see *infra*, this title, *Who May Recover—Police and Other Officers*.

Statute of Frauds.—The liability upon an offer of reward is one at common law, and not one upon contract within the Statute of Frauds. Williams *v.* Byrnes, 1 Moore P. C. N. S. 154; 8 L. T. N. S. 69. And it has been held that the furnishing of the desired information was sufficient to

drawn at any time before the performance of the service, and in such case there can be no recovery.[1] Whether or not the offer is revoked by the lapse of time does not seem to be settled, it being held in *Massachusetts* that it is,[2] and in *Connecticut* that it is not.[3]

take the case out of the statute, as much so as payment. White *v.* Drew, 56 How. Pr. (N. Y.) 53.

1. Harson *v.* Pike, 16 Ind. 140; Ryer *v.* Stockwell, 14 Cal. 137; 73 Am. Dec. 634; Wentworth *v.* Day, 3 Met. (Mass.) 354; 37 Am. Dec. 145; Freeman *v.* Boston, 5 Met. (Mass.) 57; Biggers *v.* Owen, 79 Ga. 658.

In Shuey *v.* U. S., 92 U. S. 73, Stone, J., said: "The offer of a reward for the apprehension of Surratt was revoked on the 24th of November, 1865, and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it, and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer, and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the reward had been withdrawn. True, it is found that then, and at all times until the arrest was made, he was ignorant of the withdrawal, but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made."

Where there has been an offer to a particular person and an acceptance by him to the offerer's knowledge, there cannot, after a part performance, be a withdrawal that will entirely deprive the performer of compensation. Bronnenberg *v.* Coburn, 110 Ind. 169.

2. In *Massachusetts* it is held that the service must be performed within a reasonable time after the offer is made. What is a reasonable time is a question of law depending on all the facts and circumstances of the case, and three years and eight months was held not to be a reasonable time. Loring *v.* Boston, 7 Met. (Mass.) 409. In this case the mayor of the city, by a public advertisement for a week, offered a reward for the apprehension and conviction of any one thereafter setting fire to any building within the city, and Shaw, C. J., in delivering the opinion of the court, said: "This is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten, or twenty years or more; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would, in fact, leave the offer itself unlimited by time. Supposing, then, that, by fair implication, there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a reasonable time; that is, the service must be done within a reasonable time after the offer made."

3. But in *Connecticut* it was held that the offer was not barred by the lapse of time, but was binding until the Statute of Limitations has run against the crime. *In re* Kelly, 39 Conn. 159. In this case a reward had been offered to any one who should be the means of detecting and convicting the person who had set fire to a barn, and the court here draws a distinction between an offer of reward for the detection of a person who has already

6. Offer as Evidence.—An offer of reward for the apprehension of a criminal is admissible as evidence to sustain the allegation in an indictment that the accused had fled from justice.[1]

III. Who May Recover Reward—1. The One Performing the Service.—In general, any person may recover[2] who furnishes the

committed an offense and one who should commit an offense after the offer made, and, in speaking of the decision in Loring *v.* Boston, 7 Met. (Mass.) 409, said, per Foster, J.: "We make no question as to the entire correctness of this decision, and readily assent to the soundness of the principles on which it rests. But the case at bar is of a totally different character. Here a reward was offered to any one who should make discovery and give information, etc., as to a crime committed on a previous day, specifically pointed out. The offer, it is true, is not limited in its terms as to time, but the Statute of Limitations, which is applicable to the crime in question, necessarily restricts the offer to the period within which the delinquent must be informed against and prosecuted, three years next after the offense was committed. So long as the Statute of Limitations continued to run against the offender, so long would this offer of reward continue good. As soon as the statute becomes a bar to the prosecution, all liability to pay the reward, of course, ceases, for the conviction of the offender is an event necessarily antecedent to the payment of the reward."

1. State *v.* Foster, 8 La. Ann. 290; 58 Am. Dec. 678.

But it is not conclusive evidence. State *v.* Auditor, 61 Mo. 263.

2. Jenkins *v.* Kelren, 12 Gray (Mass.) 330; 74 Am. Dec. 596; Russell *v.* Stewart, 44 Vt. 170; Hayden *v.* Souger, 56 Ind. 42; 26 Am. Rep. 1; Besse *v.* Dyer, 9 Allen (Mass.) 151; 85 Am. Dec. 747; Stephens *v.* Brooks, 2 Bush (Ky.) 137; First Nat. Bank *v.* Hart, 55 Ill. 62; Cummings *v.* Gann, 52 Pa. St. 484; Butler Co. *v.* Seibold, 107 Pa. St. 407; Stone *v.* Dysert, 20 Kan. 123; Reif *v.* Paige, 55 Wis. 496; 42 Am. Rep. 731; Auditor *v.* Ballard, 9 Bush (Ky.) 572; 15 Am. Rep. 728; Sias *v.* Hallock, 14 Nev. 332; Janvrin *v.* Exeter, 48 N. H. 83; 2 Am. Rep. 185; Shuey *v.* U. S., 92 U. S. 73; Williams *v.* U. S., 12 Ct. of Cl. 192.

The person claiming the reward should be particularly instrumental in the arrest and conviction of the offender, but it is not necessary that he himself should take the witness stand. Rinehart *v.* Lancaster (Pa. 1886), 6 Atl. Rep. 91.

A reward cannot be recovered for apprehending a person who has been admitted to bail, for he is constructively in the custody of the law. Marking *v.* Needy, 8 Bush (Ky.) 22; nor for apprehending one who has been arrested and discharged by the committing magistrate. Itawamba Co. *v.* Candler, 62 Miss. 193.

If a State offer a reward to "whoever shall pursue and apprehend" any person who shall steal a horse, the owner of the horse stolen can recover the reward if he comply with the terms of the offer. Butler Co. *v.* Seibold, 107 Pa. St. 407.

Where one accidentally leaves an article at a bank, and then offers a reward to the finder who returns it, describing it as lost, another person who, while dealing at the bank, discovers and takes it, is not entitled to the reward upon returning it to the owner, although it had been left on a desk outside the bank counters and accessible to all persons. This is not the finding of a lost article. The occupants of the banking house and not the plaintiff were the proper depositaries of an article so left. Kincaid *v.* Eaton, 98 Mass. 139.

Recovery by Employe.—An employé may recover the reward offered by his employer. Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181. But where the agent of an express company telegraphed to his superior his suspicions that a party who had purchased a ticket at his station was implicated in a recent robbery of the express company, and that others were satisfied of his guilt, it was held to indicate no more than that he was desirous of discharging a moral duty which he owed his employers, and he was not allowed to recover a reward offered on the party's arrest and conviction. Burke *v.* Wells, 50 Cal. 218.

Voluntary Surrender by a Criminal.—The following decision is taken from the *Vienna Juristische Blaetter:* A, whose servant had embezzled 37,000 florins and fled, went to the director of police at Prague and formally

information or performs the services for which the reward was offered, if within the terms of the offer.[1]

2. Nature of Performance Requisite.—One who offers a reward has the right to prescribe whatever terms he may see fit, and these terms must be complied with before any contract arises between

declared before him that he would give ten per cent. of the sum found with the servant on his arrest. The police authorities published this offer of reward in the newspapers. A few days thereafter B delivered A's servant into the hands of the police, 17,372 florins being found on his person. On A's refusing to pay B ten per cent. of this sum, B brought suit for 1,737 florins. The trial court nonsuited him, it appearing that the servant had voluntarily come to B and given himself up, and that B had then merely accompanied him to the police station. On appeal to the Bohemian supreme court, and on a further appeal to the imperial appellate court, both decided that B was entitled to the reward, holding that A was only interested in the success consequent upon his offer, the manner and mode of effecting it being immaterial to him, and that he had no right to scrutinize the action of B, his intent or meritoriousness, and that without B the servant might have changed his mind, concealed himself, and wasted the money; 22 Alb. L. J. 422. But where a criminal voluntarily surrenders himself to a police officer, no one can be entitled to the reward. Bent *v.* Wakefield, etc., Bank, 4 C. P. Div. 1.

Amount of Recovery.—Where an informer procures the arrest and conviction of certain members of a conspiracy, and they, upon their examination, confess and implicate others engaged in the same fraudulent transaction, who in turn are also arrested, convicted, and fined solely upon such information, the original informer is entitled to share in such fine. U. S. *v.* Simons, 7 Fed. Rep. 709.

Claimant had been employed to work up the case against offenders against the revenue laws, and in that capacity had been paid the sum of $888. Claimant furnished information by which the government recovered $20,000 from certain offenders. It was held that the sum of $888, previously paid him was properly deducted from the ten per cent. reward offered for the detection and punishment of offenders, as being a part thereof already paid him. Crane *v.* U. S., 23 Ct. of Cl. 94.

Competency as Witness of Party Entitled to Reward.—In criminal cases where a witness is entitled to a reward upon conviction of an offender, such witness is competent to testify. Rex *v.* Williams, 9 B. & C. 549; 17 E. C. L. 440; U. S. *v.* Wilson, Baldw. (U. S.) 78; U. S. *v.* Murphy, 16 Pet. (U. S.) 203; Com. *v.* Moulton, 9 Mass. 30; Salisbury *v.* State, 6 Conn. 101; 1 Phillips Ev. 92; 1 Gilbert's Ev. (Loft's ed.) 245–250; Greenl. Ev. (14th ed.), § 412; Starkie Ev., Pt. 2, 772, 773; 4 Blackstone's Com. 294; 1 Leach C. C. 314, n.; 1 Chitty Cr. Law 88.

1. Only persons included in the terms of the offer can claim under it; Means *v.* Hendershott, 24 Iowa 78; but if a person not included in the terms of an offer complies with it and his services are accepted by the parties offering the reward, he may recover. Thus, a bank offered a reward "to any bank officer or police detective" for the detection and conviction of a forger, and the recovery of money obtained by him from the bank on forged drafts, and a person who was neither a bank officer nor a police detective, believing he had discovered the criminal, communicated his suspicions to an officer of the bank by letter, saying if the person turned out to be the guilty party he should claim the reward. The bank officer responded, inclosing one of the circulars offering the reward, and advised his informant "to keep quiet but a close watch," and promised to send a detective to him. The detective was afterwards sent and the bank officer also went, and both communicated personally with the informant, and through the information derived from him the suspected person was arrested and convicted, and most of the money recovered. It was held that the person thus instrumental in accomplishing the purpose for which the reward was offered, his services being accepted and availed of by those offering it, was entitled to the reward, although he was not embraced in the description of persons to whom it was originally pro-

him and the claimant,[1] though if the performance substantially corresponds with the terms of the offer, it will generally be sufficient.[2] If a reward is offered for the arrest and conviction of a

posed. First Nat. Bank *v.* Hart, 55 Ill. 62.

1. Amis *v.* Conner, 43 Ark. 337; Loring *v.* Boston, 7 Met. (Mass.) 412.

2. Besse *v.* Dyer, 9 Allen (Mass.) 152; 85 Am. Dec. 747; Gilkey *v.* Bailey, 2 Harr. (Del.) 359; Bull *v.* Talcot, 2 Root (Conn.) 119; 1 Am. Dec. 62; *In re* Kelly, 39 Conn. 159; Williams *v.* U. S., 12 Ct. of Cl. 192.

Furnishing the means of getting proof is equivalent to furnishing evidence. Huckins *v.* Second Nat. Bank, 47 Mich. 92; and a person who gives information by which, with reasonable diligence, one is able to recover stolen property and detect the thief, is entitled to a reward offered for the recovery of the property stolen and the detection of the thief. Besse *v.* Dyer, 9 Allen (Mass.) 152; 85 Am. Dec. 747. But giving information that led to the arrest of a criminal does not entitle one to a reward offered for his apprehension, for they are quite distinct things, though one may have been a consequence of the other. Shuey *v.* U. S., 92 U. S. 73. Nor is a reward offered for the capture of a thief earned by merely giving information to the sheriff which enables him to find and arrest him. Everman *v.* Hyman, 3 Ind. App. 459; and this, although the party giving the information went with the sheriff as one of his *posse* to make the capture. Juniata Co. *v.* McDonald, 122 Pa. St. 115; Adair *v.* Cooper, 25 Tex. 548. And merely communicating one's suspicions that a certain person is guilty, with the statement that others are satisfied of his guilt, and that circumstances point strongly towards him, will not entitle one to a reward offered for the arrest and conviction of robbers. Burke *v.* Wells, 50 Cal. 218. And where a person, after the commission of a murder, gives information to the police tending to excite suspicion as to two persons, but without any knowledge of where they are, or any evidence upon which they can be convicted or which would justify their arrest, and the case is afterwards worked up and evidence sufficient to secure their conviction procured by the police, he cannot recover a reward offered. Austin *v.* Milwaukee Co., 24 Wis. 278.

But a party who gives information to the police of a city, upon which an incendiary is arrested, and which has a tendency to produce ultimate conviction, and without which a conviction would not have been had if the prisoner had not, while under arrest, confessed his guilt, is entitled to a reward offered for the "apprehension and conviction" of the incendiary, although not called as a witness, and the conviction was probably due to the confession. Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374. And where a reward was offered for information leading to the discovery of an offender, and A told the defendant that B knew something of the affair and if "treated" would confess, and the defendant accordingly treated him and he confessed and was convicted, A was held entitled to the reward. Smith *v.* Moore, 1 C. B. N. S. 438; 50 E. C. L. 438. In Brennan *v.* Haff, 1 Hilt. (N. Y.) 151, the defendant's horse having been stolen, he offered a reward of $50 for the detection of the thief. The plaintiff informed him that D was the thief and gave him some information tending to sustain the charge, and the defendant had D arrested therefor, it was held sufficient *prima facie* evidence to sustain a recovery for the amount of the reward.

A jeweler who had been robbed. offered a reward for the discovery of the thief. Through information given by a watchmaker, to whom one of the stolen watches had been taken for repairs, a receiver of part of the stolen property was arrested, who confessed and gave information which led to the arrest and conviction of the thieves. On an action brought by the watchmaker for the reward, it was held that the information given by him was not too remote from the apprehension and conviction of the thieves, and that it was properly left to the jury whether it led to their apprehension and conviction within the meaning of the offer. Tarner *v.* Walker, 6 B. & S. 871; 118 E. C. L. 871; 14 L. T. N. S. 660; 14 W. R. 793; 35 L. J. Q. B. 179.

The defendant offered a reward to any one securing the conviction of the person who broke into his shop on May 17 and stole his goods. The plaintiff pointed out the thief, who was

criminal, or for his arrest and the recovery of money paid him, both the arrest and conviction, or arrest and recovery of the money, are conditions precedent to a recovery of the reward;[1] and where the offer is for the delivery of a fugitive at a certain place, the reward cannot be earned by the delivery of him at another place.[2] An offer for the capture of two is not acted upon by the capture of one,[3] nor where the reward is for the conviction of a particular crime, will it be earned by securing a conviction of another crime, even of the same kind.[4] A reward offered for the conviction of an offender is earned by securing a verdict of guilty, though sentence be indefinitely suspended, as conviction is complete without sentence.[5]

3. Waiver of Substantial Performance.—Substantial performance, or performance in any material part, may be waived by the party offering the reward.[6]

convicted, on his own confession, of larceny on May 15. The plaintiff was held entitled to the reward, although the conviction was for larceny, and not for breaking into the shop and stealing from it, and the date was different, more especially in the absence of proof that there were two offenses about that time at the same place, or that the person convicted was only a receiver. Williams *v.* Nicholas, 7 Leg. News 75.

1. Jones *v.* Phœnix Bank, 8 N. Y. 228. And hence where a reward was offered for information leading to the conviction of a murderer, and the claimant gave information, but the accused before he could be tried, committed suicide, it was held that he could not recover the reward as the conviction of the murderer was a condition precedent to the recovery. Fortier *v.* Wilson, 11 U. C. C. P. 495.

2. Where A advertised a reward of $300 to be "paid for the apprehension and delivery to the jailer of Kershaw district" of a slave charged with murder, and B apprehended and delivered the slave to a magistrate of Kershaw, who delivered him to a constable, in whose custody he remained until he was tried a few days afterwards and acquitted, it was held that B, not having complied with the condition to deliver the slave to the jailer of Kershaw district, was not entitled to the reward. Clanton *v.* Young, 11 Rich. (S. Car.) 546.

But in Stone *v.* Dysert, 20 Kan. 123, the prisoner charged with committing an offense in A county had been transferred to the jail of B county for safekeeping, and while there escaped. The sheriff of A county offered a reward for the delivery of the escaped prisoner to him at the county seat of A county. The plaintiffs, with a view to securing the reward, captured the prisoner and took him back to the county seat of B county, where they were met by the sheriff of that county who demanded him by virtue of his office, so they delivered the prisoner to him as the legal custodian, and forthwith demanded the reward. The sheriff of A county shortly afterwards came and took the prisoner and carried him back to the jail in A county. It was decided that the claimants were entitled to the reward, for the real object in offering it had been attained.

3. Blain *v.* Pacific Express Co., 69 Tex. 74. And a reward offered for the apprehension and conviction of any one implicated in the murder of four persons cannot be recovered upon an allegation that the perpetrators have been convicted of the murder of one of them. Furman *v.* Parke, 21 N. J. L. 310.

4. Cornelson *v.* Sun Ins. Co., 7 La. Ann. 345.

It was held that a claimant who arrested and secured the conviction of a mule thief, was not entitled to a reward under a statute that declared that a reward should be paid to any one arresting and securing the conviction of a horse thief. Com. *v.* Edwards, 10 Phila. (Pa.) 215.

5. Wilmoth *v.* Hensel (Pa. 1892), 25 Atl. Rep. 86; Williams *v.* U. S., 12 Ct. of Cl. 192.

6. Thus, a railroad company offered

4. Knowledge of Offer.—Whether or not it is necessary that the party claiming the reward should have known of the offer at the time he performed the service is an important question, and one upon which there is much dispute, one line of decisions holding that there can be no recovery of the reward unless the claimant knew of the offer,[1] while other decisions hold that knowledge of the offer is immaterial.[2]

rewards for the arrest and conviction of several criminals, and the claimants procured the information and upon it secured indictments. Two of them confessed their guilt and the indictments against them were dismissed at the urgent request of the attorneys for the railroad, in order to use them as witnesses against the others. It was held that the rewards must be paid, the conviction having been prevented by the dismissal at the instance of the attorneys for the railroad. Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552; 19 Am. Rep. 80. And where a party was convicted of illegally operating a distillery, upon information furnished by the claimant, but upon motion by the district attorney, judgment was suspended on the payment of all costs by the prisoner, it was held that the informer's obligation ended with the verdict, and he was entitled to recover the reward offered by the government for information which would lead to the conviction of persons operating illegal distilleries. Williams *v.* U. S., 12 Ct. of Cl. 192.

1. Howland *v.* Lounds, 51 N. Y. 604; 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248; 97 Am. Dec. 791; Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181; Rea *v.* Smith, 2 Handy (Ohio) 193; and Lee *v.* Flemingsburg, 7 Dana (Ky.) 29, which is now overruled by Auditor *v.* Ballard, 9 Bush (Ky.) 575; 15 Am. Rep. 728.

In Stamper *v.* Temple, 6 Humph. (Tenn.) 115; 44 Am. Dec. 296, the court, per Turley, J., said: "To make a good contract there must be an *aggregatio mentium*, an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?" But this was perhaps *obiter*, the decision being rendered upon other grounds.

Howland *v.* Lounds, 51 N. Y. 604; 10 Am. Rep. 654, was based upon Fitch *v.* Snedaker, 38 N. Y. 248; 97 Am. Dec. 791, in which the point was not necessarily involved, and Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181, was based upon both of these.

2. Everman *v.* Hyman, 3 Ind. App. 459; Auditor *v.* Ballard, 9 Bush (Ky.) 575; 15 Am. Rep. 728; Russell *v.* Stewart, 44 Vt. 170; Eagle *v.* Smith, 4 Houst. (Del.) 293. And see Neville *v.* Kelly, 12 C. B. N. S. 740; 104 E. C. L. 740. And this seems to be the better doctrine, and the one supported by the weight of authority.

In Dawkins *v.* Sappington, 26 Ind. 200, Frazier, J., said: "The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine constituting an exception to the general rule. . . . If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being performed by the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime may know that by so doing he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?"

In Williams *v.* Carwardine, 4 B. & Ad. 621; 24 E. C. L. 126, there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the king's bench that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that

5. Several Claimants.—Where there are several claimants the one first complying with the terms of the offer is the one entitled to recover the reward;[1] and where a reward is offered for information, and several persons furnish distinct pieces, which combined make a perfect whole, it may be equitably apportioned

the court could not go into the plaintiff's motives.

In Marvin *v.* Treat, 37 Conn. 96; 9 Am. Rep. 307, the plaintiff recovered a horse and wagon that had been stolen, and when he returned them the defendant handed him some money saying: "Here is something towards what you have done, and if you will catch the thief I will give you $25." The plaintiff replied that he would do all he could, and did not look at the money until the defendant was gone, when he found it to be $2. The defendant had on the morning of that day posted handbills offering a reward of $50 to any one who should recover and return the horse and wagon, and $25 for the arrest of the thief, but the plaintiff did not know of this offer until a few hours after the defendant had left. In an action to recover the reward offered it was held that the plaintiff had accepted the $2 in satisfaction for his services and could not recover the reward.

No Intent to Claim.—Where the person performing the service knew of the offer of reward, but performed the act for which the offer was made without any intention of claiming it, he cannot after performance insist that it is due him. Hewitt *v.* Anderson, 56 Cal. 476; 38 Am. Rep. 65; Lockhart *v.* Barnard, 14 M. & W. 674; 15 L. J. Exch. 1.

1. Williams *v.* Carwardine, 4 B. & Ad. 621; 24 E. C. L. 126; 1 N. & M. 418; 5 C. & P. 566; 24 E. C. L. 457; Lancaster *v.* Walsh, 4 M. & W. 16; 1 H. & H. 258; Bent *v.* Wakefield, etc., Bank, 4 C. P. Div. 1; Thatcher *v.* England, 3 C. B. N. S. 254; 54 E. C. L. 254.

Brown, J., in U. S. *v.* Simons, 7 Fed. Rep. 709, thus expresses the rule: "In a contest between informers, he is the informer who, with the intention of having his information acted upon, first gives information of a violation of the law, which induces the prosecution and contributes to the recovery of the fine, penalty or forfeiture which is eventually recovered." And see U. S. *v.* George, 6 Blatchf. (U. S.) 406; Sawyer *v.* Steele, 3 Wash. (U. S.) 464; Lancaster *v.* Walsh, 4 M. & W. 16; Fallick *v.* Barber, 1 M. & S. 108; Gibbons *v.* Proctor, 64 L. T. 594; 55 J. P. 616; U. S. *v.* Isla de Cuba, 2 Cliff. (U. S.) 458; One Hundred Barrels of Whisky, 2 Ben. (U. S.) 14; Fifty Thousand Cigars, 1 Low. (U. S.) 22. This rule was applied in City Bank *v.* Bangs, 2 Edw. Ch. (N. Y.) 95, and it was held that a servant, whose information to her mistress may have given the first cause of suspicion of a robber, would not be entitled to any part of a reward offered for the restoration of stolen property, where such information was not given with an intention of inducing the mistress to act, or the servant's becoming an instrument towards its recovery.

Where one captures a fugitive and while on the way to deliver him to the jailer he escapes, but is afterwards recaptured and delivered up for trial by another, the one delivering him for trial is entitled to the reward. Wilson *v.* Wallace, 64 Miss. 13.

Where a stolen horse is left at the house of one who knows nothing of a reward offered for its return, and in his absence an officer comes after it and returns it to the owner, the officer, and not such person, is entitled to the reward. Sanderson *v.* Lane, 43 Mo. App. 158.

A party who followed a horse-thief into another State and by means of a requisition brought him back, was held entitled to a reward offered for the pursuit and arrest of the thief, notwithstanding such thief had been arrested in the other State by local officers who delivered him up to the claimant. Montgomery Co. *v.* Robinson, 85 Ill. 174.

A, on being arrested for burning a barn, confessed his guilt and disclosed the fact that he had been hired to do so by B, but his statement was not corroborated, and B was not prosecuted. Three years afterwards C discovered additional and corroborative evidence sufficient to convict B, but without the disclosure made by A no conviction could have been obtained. C was held entitled to a reward offered to any one who should be the means of detecting and convicting the person who set fire

amongst them,[1] a bill of interpleader being maintainable for such purpose.[2]

6. Recovery Pro Rata.—Where a reward is offered for the recovery of property, one who recovers only a portion of it will be entitled to a *pro rata* proportion of the reward,[3] though the offer may undoubtedly be so framed as to exclude any apportionment.[4]

7. Fraud on Part of Claimant.—If the claimant has been guilty of fraud, he cannot recover the reward.[5]

8. Police and Other Officers.—Police and other officers may recover the reward offered when the information furnished or the service performed was extra-official,[6] but cannot recover the reward

to the barn. *In re* Kelly, 39 Conn. 159.

1. Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193; Janvrin *v.* Exeter, 48 N. H. 86; 2 Am. Rep. 185; Goldsborough *v.* Cradie, 28 Md. 477; Rea *v.* Smith, 2 Handy (Ohio) 193.

Where several enter into an agreement to divide a reward, when recovered, although it does not constitute a partnership, in the legal sense of that term, yet one who receives the entire reward is liable to each of the others for his proportion in an action for money had and received. Dawson *v.* Gurley, 22 Ark. 381. But where there is no agreement, a party who assists in apprehending runaway slaves is not entitled to share the reward. Stroud *v.* Garrison, 24 Ark. 53.

Where two or more persons jointly perform the service they must all join as plaintiffs in an action for the reward. Janvrin *v.* Exeter, 48 N. H. 86; 2 Am. Rep. 185.

2. Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193; City Bank *v.* Bangs, 2 Paige (N. Y.) 570; *In re* Claxton, 43 Leg. Int. 195; Peel *v.* Board of Metropolitan Police, 5 Am. Law Reg. 98.

3. Hawk *v.* Marion Co., 48 Iowa 472; Deslondes *v.* Wilson, 5 La. Ann. 397; 25 Am. Dec. 187. Thus, where a reward was offered for the recovery of a parcel of lost bank bills, the finder of part was allowed a *pro rata* proportion of the reward. Symmes *v.* Frazier, 6 Mass. 344; 4 Am. Dec. 142. And see Jones *v.* Phoenix Bank, 8 N. Y. 228.

4. Symmes *v.* Frazier, 6 Mass. 344; 4 Am. Dec. 142.

5. Thus, a reward for the recapture of an escaped prisoner cannot be recovered by one who gave the required information, but had assisted in the escape and withheld that fact at the time of the offer. The policy of the law forbids that he shall be compensated for that which his own crime renders necessary. Hassan *v.* Doe, 38 Me. 45. If a party claiming a reward offered for the recovery of stolen goods had possession of them, knowing them to have been stolen, before the offer of reward; or if he has been connected with the alleged felony, either as a participator in the felonious taking, or in concealing the stolen property, he cannot recover. Jenkins *v.* Kelren, 12 Gray (Mass.) 330; 74 Am. Dec. 596. Where a detective, knowing that M had wrongful possession of H's watch, offered to recover it for $50, which H agreed to pay, and on finding that M had in the meantime sent the watch by express to H, arrested him and compelled him to recall the watch before delivery, he was held to have no right to compensation or a lien on the watch therefor. Hoffman *v.* Barthelmess, 63 Ga. 759; 36 Am. Rep. 129. And if a detective who cannot recover a reward offered, on account of his position, gives information to a third party, and a confession is made to the third party and detective, the third party cannot recover. Dunham *v.* Stockbridge, 133 Mass. 233.

6. See CONTRACT, vol. 3, p. 834; City Bank *v.* Bangs, 2 Edw. Ch. (N. Y.) 94; Brown *v.* Godfrey, 33 Vt. 120; Davis *v.* Munson, 43 Vt. 677; 5 Am. Rep. 315; Russell *v.* Stewart, 44 Vt. 170; Warner *v.* Grace, 14 Minn. 487; Rea *v.* Smith, 2 Handy (Ohio) 193; Bronnenberg *v.* Coburn, 110 Ind. 169; England *v.* Davidson, 11 A. & E. 856; 39 E. C. L. 254; Neville *v.* Kelley, 12 C. B. N. S. 740; 104 E. C. L. 740.

Thus, where a sheriff followed a criminal into another State and by means of a requisition arrested and brought him back, he was held entitled

offered if the information furnished or the service performed was within the scope of the duties of such officer.[1]

to the reward. Gregg *v.* Pierce, 53 Barb. (N. Y.) 387.

A police officer who has been temporarily suspended may recover a reward; Smith *v.* Moore, 1 C. B. N. S. 438; 50 E. C. L. 438, and a member of a fire department who receives a salary for his services, can claim a reward offered for bringing a body from a burning building. Reif *v.* Paige, 55 Wis. 496; 42 Am. Rep. 731.

Under the Code Crim. Proc. of *Texas*, making it the duty of peace officers to preserve the peace and execute process directed to them, it is no part of the duty of a constable to search for unknown criminals, and he may recover a reward for the arrest of a criminal in his own precinct, the offer having induced him to make the search. Morris *v.* Kasling, 79 Tex. 141; Kasling *v.* Morris, 71 Tex. 584.

A deputy-sheriff may receive compensation for furnishing evidence which leads to the conviction of persons implicated in the commission of a crime, when he had no legal duty to perform by virtue of his office, and the offense was committed and the trial had out of his county. Harris *v.* More, 70 Cal. 502; and see Bronnenberg *v.* Coburn, 110 Ind. 169. And where a constable gave information leading to the conviction of a thief, it was held a good consideration for a promise to pay him the reward. England *v.* Davidson, 11 A. & E. 856; 39 E. C. L. 254; Smith *v.* Whildin, 10 Pa. St. 39; 49 Am. Dec. 572.

A deputy-sheriff, having no process in his hands to execute, is under no obligation or duty to go in search of an offender, and if he does, and arrests him, may recover a reward for his apprehension, Russell *v.* Stewart, 44 Vt. 170; Davis *v.* Munson, 43 Vt. 676; 5 Am. Rep. 315. But see *contra*, Day *v.* Putnam Ins. Co., 16 Minn. 408, and Warner *v.* Grace, 14 Minn. 487; though these decisions seem to rest on the ground that a constable was given authority by statute to pursue and arrest felons without a warrant, and allowed his fees for so doing.

Where a city offered a reward for the discovery of any unrecorded land belonging to it, and a tract was discovered by the city surveyor, he was held entitled to the reward in the absence of proof showing that the discovery and report formed part of his official duties. Pilie *v.* New Orleans, 19 La. Ann. 274.

If a private person procures a warrant and makes an arrest for which a reward was offered, he is entitled to recover the amount of such reward, if, in fact, such warrant imposes upon him no duty and gives him no authority to make such arrest. Hayden *v.* Souger, 56 Ind. 42; 26 Am. Rep. 1. In this case Worden, J., delivering the opinion of the court, said: "If a private person is desirous of making an arrest in order to obtain a reward, it seems to us much better that he should do it under a proper warrant and appointment as special constable, than that he should do it without any warrant at all."

1. Gilmore *v.* Lewis, 12 Ohio 281; Rea *v.* Smith, 2 Handy (Ohio) 193; Means *v.* Hendershott, 24 Iowa 78; Marking *v.* Needy, 8 Bush (Ky.) 22; Warner *v.* Grace, 14 Minn. 487; Hatch *v.* Mann, 15 Wend. (N. Y.) 44; Smith *v.* Whildin, 10 Pa. St. 39; 49 Am. Dec. 572; Morrell *v.* Quarles, 35 Ala. 544; Brown *v.* Godfrey, 33 Vt. 120; *Ex parte* Gore, 57 Miss. 251; Kick *v.* Merry, 23 Mo. 72; 66 Am. Dec. 658; Thornton *v.* Missouri Pac. R. Co., 42 Mo. App. 58; Stamper *v.* Temple, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296; Smith *v.* Stotesbury, 2 Burr. 924; and see People *v.* Rainey, 89 Ill. 34, and Bent *v.* Wakefield, etc., Bank, 4 C. P. Div. 6. In this last case, although the decision was put upon another ground, it was said: "There are strong arguments of expediency, touching the administration of justice and the interests of the State, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an act of service, by which delay the criminal might escape, or, in a case like the present, to delay taking into custody a criminal who gave himself up, so that the constable might appear to use exertions to procure complete information, and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes, or to seek promises of rewards from persons anxious to recover their property, and

9. Performance by Agent.—One may perform the services for which the reward is offered by an agent, and he, and not the agent, will be entitled to the reward.[1]

unless such were offered, to be inert in their efforts."

A reward offered by statute to one who becomes the prosecutor in certain cases, cannot be recovered by the commonwealth's attorney who entered himself as prosecutor, for it is his sworn duty to prosecute for the compensation provided for him as prosecuting officer. Harris *v.* Beaven, 11 Bush (Ky.) 258.

Parties called out during a railroad strike as the *posse comitatus* of a sheriff, to aid him in protecting railroad property, cannot claim to have acted as individuals independently of the sheriff, and recover a reward offered by the railroad company for the arrest and conviction of persons interfering with their property. St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504; 14 Am. St. Rep. 66.

A city watchman, who, while in the discharge of his duty as such, discovers a person setting fire to a building and prosecutes him to conviction, is not entitled to claim a reward offered by the city government for the detection and conviction of an incendiary. Pool *v.* Boston, 5 Cush. (Mass.) 219.

A police officer whose duty it is to "notice and diligently inquire into and report violations of the criminal laws of the State, and breaches of the peace, and to attend punctually on all trials of offenses in regard to which complaint has been made by any policeman," does not entitle himself to a reward offered for the arrest and conviction of the perpetrators of an offense within the city by ascertaining who committed such offense, making complaint, proving the arrest of the perpetrators, procuring the attendance of witnesses, and being examined himself as a witness on the trial. Day *v.* Putnam Ins. Co., 16 Minn. 408. And where it was their duty, as required by the police regulations, to "constantly use their exertions . . . during the time given them for rest the same as during their regular hours of duty," policemen who, during the hours allotted them for rest and while off duty, discovered a burglar and obtained information which led to his conviction, were not allowed to receive the reward offered for his detection. *In re* Russell, 51 Conn. 577; 50 Am. Rep. 55.

A customs officer, who, though in the discharge of no specific duty, discovered smuggled goods while assisting the inspectors who had charge of a vessel, cannot recover a reward offered for such discovery. Davis *v.* Burns, 5 Allen (Mass.) 349; and an overseer or superintendent of a poor house and county asylum cannot recover a reward offered for the return of an insane person who has escaped from another asylum and been placed by the authorities of the town into which he had wandered in the asylum of which the overseer has charge. Ring *v.* Devlin, 68 Wis. 384.

1. Montgomery Co. *v.* Robinson, 85 Ill. 174. And see Shuey *v.* U. S., 92 U. S. 73.

A reward was offered by F county for the arrest and delivery of E to the sheriff of that county. M arrested him in another State and brought him back, but when near F county by his carelessness allowed him to escape. M stated to P what he had done, and asked him to assist him in the recapture, and promised to compensate him. P agreed to watch a house where M told him he thought E was secreted, and to take him if he should come there, and give M notice of the arrest. M continued his search in the vicinity. P arrested E at the house on the day after the conversation, but concealed the fact from M and delivered E to the sheriff of F county, who paid him the reward. M sued P in *assumpsit* to recover the reward, and it was held that he could recover, for P was merely the servant of M to make the arrest. Pruitt *v.* Miller, 3 Ind. 16.

Where F sent a messenger to request S to watch for and arrest a murderer, and the message reached S not directly from the messenger but through L, and it did not appear that S knew that it came from F, it was held that S did act as the agent of F, and, on arresting the murderer, was entitled to the reward. Russell *v.* Stewart, 44 Vt. 170.

The fact that lost property was returned by an agent or lawyer who refuses to disclose the name of the finder, his client, and who makes threats

IV. Reward for Lost Property.[1]

V. Illegal Agreements for Reward.—A certain class of agreements for reward are held void on the ground of public policy.[2]

VI. Action for Reward.—In an action for a reward the burden of proof is upon the claimant,[3] and where the reward was offered for the conviction of a criminal, the record of the court wherein the conviction was had is competent and *prima facie* evidence.[4]

if the full reward be not paid, does not entitle the payer to recover back the reward. Grady *v.* Crook, 2 Abb. N. Cas. (N. Y.) 53; *aff'd* 72 N. Y. 612.

One who has recovered a reward for the restoration of a child, through information furnished him by another with the intention of his availing himself of it for his own benefit and at his own risk, is not liable to an action by his informant to recover the reward or any part of it. Fallick *v.* Barber, 1 M. & S. 108.

Defendant offered a reward of $200 for the recovery of the body of his drowned son. Plaintiff applied to defendant's agent to furnish suitable apparatus and aid for the purpose of searching for the body by diving, which was done. The plaintiff recovered the body, and it was held that his services were not rendered as a mere employé of defendant, and that he might recover the reward. Bagnall *v.* Barnard, 59 Hun (N. Y.) 151.

1. See Finder of Property, vol. 7, p. 987.

The fact that the finder of lost property recovers judgment against the owner for the amount of an offered reward does not destroy his lien on the property. Everman *v.* Hyman, 3 Ind. App. 459.

2. See Illegal Contracts, vol. 9, p. 879.

Rewards agreed to be paid to parents or guardians to get their consent to marriage with their daughter or ward, cannot be recovered, for such agreements are void on the ground of public policy. Stribblehill *v.* Brett, 2 Vern. 445; Keat *v.* Allen, 2 Vern. 588; Peyton *v.* Bladwell, 1 Vern. 240; Crawford *v.* Russell, 62 Barb. (N. Y.) 92.

So, where the law makes it the duty of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and subjects them to a fine for refusal or neglect to do so, a contract to pay a pilot $500 extra for such duty is void. Callaghan *v.* Hallett, 1 Cai. (N. Y.) 104.

No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than his ordinary share of duty in navigating the ship. Harris *v.* Watson, Peake 72, where Lord Kenyon put it on the ground of public policy. And see Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260; Harris *v.* Carter, 3 E. & B. 559; 77 E. C. L. 559. The Araminta, 1 Spinks 224. So, where some seamen deserting, and the captain, not being able to supply their places, promised to divide their overdue wages among the rest of the crew, they were not allowed to recover. Stilk *v.* Myrick, 2 Camp. 317; 6 Esp. 129, where Lord Ellenborough put it on the ground of want of consideration.

A promise to bribe a bailiff to take bail is illegal and will not maintain an action of assumpsit. Smith *v.* Stotesbury, 2 Burr. 924.

3. Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Howland *v.* Lounds, 51 N. Y. 604; 10 Am. Rep. 654.

4. Brown *v.* Bradlee (Mass. 1892), 30 N. E. Rep. 85; Mead *v.* Boston, 3 Cush. (Mass.) 404; Borough of York *v.* Forscht, 23 Pa. St. 391. And as to what is admissible in evidence, see Rollins *v.* Clement, 25 S. Car. 601.

In Brown *v.* Bradlee (Mass. 1892), 30 N. E. Rep. 85, Holmes, J., in delivering the opinion of the court, said: "The second question was raised by a request for a ruling that there was no evidence of the defendants' liability. It was proved by the record that one De Lucca had been convicted for the shooting of Edward Cunningham, and De Lucca's evidence at his trial, admitting that he shot Cunningham, was also put in; but the defendants contended that this evidence was *res inter alios*, and not competent in this action to prove that De Lucca was the guilty

RIDGLING—(See also GELDING, vol. 8, p. 1292; HORSES, vol. 10, p. 759).—A "ridgling" is an animal half castrated; a male of any beast, half-gelt.[1]

RIGGING.—See note 2.

RIGHT HEIRS.—See note 3.

RIGHT IN ACTION.—A chose in action, *q. v.*

RIGHT OF ACTION (see also ACTIONS, vol. 1, p. 178; CAUSE, vol. 3, p. 46) is the right to bring an action.

The phrase is used in the old books to denote the right of a person who has lost his right of entry and has only his right of action left.

man. This position rests on too strict a construction of the words 'the person who shot Mr. Cunningham,' in the contract. We will assume that they mean a little more than 'a person for shooting,' and that it would be open to the defendants to prove mistake or fraud in the conviction. But we have no doubt that the contract so far adopts the proceedings of the criminal trial as a test of liability that the conviction is *prima facie* evidence of guilt, and that the admission of the party accused there is admissible when necessary."

Pleading.—To recover a reward offered for the apprehension *and* conviction of a criminal, it is not sufficient to allege that plaintiff caused the criminal to be apprehended, and that *he was afterwards convicted* without directly alleging that the plaintiff was instrumental in the conviction. Furman *v.* Parke, 21 N. J. L. 310. In this case Green, J., in delivering the opinion of the court, said: "Nor does it appear with sufficient certainty that the conviction of Carter was in consequence of the oath made by the plaintiff, nor that he was the efficient instrument of the conviction. For all that appears in the plaintiff's declaration, Carter may have been discharged upon his first arrest, and may have been subsequently apprehended and convicted upon information furnished by others who would be legally entitled to the reward. All that is contained in the declaration—all that may be legitimately inferred from its statements may be true, and yet the plaintiff may have no title to the reward."

A complaint alleging that defendant, the sheriff, "offered a reward of $500 for the arrest of the murderer of L. T.," avers that the defendant himself offered to pay the reward, and cannot be demurred to generally on the ground that the offer is not to be construed as a reward offered by the sheriff himself, but merely as information that some one not named had offered a reward; however it may have been demurred to specially. McLeod *v.* Meade, 77 Cal. 87.

1. Webst. Dict., *followed* in Brisco *v.* State, 4 Tex. App. 221.

In that case the defendant was indicted for stealing a "gelding." The proof was that the stolen animal was a "ridgling." It was held that the variance was fatal; and that a "ridgling" is a "horse" and not a "gelding" within the list of animals enumerated in *Texas* Penal Code, art. 765.

A "gelding" is a fully castrated horse, in distinction to a "stallion," who is possessed of all his parts, and a "ridgling," which is deprived of half of them. People *v.* Adams, 85 Cal. 231.

2. **Rigging the market**, is going into the market pretending to buy shares by a person whom you put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted in the public papers as bearing a premium, which premium is never paid. Rubery *v.* Grant, L. R., 13 Eq. 447.

3. **Right Heirs.**—In Garland *v.* Beverley, L. R., 9 Ch. Div. 220, the court, by Fry, J., said: "In my judgment, the expression 'my own right heir' or 'right heirs' means, according to the law of *England*, the heir or heirs of the testator at common law. About that as a general proposition, I imagine no doubt can be entertained. Then, is that meaning altered by the fact that the testator was possessed of

RIGHT OF COMMON (see also COMMON, vol. 3, p. 346; PROFIT Á PRENDRE) is an incorporeal hereditament, being a profit which one man hath in the land of another.[1]

RIGHT OF LIEN—(See also LIENS, vol. 13, p. 574).—The word "lien" is of the same origin as the word "liable," and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty.[2]

RIGHT OF POSSESSION—(See also REAL ACTIONS).—The right to possession, which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant; *e. g.*, the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents.[3]

RIGHT OF PROPERTY—(See also REAL ACTIONS).—The mere right of property in land; the abstract right which remains to the owner after he has lost the right of possession, and to recover which a writ of right is given. United with possession and the right of possession, this right constitutes a complete title to lands, tenements, and hereditaments.[4]

The phrase "right of property" is sometimes used, in a different sense from the above, as synonymous with "property."[5]

RIGHT OF POSTLIMINIUM (see also INTERNATIONAL LAW, vol. 11, p. 483) is that in virtue of which persons and things taken by the enemy are restored to their former state on coming again into the power of the nation to which they belonged.[6]

RIGHT OF SEARCH.—See INTERNATIONAL LAW, vol. 11, p. 483; SEARCHES AND SEIZURES.

RIGHT OF WAY (see also EASEMENT, vol. 6, p. 139; HIGHWAY, vol. 9, p. 362; PRIVATE WAYS, vol. 19, p. 93; RAILROADS, vol. 19, p. 779; WAYS) means a right to pass over another's

lands? In my opinion it is not. Is it altered by the fact that he devises gavel-kind lands? In my opinion it is not."

A limitation to one and his "right heirs" is the same as to his "heirs" simply; and a limitation directly to the "right heirs" of one carries a fee without adding the words "and their heirs." 1 Wash. Real Prop. 57. See also Harrison *v.* Jones, 82 Ga. 603.

Where a testator provided after the death of all his children, during whose lives the property was devised in trust, that the residue of his real estate should go to the "right heirs of my children in fee simple," it was held that the words "right heirs" meant children. Ballentine *v.* Wood, 42 N. J. Eq. 552. See also WILLS.

1. Smith *v.* Floyd, 18 Barb. (N. Y.) 527.

2. Wood's Appeal, 30 Pa. St. 277.

3. Bouv. L. Dict.; 2 Black. Com. 196.

4. Black's L. Dict; 2 Black. Com. 197.

5. Bruch *v.* Carter, 32 N. J. L. 561.

"The right of property consists in the absolute dominion over a thing, in the use, enjoyment, and disposal of it, without any control or diminution, save only by the laws of the land." Toledo Bank *v.* Bond, 1 Ohio St. 662. See also PROPERTY, vol. 19, p. 283.

6. Leitensdorfer *v.* Webb, 1 N. Mex.

land more or less frequently, according to the nature of the use to be made of the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass.[1]

RIGHTS.—A right, in jurisprudence, is an enforceable claim or title to any subject-matter whatever; either to possess and enjoy tangible things, or to do any act, pursue any course, enjoy any means of happiness, be exempt from any cause of annoyance, etc. It is often used to denote one's claim to something out of his possession. On the other hand, it is not always restricted to a claim to property, or in the nature of property, but is often used to designate power, prerogative, and privilege, especially when applied to corporations.[2]

A right, in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or abstain from doing a particular thing.[3] "We may, therefore, define a legal right as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others."[4]

44; *quoting* Vatt., bk. 3, ch. 14, § 204.

1. Bodfish *v.* Bodfish, 105 Mass. 319.

2. Abb. L. Dict.; People *v.* Dikeman, 7 How. Pr. (N. Y.) 124; Union Nat. Bank *v.* Bryam, 131 Ill. 92; And. L. Dict.

3. Sweet's L. Dict.

4. Holland's Jurisprudence 56.

The term "right," in civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law. Atchison, etc., R. Co. *v.* Baty, 6 Neb. 40.

"The very idea of legal right is, that it is one which is enforced and protected by the law; and as this can only be done by the remedy, the coercive means, whatever they may be, which the law affords for that purpose, it is plain that no one can have a legal right in that which another may take and apply to his use, and for doing so the law will afford no redress." Stanley *v.* Earl, 5 Litt. (Ky.) 281; 15 Am. Dec. 66; Robinson *v.* Steamboat Red Jacket, 1 Mich. 175.

An *Illinois* statute (Rev. St., ch. 11, § 8) provides that writs of attachment shall be executed upon the debtor's "lands, tenements, goods, chattels, rights, credits, money, and effects." In Union Nat. Bank *v.* Bryam, 131 Ill. 92, it was held that "the words 'rights' and 'effects' can certainly be held to embrace within the scope of their signification the shares of a stockholder in an incorporated company." In this connection the court by Magruder, J., said: "Bouvier defines a 'right' as 'a well-founded claim.' Whatever may be the correct definition of the word 'rights,' as used in section 8, it refers to some kind of property interest which is incorporeal in its nature, and not to that species of property which is capable of being actually and corporeally seized by the sheriff."

All Right.—In Tummonds *v.* Moody, 51 Hun (N. Y.) 637, it was held that the statement by a creditor, when told of a payment to his wife, that "it was all right" if it had been so made, amounts to a ratification of the wife's authority. And see Burgdorf *v.* Odell, 53 Hun (N. Y.) 631, where, under different circumstances, it was held that the expression "all right" could not be construed as a ratification.

Right, Debt, or Duty.—A *Vermont* statute pronounces null and void as against the person aggrieved, all judgments, bonds, fraudulent conveyances, etc., made or had to avoid "the right, debt, or duty" of another person. It has been held that, although the words "right and duty," in the statute, are limited to such rights and duties as are

2. In an abstract sense, the term means justice, ethical correctness or consonance with the rules of law and principles of morals, but is difficult to define more precisely. Thus, it has been said by a learned judge: "There can be no more uncertain rule of action than that which is furnished by an intention to do right. How or by whom is the right to be ascertained? What is right in a particular case? Archbishop Whately says: 'That which is conformable to the supreme will is absolutely right, and is called right simply, without reference to a special end. The opposite to right is wrong.' This announces the standard of right, but it gives no practical aid. What is or may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts."[1]

RIGHTS OF CONSCIENCE (see also RELIGIOUS LIBERTY) are simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act for conscience' sake, the doing or forbearing of which, is not prejudicial to the public weal.[2]

RIGHT TO BEGIN.—See OPEN AND CLOSE, vol. 17, p. 194.

RING—(See also RINGING UP).—A clique; an exclusive combination of persons for illegitimate or selfish purposes; as to control elections or political affairs, distribute offices, obtain contracts, control the market or the stock exchange, etc.[3]

or the nature of debts existing *ex contractu*, yet, even with that limitation, they are far more extensive in their signification than "debt" in its strict sense. Beach *v.* Boynton, 26 Vt. 725. And so the inchoate right of a wife to alimony was held to be within the statute. Green *v.* Adams, 59 Vt. 610; 59 Am. Rep. 761. See generally FRAUDULENT CONVEYANCES, vol. 8, p. 750. See also Brooks *v.* Clayes, 10 Vt. 54; Fairbanks *v.* Benjamin, 50 Vt. 102.

"Right of Trial by Jury."—In State *v.* Worden, 46 Conn. 363, it was held that "right," as used in the section of the constitution of *Connecticut* providing that "the right of trial by jury shall remain inviolate," must be given its ordinary meaning and is not to be taken in the sense of "law." See generally CONSTITUTIONAL LAW, vol. 3, p. 731.

Civil Rights.—See CONSTITUTIONAL LAW, vol. 3, p. 713.

Natural and Acquired Rights.—"All rights which appertain to man are of one or the other of two classes—that is to say: 1. Natural rights; or, 2. Acquired rights. The former are such as appertain originally and essentially to man, such as are inherent in his nature, and which he enjoys as a man independent of any particular act on his side. The latter, on the contrary, are those which he does not naturally enjoy, but are owing to his own procurement. The right of providing for one's preservation is of the one class; while sovereignty, or the right of commanding, or the right to property, are of the other class." Borden *v.* State, 11 Ark. 519; 54 Am. Dec. 221.

1. Allen *v.* Ferguson, 18 Wall. (U. S.) 1. And so in that case it was held that a promise from a debtor to his creditor in the following language: "Be satisfied; I intend to do right; all will be right betwixt my just creditors and myself," was not such a new promise as would revive a debt barred by a discharge in bankruptcy. See generally, as to what is a "new promise," BANKRUPTCY, vol. 2, p. 67; INSOLVENCY, vol. 11, p. 167; LIMITATION OF ACTIONS, vol. 13, p. 749.

2. Com. *v.* Lesher, 17 S. & R. (Pa.) 160.

3. Black's L. Dict.

RING DROPPING.—See FALSE PRETENSES, vol. 7, p. 702.

RINGING UP—(See also RING).—A custom among stock-brokers and commission merchants by which, when it is found that a series of contracts are in existence for the sale of like grain for like delivery, so that a commission merchant owes grain to a buyer to whom he has sold, and he (the buyer) to another, who owes like grain for like delivery to the first commission merchant, they settle by what is called, a "ring," that is, they all reciprocally surrender or cancel their contracts, adjust differences and prices between themselves and surrender all margins that have been put up. The custom is founded in commercial convenience, and when not adopted to promote gambling contracts is not in contravention of the law.[1]

RINGLEADER.—See note 2.

RINK.—See note 3.

RIOT—(See also AFFRAY, vol. 1, p. 315; UNLAWFUL ASSEMBLY.—For liability of counties and municipal corporations for the value of property destroyed by riot, see COUNTIES, vol. 4, p. 343; MUNICIPAL CORPORATIONS, vol. 15, p. 949.)

I. Definition, 408.
II. Essential Elements of Riot, 409.
III. The Indictment, Information or Complaint, 410.
IV. Proof, 410.
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I. DEFINITION.—A tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act inflicted were of itself lawful or unlawful.[4]

1. Ward *v.* Vosburgh, 31 Fed. Rep. 16; Clarke *v.* Ross, 7 Biss. (U. S.) 548. The transaction is not unlike those conducted by clearing-houses. See CLEARING-HOUSE, vol. 3, p. 282.

2. **Ringleader** is used by old writers in the sense of leader or chief, and is therefore not slanderous in itself. Miller *v.* David, L. R. 9 C. P. 118, in which case the court by Coleridge, C. J., said: "Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import. From amongst other authorities he cites Barrows as calling 'Saint Paul the ringleader of the apostles.'"

3. **Skating Rink.**—See LICENSE, vol. 13, p. 535.

4. Hawk. Pl. Cr., ch. 65, § 1. And see Maxwell *v.* Carlile, 1 McCord (S. Car.) 434; State *v.* Cole, 2 McCord (S. Car.) 117; State *v.* Colder, 2 McCord (S. Car.) 462; State *v.* Connolly, 3 Rich. (S. Car.) 337; Bankus *v.* State, 4 Ind. 114; Hardebeck *v.* State, 10 Ind. 459; State *v.* Scaggs, 6 Blackf. (Ind.) 37; Sloan *v.* State, 9 Ind. 565; Kiphart *v.* State, 42 Ind. 273; Scott *v.* U. S., 1 Mor. (Iowa) 142; U. S. *v.* McFarland, 1 Cranch. (C. C.) 140; U. S. *v.* Dunn, 1 Cranch (C. C.) 165; State *v.* Snow, 18 Me. 346; Com. *v.* Runnels, 10 Mass. 518; 6 Am. Dec. 148; Com. *v.* Berry, 5 Gray (Mass.) 93; People *v.* Judson, 11 Daly (N. Y.) 1; People *v.* O'Loughlin, 3 Utah 133. In *Illinois* and *Georgia*, by statute, a tumultuous disturbance by two or more may be a riot. See Dougerty *v.* People, 5 Ill. 179; Bell *v.* Mallony, 61 Ill. 167; Prince *v.*

II. Essential Elements of Riot.—To constitute a riot, the act done must be such as is likely to create an apprehension of danger in the minds of others than the rioters.[1]

The offense consists not in the unlawfulness of the assembling or of the act done, but in the violence and turbulence of the manner of doing it.[2]

The accomplishment or consummation of the contemplated act is essential, strictly speaking, to the offense of riot.[3] But, practically, this is unimportant, in view of the allied offenses of unlawful assembly and rout, the former of which may be com-

State, 30 Ga. 27; Davenport *v.* State, 38 Ga. 184. Generally, however, the concurrence of three persons or more, is indispensable. Com. *v.* Gibney, 2 Allen (Mass.) 150; Turpin *v.* State, 4 Blackf. (Ind.) 72; Com. *v.* Edwards, 1 Ashm. (Pa.) 46; State *v.* Allison, 3 Yerg. (Tenn.) 428; Rex *v.* Scott, 3 Bur. 1262; Rex *v.* Sudbury, 12 Mod. 262; Reg. *v.* Ellis, Holt 636.

As to the extent of the concurrence or participation necessary it was held in State *v.* Straw, 33 Me. 554, that if two persons did the physical mischief, while a third was present, aiding and abetting them, there was a riot. In Bell *v.* Mallory, 61 Ill. 167, it was deemed a riot where one claiming a colt, procured the assistance of two others to take it from the possessor, and, all being present, and acting, one threatened the owner with a pistol if he interfered. In Sloan *v.* State, 9 Ind. 565, it was held that one who came up after a fight and beat a person who had been beaten during the fight could not be convicted; and in Hibbs *v.* State, 24 Ind. 140, the holding was similar. In Williams *v.* State, 9 Mo. 270, the court said that, to constitute one a rioter, it was not necessary that he should be actively engaged, if he was present, giving countenance or acquiescence. And see also Pennsylvania *v.* Craig, Add. (Pa.) 190; Newby *v.* Territory, 1 Oregon 163; Williams *v.* State, 9 Mo. 270; Treat *v.* Jones, 28 Conn. 334; State *v.* Cold, 2 McCord (S. Car.) 117; State *v.* Brazil, 1 Rice (S. Car.) 257; State *v.* Jackson, 1 Spear (S. Car.) 13. This doctrine would seem, however, not to have been recognized to its full extent in Scott *v.* U. S., 1 Mor. (Iowa) 242.

1. When persons whose assembling together was innocent, fall some of them, on one of their number and beat him, this, without more, is not a riot. Reg. *v.* Soley, 2 Salk. 594. And see Rachels *v.* State, 51 Ga. 374; State *v.* Kempf, 26 Mo. 429. In Sanders *v.* State, 60 Ga. 126, armed men who invaded private premises for the purpose of searching them, without authority and violently and tumultuously, were held guilty of riot, though the owner of the premises, from policy, treated them hospitably for the purpose of getting rid of them as soon as possible. In Pennsylvania *v.* Morrison, Add. (Pa.) 274, it was held a riot to raise a liberty pole, in defiance of law and in a riotous manner.

It is not essential that more than one person or family should have been terrified, where three persons went to the premises of a fourth, and threatened and intimidated him. State *v.* Jackson, 1 Spear (S. Car.) 13; where a party went, in frolic, to a stable at midnight, and shaved a horse's tail, arousing and alarming the family by the noise. State *v.* Alexander, 7 Rich. (S. Car.) 5; and see also Sanders *v.* State, 60 Ga. 126; State *v.* Batchelder, 5 N. H. 549; Com. *v.* Taylor, 5 Binn. (Pa.) 279; Bankus *v.* State, 4 Ind. 114.

2. See authorities cited in previous notes, also Kiphart *v.* State, 42 Ind. 273; State *v.* Blair, 13 Rich. (S. Car.) 93; State *v.* Boies, 34 Me. 235; State *v.* Bennett, 4 Dev. & B. (N. Car.) 43; State *v.* York, 70 N. Car. 66; State *v.* Hughes, 72 N. Car. 25; Darst *v.* People, 51 Ill. 286; Henderson *v.* Com., 8 Gratt. (Va.) 708; 56 Am. Dec. 160; Samanni *v.* Com., 16 Gratt. (Va.) 543; Douglass *v.* State, 6 Yerg. (Tenn.) 525; State *v.* Whitesides, 1 Swan (Tenn.) 88; U. S. *v.* Stockwell, 4 Cranch (C. C.) 671; U. S. *v.* Fenwick, 4 Cranch (C. C.) 675.

3. Rex *v.* Birt, 5 C. & P. 154; 24 E. C. L. 252; Reg. *v.* Vincent, 9 Car. & P. 91; 38 E. C. L. 48.

plete where the assembly is with the intent to do that which, if done, would constitute a riot, while a partial and uncomplete execution of the act is rout.[1]

III. The Indictment, Information or Complaint.[2]—The essential elements of an assembly of three or more and a disorderly act of a character likely to terrify others must be alleged. So the unlawfulness of the assemblage must appear; as an assemblage, lawful in the first instance, must have developed into an unlawful assemblage before its members can be guilty of riot.[3] If the indictment is on a statute, the terms thereof must be followed.[4]

IV. Proof.—Evidence of riotous assemblages in former years is incompetent, either as tending to rebut the defense that the assemblage in question was of a peaceful character or as tending, in the first instance to characterize the assemblage in question.[5] Nor may it be shown that the defendant had been engaged in riotous proceedings in former years.[6] Proof of an agreement or proposal to do the unlawful act need not be made.[7] An allegation that some of the rioters are unknown need not be proved.[8]

V. Conviction.—Where of three indicted, two are acquitted, a judgment cannot be rendered on a verdict of guilty against the third.[9] One cannot be charged with manslaughter by reason of his participation in a riot in which those suppressing it killed an innocent person.[10]

1. See articles Unlawful Assembly; Rout; also State *v.* Sumner, 2 Spear (S. Car.) 599, where, under an indictment for riot, a conviction of rout was sustained and a general verdict of guilty held sufficient.

2. In *Illinois*, a charge of riot cannot be tried in a county court on a simple affidavit; there must be an information and plea. Gould *v.* People, 89 Ill. 216. See also Mackaboy *v.* Com., 2 Va. Cas. 268. In *Kentucky* a prosecutor is not required on an indictment for a riot. Com. *v.* Bybee, 5 Dana (Ky.) 219; otherwise in *Missouri*. McWaters *v.* State, 10 Mo. 167.

3. See on the general subject, Com. *v.* Jenkins, Thach. Cr. Cas. (Mass.) 118; Com. *v.* Runnels, 10 Mass. 518; 6 Am. Dec. 148; Com. *v.* Berry, 5 Gray (Mass.) 93; Com. *v.* Gibney, 2 Allen (Mass.) 150; State *v.* Renton, 15 N. H. 169; State *v.* Russell, 45 N. H. 83; State *v.* Dillard, 5 Blackf. (Ind.) 365; Thayer *v.* State, 11 Ind. 287; Bankus *v.* State, 4 Ind. 114; 35 Am. Dec. 128; State *v.* Martin, 3 Murph. (N. Car.) 533; State *v.* Hathcock, 7 Ired. (N. Car.) 52; State *v.* York, 70 N. Car. 66; Martin *v.* State, 9 Mo. 286; McWaters *v.* State, 10 Mo. 167; Whitesides *v.* People, 1 Ill. 4; State *v.* Whitesides, 1 Swan (Tenn.) 88; State *v.* Blair, 13 Rich. (S. Car.) 93; State *v.* Brazil, 1 Rice (S. Car.) 257; State *v.* O'Donald, 1 McCord (S. Car.) 532; State *v.* Calder, 2 McCord (S. Car.) 462; State *v.* Sims, 16 S. Car. 586; U. S. *v.* Fenwick, 4 Cranch (C. C.) 675; State *v.* Boies, 34 Me. 235.

4. State *v.* Kutter, 59 Ind. 572; State *v.* Dean, 71 Wis. 678; Mackaboy *v.* Com., 2 Va. Cas. 268.

5. State *v.* Renton, 15 N. H. 169.

6. State *v.* Renton, 15 N. H. 169.

7. U. S. *v.* Stockwell, 4 Cranch (C. C.) 671; U. S. *v.* Fenwick, 4 Cranch (U. S.) 675.

8. State *v.* Blair, 13 Rich. (S. Car.) 93. See, as bearing on questions of evidence and proof on indictments for riot, Whitley *v.* State, 66 Ga. 656; Logg *v.* People, 92 Ill. 598; State *v.* Bennett, 4 Dev. & B. (N. Car.) 43; State *v.* Wilson, 1 Ired. (N. Car.) 32; Douglass *v.* State, 6 Yerg. (Tenn.) 525; State *v.* Kuhlman, 5 Mo. App. 587.

9. Turpin *v.* State, 4 Blackf. (Ind.) 72.

10. Com. *v.* Campbell, 7 Allen (Mass.) 541. In *Illinois*, one indicted for riot cannot be convicted of an assault. Ferguson *v.* People, 90 Ill. 510.

RIOTOUS—(See also RIOT).—See note 1.

RIPARIAN RIGHTS—(See also ACCRETION, vol. 1, p. 136; BEACH, vol. 2, p. 159; BOUNDARIES, vol. 2, p. 504; DAM, vol. 4, p. 971; FERRIES, vol. 7, p. 941; FISH AND FISHERIES, vol. 8, p. 23; ICE AND ICE COMPANIES, vol. 9, p. 852; IRRIGATION, vol. 11, p. 846; LAKES AND PONDS, vol. 12, p. 610; MILLS, vol. 15, p. 482; MINES AND MINING CLAIMS, vol. 15, p. 580; NAVIGABLE WATERS, vol. 16, p. 236; SHORE; SUBTERRANEAN WATERS; SURFACE WATERS; TIDE WATERS.)

Riparian rights, according to the strict meaning of the term, are such as follow or are connected with the ownership of the banks of streams or rivers. Those whose lands border upon tide waters are called "littoral" proprietors, although the words "riparian" and "littoral" are sometimes used interchangeably.[2] The law of riparian rights will be treated under the title WATERS AND WATER COURSES.

RIPRAP.—See note 3.

RISING.—See note 4.

RISK—(See generally FIRE INSURANCE, vol. 7, p. 1002; MARINE INSURANCE, vol. 14, p. 319).—A danger, hazard, or peril.

In insurance law, "risk" expresses the obligation of the insurer; the probability of loss; the anticipated cause of loss; and the property, thing, or venture covered by the insurance.[5]

On an indictment for riot, and a riotous assault and battery, by four persons, one of them may be convicted of the assault and battery and the others acquitted of the whole. Shouse *v.* Com., 5 Pa. St. 83.

1. **"Riotous" Equivalent to "Violent."**—The affidavit for a riot used the words "riotous and tumultuous" to describe the offense instead of the statutory word "violent." It was held that "riotous" in this connection was substantially equivalent to "violent." Stockton *v.* Stockton, 59 Ind. 574.

2. Gould on Waters (2d ed.), § 148.

The words "riparian proprietor" have been heedlessly extended from rivers and streams to the shores of the sea. If necessary to express it by a single adjective, the term "littoral" is more accurate, when the shore of the sea is in question. Com. *v.* Roxbury, 9 Gray (Mass.) 521, note; West Roxbury *v.* Stoddard, 7 Allen (Mass.) 167; Reg. *v.* Keyn, 2 Ex. D. 63; Hamilton *v.* Menifee, 11 Tex. 718; Smith *v.* Power, 14 Tex. 146; Boston *v.* Lecraw, 17 How. (U. S.) 433.

3. Riprap, as used in a contract, was held to mean a kind of wall; stone laid upon the slope of a dirt embankment, at such points as are likely to be washed by water. Wood *v.* Vermont Cent. R. Co., 24 Vt. 608.

4. **Rising of Court.**—A *Nebraska* statute provided that the party excepting must reduce his exceptions to writing within a time not exceeding forty days from the "rising of the court." It was held that the phrase, "'the rising of the court' must be deemed to be equivalent to final adjournment or the 'last day of the term.'" State *v.* Weaver, 11 Neb. 165; *citing* Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106.

5. "The fallacy in the defendant's argument arises from the double meaning of the word 'risk.' That means both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance." Bradford *v.* Symondson, 7 Q. B. Div. 464; Rodocanachi *v.* Elliott, L. R., 8 C. P. 949.

Stock subscriptions are not "risks." Bartlett *v.* Chouteau Ins. Co., 18 Kan. 369.

Risk does not mean the danger but the circumstances which gave rise to it. Stokes *v.* Cox, 1 H. & N. 533.

Port Risk.—See PORT, vol. 18, p. 838; MARINE INSURANCE, vol. 14, p. 347.

Carpenter's Risk.—See ONLY, vol. 17, p. 191. **Owner's Risk.**—See OWNER, vol. 17, p. 300.

ROAD—(See also BILL OF LADING, vol. 2, p. 233; BRIDGES, vol. 2, p. 540; CROSSING, vol. 4, p. 907; HIGHWAYS, vol. 9, p. 362; LAW OF THE ROAD, vol. 12, p. 957; PRIVATE WAYS, vol. 19, p. 95; STREETS).—1. An open way or public passage; ground appropriated for travel; as a generic term includes highway, street, lane.[1]

"**Risks of Navigation**" was held to be a broader term than "perils of navigation," or "perils of the sea" in Pitcher *v.* Hennessey, 48 N. Y. 419. See also PERILS OF THE SEA.

Risk Suspended While Loading.—See LOADING, vol. 13, p. 976.

Builder's Risk.—See FIRE INSURANCE, vol. 7, p. 1039.

Risk of Boats.—See BILL OF LADING, vol. 2, p. 239; BOAT, vol. 2, p. 441 n. See also MARINE INSURANCE, vol. 14, p. 349.

1. Webst. Dict.; And. L. Dict.; Manchester *v.* Hartford, 30 Conn. 120.

A passage through the country for the use of the people. Bouv. L. Dict. *followed* in Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 373.

"Road" applies in its ordinary acceptation to a place set apart and appropriated, either *de jure* or *de facto*, to the purpose of passing with carriages, whether by public authority or by the general license and permission of the owners. Com. *v.* Gammons, 23 Pick. (Mass.) 203.

In re Woolsey, 95 N. Y. 135, it was held that the provision of the *New York* constitution (§ 12, art. 3), prohibiting the passage of a "private or local bill . . . laying out, opening, altering, etc., roads, highways, or alleys" does not include and is not applicable to city streets and avenues. But in giving this construction to the clause, the court was governed, perhaps, rather by the history of the amendment than by the force of the words used.

A "bridge" is a portion of a "road." Isaacs *v.* Wiley, 12 Vt. 679. See also BRIDGES, vol. 2, p. 541.

"**Road**" **Compared With** "**Way.**"—A clause in a deed conveying a tract of land, "reserved" to the grantor "a road ten feet wide along the line of C. D." It was held that this constituted a reservation to the grantor of a right of way, and not an exception from the conveyance of a ten foot wide strip of land. The court, by Trunkey, J., said: "The word road has never been defined to mean land; it is difficult to find a definition which does not include the sense of way, though the latter is more generic, referring to many things besides roads. Road is generally applied to highway, street, or lane, often to a pathway, or private way. Its sense in this deed is very clear. Taking the entire clause, with reference to the grant, it means the reservation of a way. This is as plain as if the word way were used in the place of road." Kister *v.* Reeser, 98 Pa. St. 4; 42 Am. Rep. 608. See also Wood *v.* Truckee Turnpike Co., 24 Cal. 487; Leavitt *v.* Towle, 8 N. H. 96; Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

Contra.—It may well be doubted, however, if the word "road" always "includes the sense of way." "Way" is a technical term having a well understood meaning in law. It is an easement and consists in the right of passing over another man's ground, whereas road is a popular term having no well defined legal meaning, and is used in the sense of "ground appropriated for travel," and does not necessarily imply that there is an easement or right separate from the fee. Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 373.

By a deed "saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads," the fee of the soil of the road, and not simply the public easement therein, is reserved. Munn *v.* Worrall, 53 N. Y. 44; 13 Am. Rep. 470. But in that case the court did not find it necessary to decide whether an exception of a "road" or "highway" includes the fee of the land, or is only a reservation of the easement. In Peck *v.* Smith, 1 Conn. 103, the language of the exception was "saving and excepting a road or highway laid out." Four of the judges held that the term "highway" or "road" did not necessarily mean the land over which the road or highway passed, and that, therefore, only the easement was excepted. Three others held that the

2. "Road" is not infrequently used in the sense of "railroad."[1]

3. In maritime law, a "road" or "roadstead" is an open passage of the sea, which, from the situation of the adjacent land and its own depth and wideness, affords a secure place for the common riding and anchoring of vessels.[2]

ROBBERS.—See BILL OF LADING, vol. 2, p. 238; MARINE INSURANCE, vol. 14, p. 375; ROBBERY.

exception was good as an exception of land. One other, that it would have been good if the grantor had had any estate in the land covered by the road. The remaining judge expressed no opinion as to the effect of the exception.

Road Sometimes Equivalent to "Public Road" and "Public Highway."—A statute gave a right of action to any person injured in person or property through the want of repairs in a road, against the town or city in which the injury occurred. It was held that "road," as here used, unquestionably meant a public highway. Bogie *v.* Waupun, 75 Wis. 1.

A requirement that a railroad company should erect suitable crossings where their road is crossed by "roads" was held not to require them to erect a bridge at a farm crossing. But the statute had provided a specific remedy for such a case. Green *v.* Morris, etc., R. Co., 24 N. J. L. 490. See also Brooks *v.* New York, etc., R. Co., 13 Barb. (N. Y.) 594.

"The term 'road' or 'common road,' not only in common parlance, but in many of the early statutes, is used synonymously with highway." Stedman *v.* Southbridge, 17 Pick. (Mass.) 162, 164. See also Fowler *v.* Lansing, 9 Johns. (N. Y.) 350.

"The word 'road,' used in a public act, means, in my opinion, a public road —a road over which the public have rights." Curtis *v.* Embrey, L. R., 7 Ex. 369.

In Heiple *v.* East Portland, 13 Oregon 103, it was said, that "the word 'road' is uniformly taken as a public highway, and such is the common and legal acceptation of the word 'road.' (Respublica *v.* Arnold, 3 Yeates (Pa.) 422.) It is, therefore, synonymous with highway." This, however, is stated too strongly. See definition given in the text and cases cited *supra*. And see also Hart *v.* Red Cedar, 63 Wis. 634, 638.

Private roads (see also PRIVATE WAYS, vol. 19, p. 95) are such as are used for private individuals only and are not wanted for the public generally. Public roads are kept in repair at the public expense, and private roads by those who use them. Bouv. L. Dict., *followed* in Witham *v.* Osburn, 4 Oregon 324; 18 Am. Rep. 287; Varner *v.* Martin, 21 W. Va. 534.

Public Roads—(See also HIGHWAYS, vol. 9, p. 362).—A road dedicated to and kept up by the public. Mills *v.* State, 20 Ala. 88.

By-road.—See BY-ROAD, vol. 2, p. 712; Yeomans *v.* Ridgewood, 46 N. J. L. 509.

Road and Its Appendages.—See APPENDAGES, vol. 1, p. 630; RAILROAD, vol. 19, p. 779.

Road-bed, Road-way—(See also RAILROAD, vol. 19, p. 779).—The road-bed, as defined by Webster, is: "The bed or foundation on which the superstructure of a railroad rests." Cass Co. *v.* Chicago, etc., R. Co., 25 Neb. 348.

Cross a Road.—See CROSS, vol. 4, p. 905.

Toll Road.—See TOLL.

Turnpike Road.—See TURNPIKE.

1. Packer *v.* New Orleans, etc., R. Co., 33 Fed. Rep. 699; Pierce *v.* Emery, 32 N. H. 484; Central R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 292. See also RAILROADS, vol. 19, p. 775.

2. Bouv. L. Dict., *citing* Hale, de Port. Mar., p. 2, ch. 2. The word, however, does not appear to have a very definite meaning.

A road or roadstead in the commercial sense and by the maritime definition is a place where ships may ride at anchor at some distance from the shore. In the very name, therefore, of Hampton Roads is implied a place of anchorage at a distance from the shore. The J. W. Everman, 2 Hughes (U. S.) 17. See also BILL OF LADING, vol. 2, p. 233.

ROBBERY—(See also ASSAULT, vol. 1, p. 778; ATTEMPT, vol. 1, p. 936; LARCENY, vol. 12, p. 760).

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1. **DEFINITION.**—Robbery is the taking with felonious intent of any money or goods to any value, belonging to another, from the person of another or in his presence, against his will, by force or violence or by putting him in fear. The force may consist of physical violence, directly applied, or it may be constructive, by threats or otherwise putting in fear the person robbed and thereby overcoming his will.[1]

1. "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever." 3 Co. Inst. 68.

"Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P. C. 532.

"Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear." 1 Hawk. P. C. (Curw. ed.) 212.

"A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C. 707.

"The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Blk. Com. 242.

Lord Mansfield defined robbery to be "a felonious taking of property from the person of another by force." Rex *v.* Donnelly, 2 East P. C. 783.

Mr. Harris defines robbery to be "the felonious and forcible taking from the person of another, or in his presence, against his will, of any money or goods to any value, by violence or putting him to fear." Harris, Crim. Law (Cincinnati ed.) p. 177.

"Robbery is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by

putting him in fear." Wharton Crim. Law (8th ed.), vol. 1, p. 657. To the same effect is 2 Bishop Crim. Law (7th ed.) 654. See also U. S. *v.* Wilson, Baldw. (U. S.) 93; Reg. *v.* Hamilton, 8 Car. & P. 49.

By the Code of *Iowa* it is declared that, "if any person, with force or violence, or by putting in fear, steal and take from the person of another, any property that is the subject of larceny, he is guilty of robbery." See State *v.* Carr, 43 Iowa 418.

In *Illinois*, by statute, robbery is defined to be "the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation." Starr & Curtis' Ann. Stat. of *Illinois* 1885, Ch. 38, par. 302.

By the *Michigan* statute, robbery is divided into two offenses: one in which the robbery is committed by an assault and robbery from the person, the robber being armed with a dangerous weapon, with intent, if resisted to kill or maim the person robbed; the other in which the offense is perpetrated by force and violence or by assault or putting in fear and robbing, stealing and taking from the person of another, the robber not being armed with a dangerous weapon. See People *v.* Calvin, 60 Mich. 113.

In *Missouri*, robbery in the first degree consists in feloniously taking the property of another from his person, or in his presence, and against his will by violence to his person, or by putting him in fear of some immediate injury to his person." *Missouri* Rev. Stat. 1889, § 3530.

Robbery, in the second degree, consists in "feloniously taking the personal property of another, in his presence or from his person, which shall have been delivered or suffered to be taken through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time, which fear shall have been produced by the threats of the person so receiving or taking such property." *Missouri* Rev. Stat., 1889, § 3531.

Robbery in the third degree is declared to be committed when "any person shall either verbally or by a written or printed communication accuse or threaten to accuse another of a felony or shall threaten to do any injury to the person or property whatever of any one, with a view or intent to extort or gain any money or property of any description belonging to another, and shall by intimidating him with said accusation or threat, extort or gain from him any money or property." *Missouri* Rev. Stat., 1889, § 3532.

By the statute of *Ohio* it is declared that, "Whoever, by force or violence, or by putting in fear, steals and takes from the person of another anything of value is guilty of robbery." *Ohio* Rev. Stat., 1889, § 6818

See also Sess. Laws of *Wyoming*, 1888, ch. 76, p. 169.

Robbery is larceny with the element of force or intimidation added. People *v.* Clary, 72 Cal. 59.

The felonious taking of personal property from the person of another or from his immediate presence, and against his will, by means of force or fear is robbery. People *v.* Anderson, 80 Cal. 205.

See Territory *v.* McKern (Idaho, 1891), 26 Pac. Rep. 123.

A larceny committed by actual force and violence, or with any constructive force, by any assault and putting in fear, is a robbery. Com. *v.* Humphries, 7 Mass. 242.

In *Texas* a robbery may be committed either by assault and putting in fear of life or of bodily injury, or by violence and putting in fear of life or bodily injury. Wilson *v.* State, 3 Tex. App. 64.

In *Tennessee*, robbery is the "felonious taking from the person of another, goods or money of any value, by violence or putting in fear." Crews *v.* State, 3 Coldw. (Tenn.) 350.

Robbery is a species of larceny involving the same elements of turpitude, aggravated by taking from the person by open violence or putting in fear. Hammond *v.* State, 3 Coldw. (Tenn.) 129.

Distinction Between Robbery and Larceny.—Robbery is committed by force; larceny by stealth, and when there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property for the sake of his person, the crime committed is not robbery, but larceny. State *v.* John, 5 Jones (N. Car.) 163; 69 Am. Dec. 777.

An instruction that, "To constitute robbery, the person robbed must have been first in fear of his person or property," is not quite full enough. If the goods be taken either by violence

II. ESSENTIALS—1. Taking and Carrying Away.—The robber must actually take possession of the goods and must remove them.[1]

or by putting the owner in fear, it is sufficient to render the felonious taking a robbery. McDaniel *v.* State, 8 Smed. & M. (Miss.) 41.

To constitute the offense under the statute of *Massachusetts*, the articles stolen must be carried away by the robber and must be the property of the person robbed, or of some third person. Com. *v.* Clifford, 8 Cush. (Mass.) 215.

Secretly picking a pocket is not robbery; there must be a putting in fear. Norris' Case, 6 City Hall Rec. (N. Y.) 86.

It is not necessary to constitute robbery, that the property should actually be taken from the person of the victim, or from his immediate presence. When the victim is bound in one room of his house, and, through fear of personal violence, is induced to tell his assailant where his property may be found in another room, and the assailant goes into such room and finds and takes the property, this is a "taking from the person," within the meaning of the statute, and the violence, putting in fear, and taking, constitute the crime. State *v.* Calhoun, 72 Iowa 432.

In State *v.* Carr, 43 Iowa 418, the following instruction was held correct: "Robbery may be committed by force or violence or by putting in fear. Now, if in this case you believe from the evidence that the Bohemian took the money from his pocket and reluctantly handed it to one of the defendants, there was no robbery, however he may have been deceived. If you believe from the evidence that the Bohemian, without being put in fear, took his money from his pocket and held it in his hand, and the defendants, without using any other force, snatched it from his hand, this is no robbery. If, however, the defendants seized the Bohemian and held him, and while they held him he took out his money and they snatched it and one made off with it while the other held him, this is robbery. It is not necessary to robbery that any injury should be inflicted on the person. And it is not necessary that the means used to put a party in fear should be such as to put in fear a man used to the ways of the world."

1. "If A have his purse tied to his girdle and B assaults him to rob him, and in struggling the girdle breaks and the purse falls to the ground, this is no robbery, because no taking; but if B take up the purse, or if B had the purse in his hand and then the girdle break, and striving, lets the purse fall to the ground and never takes it up again, this is a taking and robbery." 1 Hale P. C. 533.

If a robber takes a purse of money from a person and restores it to him immediately, saying, "If you value your purse take it back and give me the contents," but is apprehended before the money is delivered to him, yet the crime is completed. Rex *v.* Peat, 1 Leach C. C. 228.

In Coffett *v.* State, 27 Tex. App. 608, it was charged that the accused took the money from the person of F. The proof showed that the accused and another presented pistols at F and demanded the money, and that F, in fear of his life, or of serious bodily harm and after being struck, delivered the money. The defense contended that this proof showed a delivery of the money by F through fear, and therefore there was a variance. *Held*, that such a delivery was a taking within the statute.

When one offers to pay another for his goods, and forces him by threats or violence to take less than the value of them, this is a taking that constitutes robbery. Rex *v.* Simons, 2 East P. C. 712; Rex *v.* Spencer, 2 East P. C. 712.

In Rex *v.* Farrell, 1 Leach C. C. (3d ed.) 362, n., the defendant met a man carrying a bed and told him to lay it down or he would shoot him. The man accordingly laid down the bed; but the robber, before he could take it up to remove it, was apprehended. It was held that the robbery was not complete.

But where the defendant had snatched a lady's ear-ring from her ear, and in so doing tore her ear, and left the ear-ring in the "curls of her hair," this was held a sufficient asportation. Rex *v.* Lapier, 1 Leach C. C. (3d ed.) 360; 2 East P. C. 708.

In James *v.* State, 53 Ala. 380, it was held that a person traveling with the

a. THE THING TAKEN AND ITS VALUE.—The thing taken must be the subject of larceny,[1] and must, as in larceny, be of some value. But however insignificant the thing taken may be, if it be of the smallest value the taking of it is robbery.[2]

owner of goods, and charged by the owner with the custody of the goods, was guilty of robbery for violently taking the goods from the constructive possession of the owner.

Where there is one continuing transaction, though there may be several distinct asportations, the party may be indicted for the final carrying away. State *v.* Trexler, 2 Car. Law Repos. 90; 6 Am. Dec. 358; Rex *v.* Dyer, 2 East P. C. 767.

Taking by Wife.—As a general rule a wife is not liable for crime committed by her, in her husband's presence and under his coercion. But several offenses "which show so much malignity as to render it improbable a wife would be constrained by her husband, without the separate operation of her own will, into their commission," are exceptions to this rule. Robbery is by many classed among these.

See 1 Hawk. P. C. (Curw. ed.), p. 4, § 11; 1 Russell on Crimes (3d Eng. ed.), p. 18, 25, notes.

See also 1 Bishop Crim. Law (7th ed.), §§ 358, 361.

But in Reg. *v.* Buncombe, 1 Cox C. C. 183, the question arose, "Can a *feme covert* be convicted if her husband were present at the commission of the felony." On this Coleridge, J., said: "If the prisoner be convicted I shall reserve the point for the consideration of the judges."

If a wife acts voluntarily throughout and takes part in the robbery committed by her husband, she is guilty of the same crime. Miller *v.* State, 25 Wis. 384.

Where a wife participated with her husband in the robbery, throttled the victim and told him to keep still while her husband and a confederate rifled his pockets, the jury would be justified in finding that she is guilty and did not act under her husband's coercion. People *v.* Wright, 38 Mich. 744; 31 Am. Rep. 331.

1. State *v.* Trexler, 2 Car. Law Repos. 90; 6 Am. Dec. 558.

As to what articles are the subject of larceny, see LARCENY, vol. 12, p. 760.

Where, by statute, something is made the subject of larceny which was not so at common law, it is robbery to take this thing from a person violently or by putting him in fear. McEntee *v.* State, 24 Wis. 93; Rex *v.* Cannon, Russ. & R. C. C. 146; Reg. *v.* Hemmings, 4 F. & F. 50; State *v.* Carro, 26 La. Ann. 377.

Bank notes are "personal property" under the *Ohio* statute against robbery. Turner *v.* State, 1 Ohio St. 422.

2. Reg. *v.* Morris, 9 C. & P. 347; 38 E. C. L. 148; Rex *v.* Bingley, 5 C. & P. 602; Rex *v.* Clark, Russ. & R. C. C. 181; Clary *v.* State, 33 Ark. 561; Williams *v.* State, 10 Tex. App. 8; Wesley *v.* State, 61 Ala. 282; State *v.* Howerton, 58 Mo. 581; State *v.* Burke, 73 N. Car. 83.

The taking is robbery whether the thing taken be above or under the value of one shilling. 1 Hale P. C. 532.

It must be of some value but need not be of the value of the smallest coin in the realm at least, that is, of a farthing. Reg. *v.* Morris, 9 C. & P. 347; 38 E. C. L. 148.

If it is of value to the prosecutor alone it is sufficient. Rex *v.* Bingley, 5 Car. & P. 602.

To obtain from a person his promissory note by threatening, with a knife held to his throat, to take his life, is not a felonious stealing of the note, for it never was of value to, or in the peaceable possession of such person. Rex *v.* Philpoe, 2 Leach C. C. (3rd ed.) 774.

It is not necessary to prove that the property had a specific pecuniary value. It is sufficient that it was not worthless, that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, although its pecuniary value was nominal, insignificant, or incapable of estimation. Jackson *v.* State, 69 Ala. 249.

In Com. *v.* White, 133 Pa. St. 182, the robbery consisted of taking a pinch of tobacco from a boy by force, and it was held error to charge that the jury had nothing to do with the value of the property taken; that they had a right to consider the value in determining whether the intent was felonious.

2. Force or Fear.—The taking must be by force or a previous putting in fear.[1]

a. NATURE OF THE FORCE.—To constitute robbery, when the taking is accomplished by force or violence, the force used must be either before or at the time of the taking;[2] and must be of

1. Clary *v.* State, 33 Ark. 561; Young *v.* State, 50 Ark. 501; State *v.* Howerton, 58 Mo. 581; State *v.* Broderick, 59 Mo. 318; McDaniel *v.* State, 8 Smed. & M. (Miss.) 401.

An indictment which fails to aver that the goods and chattels were taken from the person of another by force or intimidation cannot be sustained as an indictment for robbery. Collins *v.* People, 39 Ill. 233.

There being no putting in fear, violence is an essential element of the crime. Hanson *v.* State, 43 Ohio St. 376.

To constitute robbery the use of force is essential. Plato's Case, 2 City Hall Rec. (N. Y.) 31.

Fear is not a necessary element under the *New York* Penal Code. People *v.* Glynn, 54 Hun (N. Y.) 332.

In Brennon *v.* State, 25 Ind. 403, the evidence showed that the accused was found standing astride the body of a man lying on the ground drunk and unconscious, that he had taken a pocket-book and other property from the pockets of the unconscious man, and in so doing had turned the pockets inside out. *Held*, no robbery.

On a trial for robbery it appeared that one A, having a jug of whiskey, entered a hack with defendant and others, both being intoxicated. A placed the jug on the floor of the hack and while his attention was diverted, defendant seized it, and, leaping from the hack, ran down the road pursued by A, and finally threw the jug over a fence. A recovered it, but testified that defendant was holding a knife and compelled him by threats again to surrender the jug. Defendant testified that he took the knife out of his vest pocket while running to prevent losing it, and carried the jug from the fence without force or threats. *Held*, error merely to charge that, to constitute the crime of robbery, the taking must have been accomplished by putting in fear, force or violence, and to refuse to charge that if he took the jug from the floor of the hack, it not being attached to the person of A, no other force being used than to carry it off without A's knowledge, he did not commit robbery. State *v.* Miller (Iowa, 1891), 49 N. W. Rep. 90.

2. Sherman *v.* State, 4 Ohio, C. Ct. 531; State *v.* John, 5 Jones (N. Car.) 163.

In this case the prisoner picked a person's pocket, whereupon a scuffle ensued in which the prosecutor was thrown down. This was held to be only larceny.

In Shinn *v.* State, 64 Ind. 13; 31 Am. Rep. 110, the complainant was fraudulently induced by two confederates to expose some money in his hands; one of them snatched it from him and ran away while the other held him so that he should not pursue and a struggle between them ensued. *Held*, that this did not constitute robbery. See also Brennon *v.* State, 25 Ind. 403.

On the trial of one indicted for assault with intent to rob, it is error to refuse to charge that violence, in order to constitute the crime, must not be subsequent to the attempt to take the property. Hanson *v.* State, 43 Ohio St. 376.

The defendant slipped his hand into a lady's pocket and furtively took therefrom a purse of money. Before he got the purse entirely out she felt the hand and tried to seize it. In extracting the hand and purse the pocket was torn and when the lady turned she saw the thief unconcernedly looking at the houses. She rushed upon him and caught him by the coat which, in the struggle was left torn in her possession. *Held*, that the crime was larceny from the person and not robbery, for there was no attempt to use force or to intimidate. Farming *v.* State, 66 Ga. 167.

Where the prosecutor, in the presence of the prisoner, accidentally dropped a bank-note, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued for the possession of it, which resulted in the prisoner's keeping it and carrying it away, it was held a forcible trespass, the note not being the subject of larceny. State *v.* Trexler, 2 Car. Law Repos. 90; 6 Am. Dec. 558.

such a nature as to show that it was intended to overpower the party robbed or to prevent resistance on his part, and not merely to get possession of the property.[1] However slight the resist-

On an indictment for robbery, it appeared that defendant met a person on the road carrying a gun, whom he stopped and engaged in conversation respecting its purchase, and the gun was handed to him. Being informed that the gun was loaded he stepped back a few paces and pointing it to the prosecutor, said: "Run or I will shoot you;" whereupon the latter backed off some distance, frightened, and the defendant ran off with the gun. *Held*, that the defendant was not guilty of robbery. Thomas *v.* State (Ala. 1891), 9 So. Rep. 81.

1. In State *v.* Jenkins, 36 Mo. 372, the court, by Holmes, J., said: "It is of the very essence of robbery in the first degree, that the violence or fear of injury shall be present and immediate to the person."

To constitute the crime of highway robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property of the party attacked it is not highway robbery. Rex *v.* Gnosil, 1 C. & P. 504.

In People *v.* McGinty, 24 Hun (N. Y.) 62, an indictment for robbery in the first degree, it appeared that one S entered a saloon kept by the wife of the accused and took out his pocketbook to put some money in it; that the accused, who stood at the end of the bar, knocked it out of his hand, that one K, who stood behind the bar, picked it up, and that the accused then seized S by the shoulders, turned him around, put him out of the saloon, and shut the door. S demanded his pocketbook and was told by the accused that he had better go away as he would never see it again. The court charged that if the force used by the accused in taking the pocketbook from the hand of S was sufficient, under the circumstances, to deprive him of his property, and if it was done with a felonious intent to steal it, then the element of violence required by the statute to constitute robbery was made out. This was held error.

The court, by Learned, P. J., said: "It is not easy, nor perhaps, is it best to attempt to make an exhaustive definition of violence as used in the statute; but we may say that it generally implies the overcoming, or attempting to overcome, an actual resistance, or the preventing such resistance through fear. It may include restraint of the person, as in Mahoney *v.* People, 3 Hun (N. Y.) 202, where the complainant was held around his neck and by his arms. And it generally implies that the acts tend to produce terror and alarm in the person on whom the violence is committed. And it ought not to be held that every assault and battery, even the most trivial, which results in the taking of property from the assaulted person, constitutes that element of violence which is mentioned in the statute."

In State *v.* John, 5 Jones (N. Car.) 163, the court, by Pearson, J., said: "Violence may be used for four purposes: 1. To prevent resistance; 2. To overpower the party; 3. To obtain possession of the property; 4. To effect an escape. Either of the first two makes the offense robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general it does not make the offense robbery, but sometimes according to some of the cases it does."

See State *v.* Gorham, 55 N. H. 152; McCloskey *v.* People, 5 Park. Cr. Rep. (N. Y.) 299.

In People *v.* Glynn, 54 Hun (N. Y.) 332, however, the court, by Van Brunt, P. J., said: "It seems to be clear that although the thief may have procured possession of the property of another without force or violence, the removal of the property from the presence of that other, with force or violence, constitutes robbery."

In Davies' Case, 2 East P. C. 709, Davies was indicted for taking a gentleman's sword from his side. It appeared that the gentleman perceived that Davies laid hold of his sword and that he himself laid hold of it at the same time and struggled for it; this was adjudged robbery.

Force Used to Prevent Resistance.— As the complainant was entering a horse-car an accomplice of the prisoner threw his arms around the complainant's neck, pulled him towards him,

ance may be, if force be used to overcome it, it is sufficient to constitute the crime.[1] And if force be used, though the prosecutor be not aware, at the time, of the taking, it is robbery.[2]

(1) *Taking by Means of a Trick.*[3]—This is not robbery, in the absence of violence.

(2) *Intentional Force.*—Where robbery is accomplished by force or violence, it must appear that the violence was intentional.[4]

(3) *Snatching.*—The mere snatching a thing from the hands or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, does not amount to robbery.[5] But snatching an article from a person will

and removed a wallet from his pocket. *Held*, robbery. Mahoney *v.* People, 3 Hun (N. Y.) 202.

Where several combine to push one about, and, while his attention is thus drawn away, take his money, it is robbery. Seymour *v.* State, 15 Ind. 288.

Running against one to divert his attention, and then picking his pocket, is sufficient to constitute robbery. Anonymous, 1 Lew. C. C. 300.

Surrounding a person so as to render resistance hazardous or vain is force sufficient to constitute the crime. Hughes' Case, 1 Lew. C. C. 301.

Excessive Force by Officers.—A bailiff handcuffed a prisoner under pretense of carrying him to prison with greater safety. *Held*, that as the accused had an original intention to take the money of the prosecutor and had made use of violence, though under the sanction and pretense of law, for the purpose of obtaining it, the offense he had committed was clearly robbery. Rex *v.* Gascoigne, 1 Leach (3rd ed.) 313; 2 East P. C. 709.

1. State *v.* Gorham, 55 N. H. 152.

But it is error to instruct that the felonious taking with violence sufficient to constitute assault would make out the crime. The property must be taken with violence to the person, which means more than a simple assault and battery. It must be sufficient to force the person to part with his property, not only against his will but in spite of his resistance. McCloskey *v.* People, 5 Park. Cr. Rep. (N. Y.) 299.

2. People *v.* Glynn, 54 Hun (N. Y.) 332.

The prisoner took hold of the prosecutor's cravat and pressed him against the wall, at the same time taking his watch, without his knowledge. *Held*, robbery. Com. *v.* Snelling, 4 Binn. (Pa.) 379.

3. **Taking by Means of a Trick.**—In Bussey *v.* State, 71 Ga. 100, the defendant falsely pretended that he was marshal of the town, had on a star designating the office, seized the prosecutor, to whom another was showing a trick of cards, and upon the exclamation of that other, "There's the marshal," pushed him against the wall, threatened to take him to jail unless he paid him money, and thus extorted from him eight dollars, which he said he paid "to keep from going to jail, and he did not want to be bothered." *Held*, robbery.

But the fraudulent and felonious taking of property by means of a trick, unaccompanied by violence, does not constitute robbery. Shinn. *v.* State, 64 Ind. 13; 31 Am. Rep. 110.

And even when a struggle ensues for the possession of property so obtained there is no robbery. State *v.* Deal, 64 N. Car. 270.

4. Where it appeared that a wound had been accidentally inflicted on the hand of the prosecutrix. *Held*, that an indictment could not be sustained, for, to constitute robbery, there must be intentional force and violence. Reg. *v.* Edwards, 1 Cox C. C. 32.

5. Snatching property from the hands of another is not sufficient force to constitute highway robbery. Rex *v.* Baker, 1 Leach C. C. (3rd ed.) 324; 2 East P. C. 702; Bonsall *v.* State, 35 Ind. 460.

Suddenly snatching a bundle from the hands of a boy as the prisoner ran past him, was held only larceny, as there was not a sufficient degree of force and terror to constitute robbery. Rex *v.* Macauley, 1 Leach C. C. (3rd ed.) 324.

A asked B what o'clock it was and B took out his watch to tell him, holding the watch loosely in both hands. A

constitute robbery, if the thing taken is so attached to the person or clothes as to afford resistance.[1]

b. FEAR.—Though no violence is used robbery may be committed by putting in fear the person robbed.[2]

(1) *What Fear Sufficient.*—The fear must be such as to create a reasonable apprehension of danger.[3]

caught hold of the ribbon and key attached to the watch and snatched it from B, and made off with it. *Held*, no robbery. Reg. *v.* Walls, 2 C. & K. 214; 61 E. C. L. 214.

In Horner's Case, 2 East P. C. 703, an umbrella was snatched suddenly out of a woman's hand as she was walking along the street. The court said that it had been ruled about eighty years before, by very high authority, that snatching anything from a person unawares constituted a robbery; but the law was now settled that unless there was some struggle to keep it, and it were forced from the hand of the owner, it was not so; that this species of larceny seemed to form a middle ground between stealing privately from the person and taking by force and violence. See also Anderson's Case, 1 City Hall Rec. (N. Y.) 163; McCloskey *v.* People, 5 Park. Cr. Rep. (N. Y.) 299. State *v.* Sommers, 12 Mo. App. 374; Territory *v.* McKern (Idaho, 1891), 26 Pac. Rep. 123; Robin's Case, 1 Leach 287.

In *Iowa*, however, under the statute, it is held that the sudden snatching of a purse or other property from the hand involves the force and violence sufficient to constitute robbery. State *v.* Carr, 43 Iowa 418.

1. If there be a struggle to keep the property or any violence done to the person, the taking is robbery. State *v.* Trexler, 2 Car. Law Repos. 90; 6 Am. Dec. 558.

Snatching a thing from the hands of another accompanied with violence, or threats creating apprehensions of bodily harm, or resistance however slight, constitutes robbery. Evans *v.* State, 80 Ala. 4.

To snatch a diamond pin from the head-dress of a lady, with such force as to remove it with part of the hair from the place in which it was fixed, is a sufficient violence to constitute robbery. Rex *v.* Moore, 1 Leach C. C. 335.

An ear-ring was so suddenly torn from a lady's ear that she had no time for resisting; yet, being done with such violence as to injure her person, the blood being drawn from her ear, which was otherwise much hurt, the prisoner was held guilty of robbery. Rex *v.* Lapier, 1 Leach C. C. (3rd ed.), 360; 2 East P. C. 708.

The prisoner took a watch out of a gentleman's pocket, but it was fastened to a steel chain which was around his neck. The prisoner made two or three jerks till he succeeded in breaking the chain. *Held*, robbery. Rex *v.* Mason, Russ. & R. C. C. 419.

In State *v.* Broderick, 59 Mo. 318, the prisoner snatched a watch-chain with such violence as to tear it away from the watch and button-hole; the owner tried to recover it, but failed, the defendant striking him and making his escape. *Held*, robbery.

In State *v.* McCune, 5 R. I. 60; 70 Am. Dec. 176, the prisoner passed his arm through the arm of the prosecutor and used violence sufficient to break the ribbon watch-guard worn by him about his neck, at the same time exclaiming, "Damn you, I will have your watch!" The force did not affright but merely surprised the prosecutor. *Held*, robbery.

2. But an instruction authorizing a verdict upon proof of violence, though the indictment alleged merely a putting in fear, and this charge was not proved, is erroneous. Glass *v.* Com., 6 Bush (Ky.) 436.

3. If the transaction be attended with such circumstances of terror, such threatening by word or gesture as in common experience are likely to create an apprehension of danger and to induce a man to part with his property for the safety of his person, he is put in fear. Actual fear need not be strictly and precisely proved, for the law *in odium spoliatoris* will presume fear when there appears to be just grounds for it. Long *v.* State, 12 Ga. 293.

It is not necessary that the means used to put a party in fear should be such as would put in fear a man used to the ways of the world. State *v.* Carr, 43 Iowa 418.

(2) *Fear of Injury to the Person.*—The fear must precede the taking and must be present and immediate at the time of the taking,[1] but may continue to operate on the mind of the injured person. If the fear arises only after the property is parted with there is no robbery.[2]

(3) *Fear of Injury to Property.*—It is robbery to extort money by a threat to destroy one's habitation.[3]

In McCormick *v.* State, 26 Tex. App. 678, the indictment charged a robbery by means of assault, violence and putting in fear. The proof showed that the defendant, at night, with his hat pulled down and his collar turned up, met the injured party and summoned him to throw up his hands, stating that he was an officer of the law and would arrest him for being drunk and noisy; that the injured party who testified that he was much alarmed, threw up his hands and the defendant then took a roll of money from his pocket. *Held* that the proof sustained an indictment for robbery by putting in fear.

In order to constitute the statutory offense of demanding property with menaces, the menaces must cause such alarm as to unsettle the mind of the person on whom it operates and take away from his acts that element of free, voluntary action which alone constitutes consent. Reg. *v.* Walton, L. & C. 289.

1. Rex *v.* Harman, 2 East P. C. 736; Rex *v.* Gray, 2 East P. C. 708; Clary *v.* State, 33 Ark. 561; State *v.* Jenkins, 36 Mo. 372.

The fear which constitutes an element of the crime of robbery is fear of present personal danger from violence offered or impending. Britt *v.* State, 7 Humph. (Tenn.)45.

When the prisoner picked the pocket of the prosecutor by stealth and when the property was demanded back, menaced him and then went away with the property, this was larceny only. Rex *v.* Harman, 2 East P. C. 736.

2. "If thieves came to rob A, and finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, though the oath bound him not." 1 Hale P. C. 532.

"If A assaults B, and bids him deliver his purse, and B delivers it accordingly, this is a taking; and so it is if B refuse, and then A prays him to give or lend him money, which B doth accordingly, this is robbery, for B doth it under the same fear; so it is if B throw his purse or cloak in a bush and A takes it up and carries it away; so if B, flying from the thief, lets fall his hat, and the thief takes it and carries it away, for all is the effect of the same fear." 1 Hale P. C. 533.

If the property is delivered after the assault or intimidation, but while the fear still continues, the whole is one transaction and constitutes robbery. Long *v.* State, 12 Ga. 293.

Fear of Injury to Another.—The only instances put of robbery where money is obtained from one by threat of injury to be done to another are to be found in Rex *v.* Donolly, 2 East P. C. 718, and Rex *v.* Reane, 2 East P. C. 735.

In Donolly's Case, Hotham, J., said: "In the case put in argument of one man walking with his child who delivered his money to another upon a threat that unless he did so he would destroy the child, he had no doubt it was sufficient to constitute robbery."

In the other case, Eyre, C. J., said: "A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it; and he saw no sensible distinction between a personal violence to the party himself and the case put by one of the judges of a man holding another's child over a river and threatening to throw it in unless he gave him money."

3. Where money was given to one of the mob during the riots in London, in 1780, upon knocking at the prosecutor's door in a menacing manner, *held* that it was robbery. Rex *v.* Taplin, 2 East P. C. 712.

In Rex *v.* Astley, 2 East P. C. 729, the prisoners threatened to bring a mob from Birmingham (then in a state of riot and disturbance) and burn the prosecutor's house if he did not give

(4) *Fear of Injury to Character—Threats to Accuse of Crime.*—When money is extorted by threats of charging one with sodomy, this is robbery, though there be no other fear than fear of loss of character.[1] The extorting of money in this way is robbery whether the party threatened be innocent or guilty of the crime charged.[2] It is not robbery if the property is parted with, not through fear of loss of character, but for the purpose of prosecuting the offender.[3] The extortion of money by threats to accuse of a crime other than that of sodomy is not robbery.[4]

them money, and he did so under fear of that threat. *Held*, robbery. See also Rex *v.* Brown, 2 East P. C. 731.

In Rex *v.* Simons, 2 East P. C. 712, it was held that when a person compels another to give him goods, and by way of color obliges him to take, or if he offers, less than the value, it is robbery. See also Rex *v.* Spencer, 2 East P. C. 712.

1. To obtain money from a person against his will, by threatening to carry him before a magistrate and to accuse him of unnatural practices, amounts to robbery, though no actual or personal violence is used. Rex *v.* Donnally, 1 Leach C. C. (3rd ed.) 229; 2 East P. C. 715.

If a man obtains money from another by accusing him of having been guilty of an unnatural crime, it will amount to robbery, although the party was under no apprehension of personal danger, and felt no other fear than that of losing his character. Rex *v.* Hickman, 1 Leach C. C. (3rd ed.) 310; 2 East P. C. 728.

The parting with money or goods, through fear of loss of character and service, upon a charge of sodamitical practices, is sufficient to constitute robbery, although the party has no fear of being taken into custody, nor any dread of punishment. Rex *v.* Egerton, 1 Russ. & R. C. C. 375. See also Rex *v.* Elmstead, 2 Russ. C. & M. 128; Rex *v.* Cannon, Russ. & R. C. C. 146; Rex *v.* Jones, 1 Leach C. C. 164; Reg. *v.* Stranger, 2 M. C. C. 261.

2. It is equally robbery to extort money from a person, by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. Rex *v.* Gardner, 1 C. & P. 479. See also Reg. *v.* Cracknell, 10 Cox C. C. 408; Reg. *v.* Richards, 11 Cox C. C. 43; Long *v.* State, 12 Ga. 293; People *v.* McDaniels, 1 Park. Cr. (N. Y.) 198.

3. Rex *v.* Fuller, Russ. & R. C. C. 408.

4. **Other Threats.**—No threat of prosecution for any crime, save only the crime of sodomy, is sufficient; in the eye of the law, to produce that fear which is necessary to constitute robbery. Long *v.* State, 12 Ga. 293. In Britt *v.* State, 7 Humph. (Tenn.) 45, the court by Reese, J., said: "The court charged the jury, 'that if the prosecutor was put in fear of confinement in the penitentiary, so that he gave up the money or property to the defendant by reason of the defendant making falsely a threat to prosecute him for passing a counterfeit banknote, the punishment for which would be confinement in the penitentiary, the defendant would be guilty of robbery. But if the prosecutor actually passed to the defendant a counterfeit note it would not be a robbery, but a mere compounding a felony, and they ought to acquit the defendant.' The principle of the charge in brief is that if one excites the fear of an innocent man, by falsely charging him with the commission of a felony, the punishment for which is confinement in the penitentiary, and threatens a criminal prosecution, and thus induces him to surrender money or other valuable things to the person accusing and threatening, such person is guilty of robbery. This charge is erroneous. It has been settled upon much consideration by judges of *England*, in more than one case, that threatening to prosecute an innocent man for any crime whatever, except only the *crimen innominatum*, and by the fear arising from such threat, to compel the surrender of money or property, does not amount to robbery. The fear constituting an element of the crime is fear of present personal peril from violence offered or impending. The fear of being arraigned before those tribunals whose function it is to protect and vindicate innocence, as well as to ascertain and punish crime, should not shake a firm mind of conscious rectitude so far

3. Must be Against the Will of the Prosecutor.—The taking must be against the will of the person robbed.[1]

4. Must be from the Person or in the Presence of the Party Robbed.—To constitute robbery the taking must be from the person of the party robbed. But anything taken from the presence or view of the party, or from his protection, is constructively taken from his person.[2]

from its propriety as to induce the surrender of money or other valuable thing to the base accuser, and it is not the fear, except in the single instance indicated, which connects itself with the legal idea of robbery. The reasoning on which the single admitted exception is made to rest, turns upon the overwhelming and withering character of the charge and damning infamy, so well calculated to unman and subdue the will and alarm the fears of the falsely accused. It is evident that the courts of *England* felt that even this exception looked extremely anomalous, and they strive, while permitting it to stand, to place it on ground unapproachable by any other case of fear of prosecution, as if determined hereafter it should have no associate in the offense of robbery."

Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. Rex *v.* Edwards, 5 C. & P. 518.

To obtain money by a threat to send for a constable and take the party before a magistrate and thence to prison is not robbery, for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. Rex *v.* Knewland, 2 Leach C. C. (3rd ed.) 833.

Where a person under pretense of an auction got a woman into a house, and compelled her, by threats of carrying her before a magistrate and to prison for not paying for a lot pretended to have been bid for by her, to pay them one shilling through fear of prison, and for the purpose of obtaining her liberation but without any fear of any other personal violence, *held*, not robbery. Rex *v.* Wood, 2 East P. C. 732.

Demand of the money is necessary; but this may be made by action as well as by speech, but the action must be plain and unequivocal. Rex *v.* Parfait, 1 Leach C. C. (3rd ed.) 23.

1. Rex *v.* McDaniel, Fost. C. L. 121; People *v.* Clough, 59 Cal. 438; Long *v.* State, 12 Ga. 293; Seymour *v.* State, 15 Ind. 288; State *v.* Jenkins, 36 Mo. 372.

If force be used, it is sufficient that the taking is without the consent of the injured party. Com. *v.* Snelling, 4 Binn. (Pa.) 379.

Where the prosecutor was knocked insensible and the defendant robbed him, it was held robbery. R. *v.* Hawkins, 3 C. & P. 392.

It is not robbery if the prosecutor consents to be robbed merely for the purpose of prosecuting the robber. Rex *v.* Fuller, Russ. & R., C. C. 408.

But in Norden's Case, Foster, C. L., 129, Norden set out in a post-chaise to accompany a stage-coach that he might arrest a highwayman who had frequently robbed the coach. He put some money and a pistol in his pocket. When the highwayman met them Norden delivered his money and then, with the assistance of others captured the robber. The prisoner was convicted of robbing Norden, and it was held that this was not a case of robbery by consent, for there was no collusion between Norden and the prisoner.

2. Rex *v.* Phipoe, 2 Leach C. C. (3rd ed.) 774; Clary *v.* State, 33 Ark. 561; People *v.* Beck, 21 Cal. 386; Stegar *v.* State, 39 Ga. 583; 99 Am. Dec. 472; State *v.* Leighton, 56 Iowa 595; State *v.* Calhoun, 72 Iowa 432; Clements *v.* State, 84 Ga. 660.

In Rex *v.* Fallows, 5 C. & P. 508, the property taken belonged to the person assaulted, but was in the possession of another who was walking with him and carrying the property; this person threw down the bundle and came to the assistance of the owner, whereupon the thief picked the bundle up and carried it away. It was held that the offense was not robbery because the property was not in the possession of the prosecutor. This cannot, however, be said to be the law.

Where a person, traveling in company with the owner of goods, is intrusted with the goods to help carry

5. The Thing Taken Must be the Property of Another than the Accused.—To constitute robbery the property taken must belong to some other than the accused.[1] It need not, however, be the property of the person robbed; it is sufficient that the property is rightfully in his possession as against the accused.[2]

them, and by violence, feloniously exerted against the person of the owner, carries off the goods, he is guilty of robbery; for his possession of the goods up to the time of the assault is constructively the possession of the owner, and the taking in his presence is constructively from his person. James *v.* State, 53 Ala. 380.

In U. S. *v.* Jones, 3 Wash. (U. S.) 209, Washington, J., said: "It is objected that the taking must be from the person. The law is otherwise; for if it be from the presence of the owner—as if, by intimidation, he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up, it is robbery."

"If a thief came into the presence of A and, with violence and putting A in fear, drives away his horse, cattle or sheep," it is robbery. 1 Hale P. C. 533.

"It is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear; as where one, having first assaulted another, takes away his horse standing by him; or having first put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head." 2 East P. C. 707.

On a trial for robbery and stealing from the person, it was proved that the prosecutor, who was paralyzed, received, while sitting on a sofa in his room, a violent blow on the head from one of the prisoners, while the other went to a cupboard in the same room and stole therefrom a cash-box. *Held*, that although the cash-box was not taken from the prosecutor's person, yet it being in the room in which he was sitting, he being aware of that fact, it was virtually under the protection of the person. Reg. *v.* Selway, 8 Cox C. C. 235.

It is not necessary, in order to constitute the crime of robbery, that the property should actually be taken from the person of the victim, or from his immediate presence; and when the victim is bound in one room of his house, and, through fear of personal violence is induced to tell his assailant where his property may be found in another room, and the assailant goes into such room and finds and takes the property, this is a "taking from the person" within the meaning of the statute. State *v.* Calhoun, 72 Iowa 432.

While B was in his smokehouse, about fifteen paces from his house, the defendant came up and said that if B put his head out he would "shoot it off." While B was thus detained the co-defendant entered the house and carried off valuables belonging to B, who did not know for what purpose he was being detained until the defendant had left. *Held*, a sufficient taking in the presence of B to constitute robbery. Clements *v.* State, 84 Ga. 660.

1. Smedly *v.* State, 30 Tex. 215; Barnes *v.* State, 9 Tex. App. 128; People *v.* Vice, 21 Cal. 344.

2. In People *v.* Vice, 21 Cal. 344, the court, by Field, C. J., said: "It is not necessary that the property should belong to the person from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant."

It is sufficient to sustain a charge of robbery if the property feloniously and forcibly taken from the person of another belonged to any person other than the defendant, and an erroneous allegation as to the ownership of the property is immaterial under the code if the offense is otherwise described with sufficient certainty to identify an act of robbery. People *v.* Anderson, 80 Cal. 205. See also State *v.* Ah Loi, 5 Nev. 99.

Goods stolen from the possession of the bailee may be described as the property of the bailor or the bailee, though the goods were never in the possession of the real owner. State *v.* Gorham, 55 N. H. 152.

But in Crews *v.* State, 3 Coldw. (Tenn.) 350, it was said that the property must be proved to belong to the

a. CLAIM OF TITLE.—Where the accused acted under a *bona fide* impression that the thing taken was his property, there is no robbery.[1]

b. BELLIGERENT RIGHTS.—Where the property is taken in the exercise of belligerent rights the taking is not robbery.[2]

6. Animus Furandi.—In robbery, as in larceny, the taking of the goods must be *animo furando*.[3] To convict two or more of robbery,

person mentioned in the indictment as owner.

1. A had set wires in which game was caught; B, a gamekeeper, found them and took them, with the game caught on them, for the use of the lord of the manor; A demanded them with menaces, and B, in fear, gave them up. The jury found that A acted under a *bona fide* impression that the wires and game were his property. *Held*, that it was no robbery. Rex *v.* Hall, 3 C. & P. 409.

A creditor having violently assaulted his debtor, and so forced him to give him a check in part payment, and having then again assaulted him, in order to force him to give him money in payment of the debt, *held*, that as there was no felonious intent, he could not properly be convicted of robbery. Reg. *v.* Hemmings, 4 F. & F. 50.

In R. *v.* Coghlan, 4 F. & F. 316, Bramwell, J., said: "If the object be to compel the delivery of accounts of money honestly held to be due, there is no evidence of the intent."

Where, in an indictment for robbery, it appeared that the taking was violent, but under claim of title, *held*, not to be robbery. Brown *v.* State, 28 Ark. 126.

It is not robbery to compel the payment of money which is due, by threats of violence. State *v.* Hollyway, 41 Iowa 200. See also State *v.* Brown, 104 Mo. 365.

Where a person on a trial for robbery admits the forcible taking but explains it as an attempt to get back property taken from himself, the question of his good faith depends entirely on whether he simply meant to get back what he believed to be his own. His being intoxicated is a fact which it is proper for the jury to consider. Driscoll *v.* People, 47 Mich. 413.

2. In Com. *v.* Holland, 1 Duv. (Ky.) 182, Robertson, J., said: "The only judicial question presented by this appeal from a judgment of the circuit court, discharging the accused on a verdict of acquittal on an indictment for robbery, is whether, in county of Kentucky, occupied and controlled by a confederate army, the forcible caption of a non-combatant citizens' horses in conformity with military authority, and in execution of a military order, was a criminal offense, cognizable by the civil power of this State. And on this question, our opinion is that the act being belligerent in the legal import of that comprehensive term, was not robbery in the technical sense."

In Hammond *v.* State, 3 Coldw. (Tenn.) 129, the plaintiff in error, with a squad of rebel scouts, in front of both armies, arrested the prosecutor, who had been a Federal soldier, but discharged, and who was dressed somewhat like the Federal soldiers with a pistol belted around him. The plaintiff in error and Inman knew that the prosecutor had been a Federal soldier. Inman demanded the prosecutors' pistol which was delivered to him. Hammond was not nearer than five or six steps and neither said nor did anything. *Held*, that the act being a belligerent act, the taking was not robbery.

See Witherspoon *v.* Farmers' Bank, 2 Duv. (Ky.) 496; 87 Am. Dec. 503; State *v.* Sawls, Phill. (N. Car.) 151.

3. Long *v.* State, 12 Ga. 293; State *v.* Hollyway, 41 Iowa 200; Murphy *v.* People, 3 Hun (N. Y.), 114; Matthews *v.* State, 4 Ohio St. 539; State *v.* Curtis, 71 N. Car. 56; State *v.* McCune, 5 R. I. 60; 70 Am. Dec. 176; U. S. *v.* Durkee, McAll. (U. S.) 196.

On an indictment for an assault with intent to commit robbery, proof of a wanton assault without any facts from which an intent to rob can be inferred, will not sustain a conviction. Garrity *v.* People, 70 Ill. 83.

On the trial of an indictment for robbery, an instruction defining that offense as being the taking of any property from the person of another by

it must appear that they acted in pursuance of a common intent.[1]

III. THE INDICTMENT.—An indictment for robbery charges larceny, together with the aggravating matter which makes it, in the particular instance, robbery.[2]

force, is error, as it omits the very gravamen of the offense, to wit, the felonious intent. Com. *v.* White, 133 Pa. St. 182. See also State *v.* O'Connor (Mo. 1891), 16 S. W. Rep. 510.

As we have seen (see *supra*, this title, *Claim of Title*), if a man, under a *bona fide* belief that the property is his own, obtain it by menaces, there is no robbery, because no felonious intent.

If one attacking another, snatches a pistol from the hand of the prosecutor who has drawn it against his assailant, simply to prevent the prosecutor from using it against him, without intending at the time to appropriate it, he is not guilty of robbery, though he afterwards takes it away and sells it. Jordan *v.* Com., 25 Gratt. (Va.) 943; U. S. *v.* Durkee, McAll. (U. S.) 196.

It is robbery to take by violence the keys of a bank, with the intention of using them in robbing the bank, though they be used in no other way. Hope *v.* People, 83 N. Y. 418; 38 Am. Rep. 460.

1. **Common Intent.**—If a gang of poachers attack a gamekeeper, and leave him senseless on the ground and one of them returns and steals his money, *held*, that that one only can be convicted of the robbery, as it was not in pursuance of any common intent. Rex *v.* Hawkins, 3 C. & P. 392.

On an indictment for robbery, the evidence showed that the accused, being confined in jail, effected his escape from his own cell and broke the locks off the doors of the others, who, as soon as the jailor made his appearance in their midst, set upon, bound, blindfolded and robbed him, the accused being one of the party. *Held*, on these facts that the act of one was the act of all; that all were alike guilty, and that the judge before whom the trial took place, was right in refusing to rule "that before the defendant could be found guilty of robbery, the jury must find that he intended the crime committed, or that such crime was the natural, necessary, or probable consequence of his original intention; and that if the prisoner was unaware of the intent to rob he was not guilty." Ferguson *v.* State, 32 Ga. 658.

In People *v.* Foley, 59 Mich. 553, the defendant and two others, without apparent cause, and without apparent time for consultation, violently assaulted a man whose vest was torn off and money taken during the assault. On indictment for robbery it was held that it was error to instruct that it made no difference which of the three tore off the vest.

If a number of persons associate together to commit a robbery and one alone perpetrates the act, all are constructively present, and are guilty. State *v.* Heyward, 2 Nott & M. (S. Car.) 312; 10 Am. Dec. 604.

Taking Money to Desist from Rape.—In Rex *v.* Blackham, 2 East P. C. 711, it was held that taking money from a woman at the time of an attempt to commit a rape, amounted to robbery, although there was no demand of money made by the prisoner, and it was clearly his original intent only to commit a rape.

2. Matthews *v.* State, 4 Ohio St. 539. See LARCENY, vol. 12, p. 760.

An indictment which charges that the defendant made an assault upon one L, "and with force and violence unlawfully and feloniously did steal, take, and carry away from the person of the said L four $20 bills," etc., sufficiently charges the crime of robbery. State *v.* Kegan, 62 Iowa 106.

An indictment which charges the felonious and forcible taking by the accused from the person of another, of money and goods to the value specified, by violence and putting him in fear, and that such money and goods were the property of the person robbed, is a good charge of robbery, at common law. Houston *v.* Com. (Va.), 12 S. E. Rep. 385.

To constitute the offense under the statute of *Massachusetts*, the articles stolen must be carried away by the robber and must be the property of the person robbed, or of some third person, and these facts must be alleged in an indictment under that statute in the same manner as in an indictment at common law. Com. *v.* Clifford, 8 Cush. (Mass.) 215.

An averment in an indictment for

1. Indictment on a Statute.—The statute must be followed.[1]

2. Description of the Property.—The property taken is to be described in the same way as in an indictment for larceny.[2]

robbery that M W, late of the county of Yancy, at and in the county aforesaid, in the common highway of the State, did then and there feloniously assault one F L, and did then and there put him in fear of his life, and ten pounds of coffee, etc., did then and there feloniously and violently steal, take and carry away," is made with sufficient certainty. State *v.* Wilson, 67 N. Car. 456.

See, generally, as to the requisites of indictments, State *v.* Anthony, 7 Ired. (N. Car.) 234; State *v.* Burke, 73 N. Car. 83; State *v.* Howerton, 59 Mo. 91; Crumes *v.* State, 28 Tex. App. 510; Clark *v.* State, 28 Tex. App. 189; Gregg *v* State (Tex. 1889), 12 S. W. 732.

An indictment for robbery alleged that the accused on, etc., at, etc., "forcibly and feloniously took from the person of A, by violence and putting him, the said A, in fear," certain personal property, which was described. *Held*, that the indictment contained a distinct charge of everything necessary to constitute the crime under the statute. Anderson *v.* State, 28 Ind. 22.

When the indictment charges facts sufficient to constitute the crime of robbery, it will not be invalidated by the omission of the word "rob." State *v.* Robinson, 29 La. Ann. 364.

1. The words of the statute should be followed. Com. *v.* Tanner, 5 Bush (Ky.) 316.

But, it has been held that if the offense is described substantially in the words of the statute it is sufficient.

In Taylor *v.* Com., 3 Bush (Ky.) 508, the indictment charged that, "the said Taylor, in the said county of Jefferson, on 11th of January, 1868, and before the finding of this bill, with force and arms feloniously did assault, beat and shake, and hold, and restrain Susan L. Rogers, with his hands and arms, and with a large knife and weapon, putting her, the said Susan, in great fear of some serious and immediate injury to her life and limb, with the felonious intent to rob her, the said Rogers, contrary to the form of the statute," and it was held that the foregoing facts, as stated in the indictment, were sufficient; and, although the offense was not charged in the precise words used in the statute in defining it, yet, being alleged in words conveying the same meaning, the variance was immaterial.

As to indictments under the Kansas statute, see State *v.* Barnett, 3 Kan. 250; 87 Am. Dec. 471; State *v.* Ready, 44 Kan. 697; State *v.* Stoffel (Kan. 1892), 29 Pac. Rep. 685. Under the *Missouri* statute, State *v.* Montgomery (Mo. 1892), 19 S. W. Rep. 221.

But, in Com. *v.* Clifford, 8 Cush. (Mass.) 215, it was held that in an indictment on a statute, it is not sufficient to preserve the very words of the statute, unless by so doing you fully, directly and expressly allege the fact in the doing whereof the offense consists, without the least uncertainty or ambiguity.

Under the Code of *Texas*, indictments following common law precedents are good. Burns *v.* State, 12 Tex. App. 269.

Under the Code of *Virginia*, of 1887, § 3674, which provides, in its first clause, that, "if any person commit robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or the presenting of fire-arms, he shall be punished," as therein specified, an indictment which properly sets forth the commission of a common law robbery in the manner specified in the statute is good, since the statute does not create or define the crime of robbery, but merely regulates its punishment in certain cases. Houston *v.* Com., 87 Va. 257.

2. See LARCENY, vol. 12, p. 760.

Terry *v.* State, 13 Ind. 70; Brennon *v.* State, 25 Ind. 403; McEntee *v.* State, 24 Wis. 43; Reg. *v.* Sharp, 2 Cox, C. C. 181.

An information for robbery which describes the property taken as a specified amount of "lawful money of the United States," is not fatally defective for not further describing the property as personalty. People *v.* Riley, 75 Cal. 98.

The indictment having unnecessarily described the money of which the accused robbed the injured party, as "lawful money of the United States of

3. Ownership.—The ownership of the property is to be set out as in an indictment for larceny.[1]

4. Against the Will of the Person Robbed.—When the indictment contains all the other necessary allegations, it is not necessary to allege that the taking was against the will of the person robbed.[2]

5. From the Person.—An indictment sufficient in other respects need not allege that the taking was from the person.[3]

America," it was essential to the validity of the conviction that the kind of money be proved as alleged. Coffelt *v.* State, 27 Tex. App. 608.

An information for robbery which describes the property as "twenty-five dollars in money, the property of John Bond," and without any allegation of its value or any excuse for want of greater particularity, is fatally defective. State *v.* Segermond, 40 Kan. 107.

If an indictment for robbery gives as a reason for insufficiently describing the property that a more particular description is unknown, this covers the omission. Territory *v.* Bell, 5 Mont. 562.

An information that charged the feloniously taking from the person of affiant "thirty-five dollars, lawful money of the United States, a more particular description of which said money is unknown to this affiant," and the proof showed that three ten dollar bills and five dollars in silver were taken, *held*, to be no variance.

1. Com. *v.* Clifford, 8 Cush. (Mass.) 215; Smedly *v.* State, 30 Tex. 214; People *v.* Vice, 21 Cal. 344; Higgins *v.* State (Tex. App. 1892), 19 S. W. Rep. 503.

The property may be laid as belonging, either to the actual owner or the person robbed. Brooks *v.* People, 49 N. Y. 436; 10 Am. Rep. 398.

An information for robbery which charges that the property taken was in the possession and was taken from the person of A, sufficiently charges that it belonged to A, and that it was taken from him by the defendant. People *v.* Hicks, 66 Cal. 103.

An indictment for robbery is not bad because it charges that the property was forcibly and violently taken from one person and against his will, and that another was the owner of it, though it fails to aver that it was taken without the consent or against the will of the owner, and also fails to aver the character of the possession of the person from whom it was taken. People *v.* Shuler, 28 Cal. 490.

An indictment for robbery which fails to aver that the property taken was the property of some person other than the defendant is fatally defective. People *v.* Vice, 21 Cal. 344.

But not so in *Oregon*, by statute. State *v.* Dilley, 15 Oregon 70.

2. When the information alleges that the robbery was "accomplished by means of force and fear," an allegation that it was accomplished "against the will" of the person robbed is unnecessary. People *v.* Riley, 75 Cal. 98.

An indictment charging that the accused did willfully and feloniously, by force and violence, rob, etc., is sufficient, without the additional words, "against his will." State *v.* Patterson, 42 La. Ann. 934. See also Acker *v.* Com., 94 Pa. St. 284. But, to the contrary, see Kit *v.* State, 11 Humph. (Tenn.) 167.

3. In *Pennsylvania*, in an indictment for robbery, it is not necessary that all the circumstances which enter into the definition of robbery at common law, should be particularly averred in the indictment. If the word "rob" is used, it includes all these circumstances, and it is not necessary to aver further that the property was taken "from his body and against his will." Acker *v.* Com., 94 Pa. St. 284.

But in State *v.* Leighton, 56 Iowa 595, it was held that a charge in an indictment for robbery, that the defendant did, with force, etc., steal, take and carry away from another certain property, is not equivalent to charging that it was taken from his person, and is insufficient.

So also in Kit *v.* State, 11 Humph. (Tenn.) 167, it was held that an indictment for robbery which alleges that the "defendant made an assault upon A, and put him in fear of his life, and did take, steal and carry away feloniously the money of said A," is insufficient because it does not state that the property was taken from the person of

6. Force or Fear.—As robbery may be committed either by force or intimidation, it is sufficient to charge it in either form.[1]

7. Animus Furandi.—It must be alleged that the taking was felonious.[2]

8. Value.—The indictment need not specify the value of the thing taken.[3]

9. Included Offenses.—Since robbery includes larceny, an indictment for robbery embraces also the charge of larceny,[4] and if the aggravating matter essential to the crime of robbery be not proved, the defendant may be convicted of larceny, if the stealing be properly alleged;[5]

A, and against his will, which is an essential averment.

1. Young *v.* State, 50 Ark. 501. If the indictment allege the assault and violence, it need not allege the putting in fear, and *vice versa.* Hammond *v.* State, 3 Coldw. (Tenn.) 129.

In an indictment for robbery, an allegation of force and violence is sufficient without alleging that the party robbed was put in fear. Com. *v.* Humphries, 7 Mass. 242; State *v.* Cowan, 7 Ired. (N. Car.) 239; Rex *v.* Pelfryman, 2 East P. C. 783.

In an indictment for robbery it is sufficient to allege that the taking was done by violence without alleging intimidation. Clary *v.* State, 33 Ark. 561.

It is not essential to the validity of an indictment for robbery, under the statute of *Iowa*, that it should in express terms charge an assault. State *v.* Brewer, 53 Iowa 735.

But in *Texas* the indictment must allege the "putting in fear" as well as the assault or violence. Wilson *v.* State, 3 Tex. App. 63. See, however, Williams *v.* State, 12 Tex. App. 240; Kimble *v.* State, 12 Tex. App. 420.

And in *Illinois*, an indictment for robbery which fails to aver that the goods and chattels were taken from the person of another by the defendant by force and intimidation cannot be sustained as an indictment for robbery. Collins *v.* People, 39 Ill. 233.

2. Rex *v.* Pelfryman, 2 East P. C. 783; Ward *v.* Com., 14 Bush (Ky.) 233.

Under the Code of *Alabama*, in indictments for robbery, if the felonious intent is averred, the taking of the property from the party robbed may be charged to have been "against his will by violence to his person," or "by putting him in such fear as unwillingly to part with the same," in different counts, or in the same count in the alternative. In either case the omission to charge the felonious intent is fatal. Chappell *v.* State, 52 Ala. 359.

But in State *v.* Durbin, 22 La. Ann. 162, it was held that where an information contains all necessary averments to support a charge of robbery, the failure to charge the defendant with any conversion or intent to convert the property to his own use, is not available on a motion in arrest.

Where the indictment charges that the accused feloniously did assault, rob, and steal and take money from the prosecuting witness, it need not charge that the putting in fear was feloniously done. State *v.* Brown, 104 Mo. 365.

3. State *v.* Burke, 73 N. Car. 83.

4. Haley *v.* State, 49 Ark. 147; People *v.* Kennedy, 57 Hun (N. Y.) 532; State *v.* Graff, 66 Iowa 482; Com. *v.* Prewitt, 82 Ky. 240; Sullivan *v.* Com. (Ky. 1887), 5 S. W. Rep. 365.

5. People *v.* Jones, 53 Cal. 58; People *v.* Nelson, 56 Cal. 77; Hickey *v.* State, 23 Ind. 21; State *v.* Jenkins, 36 Mo. 372; Tucker *v.* State, 3 Heisk. (Tenn.) 484.

But, on an indictment for robbery, a charge to find the defendant "guilty or not guilty" is not erroneous, as withdrawing from the jury the right to find the defendant guilty of petit larceny only, if the evidence shows that, if guilty at all he is guilty of robbery. People *v.* O'Brien, 88 Cal. 483.

or of larceny from the person;[1] or of grand larceny;[2] or of assault.[3]

IV. EVIDENCE.—The principles underlying questions of the competency of evidence are stated above. The various cases involving the application of these principles in particular instances, are dealt with in the appended note, so far as they have not been given already.[4]

1. Murphy *v.* People, 3 Hun (N. Y.) 114. In this case the plaintiff in error had been convicted on an indictment for robbery, in the first degree. Upon the trial, testimony was given by the prisoner which, if believed, would have acquitted him of robbery, but would have justified a conviction for a lesser offense. The prisoner's counsel requested the court to charge the jury that they could render a verdict of guilty of larceny from the person, or of assault and battery. The court charged: "It is in your power to find this man guilty of arson in setting fire to the City Hall. You are only to find such a verdict as the facts that have been proven before you will justify." *Held*, that as this was in effect a charge that the jury could not legally find him guilty of the specified offenses, it was erroneous.

2. If the felonious taking of goods of sufficient value be shown. Allen *v.* State, 58 Ala. 98.

Robbery in the first degree does not necessarily include grand larceny. State *v.* Howard, 19 Kan. 507.

3. Reg. *v.* Birch, 2 Cox C. C. 22; Howard *v.* State, 25 Ohio St. 399. See also Hamilton *v.* State, 36 Ind. 280.

A count for larceny as bailee may properly be joined to another for robbery, when they relate to the same act. Com. *v.* Shuette, 130 Pa. St. 272.

4. **Felonious Intent.**—When the fact of the taking has been proved, the felonious intent may be inferred from the appropriation of the property. Jordan *v.* Com., 25 Gratt. (Va.) 948; Long *v.* State, 12 Ga. 293.

It was held permissible to show the *animus furandi* of members of a mob who obtained money by threats of mob violence, by evidence of similar demands for money at other places on the same day by the same mob. Rex *v.* Winkworth, 4 C. & P. 444.

That the thief was disguised at the time of the taking shows *animus furandi*, and so does artifice in concealing the fact that the taker has the property. State *v.* Deal, 64 N. Car. 270.

Variance.—As an indictment for robbery charging the taking of $10 in money, proof of value is not necessary, as money is the measure of value. McCarty *v.* State, 127 Ind. 223.

An indictment for robbery of sundry bank-bills and United States treasury notes, all together "amounting to ninety dollars," and of the value of ninety dollars, cannot be supported by proof of a robbery of U. S. treasury notes alone. Com. *v.* Cahill, 12 Allen (Mass.) 540.

In Taylor *v.* State (Ind. 1891), 29 N. E. Rep. 415, a failure to prove that the money taken was "lawful money of the United States" was held a fatal variance.

As to what constitutes a variance, see State *v.* Fallon (N. Dak. 1892), 52 N. W. Rep. 318.

Competent Evidence.—On the trial of an indictment for robbery, a witness testified that, on the morning after the robbery was committed, an officer told him that "he was onto the fellows that committed the robbery, and if they didn't put up or whack up with him some of the money they had, he would pull the whole party;" that the officer did not give the names of the persons suspected; that on the same day the defendant and several others were at the witness's house, and he repeated to them what the officer had said; that, on the night following, the defendant and two others who had heard him repeat what the officer had said, went to the witness's house, and calling him out, gave him eight dollars, and requested him to give it to the officer "to hush the robbery." *Held*, that this testimony was properly admitted. Young *v.* State, 50 Ark. 501.

At the trial of an indictment for robbing A B of a watch and chain, evidence is admissible that a ring, such as is used to fasten watches to chains, which A B could not distinguish from the ring that was on his watch, and which bore the appearance of having

been wrenched off, was found in the place where he said he was robbed. Com. *v.* Watson, 109 Mass. 354.

A and G having united in the common intention of robbing I, knocked him from a moving train. The train was stopped, and while I was being carried off, A in a short time reappeared alone, and again attempted to rob I. *Held*, that the acts and words of A, whether G was present or not in this second attempt, might be proven on the trial of G, such attempt being in furtherance of the common purpose from which the defendant had not withdrawn. Grogan *v.* State, 63 Miss. 147.

In a prosecution for robbery the testimony of the complaining witness that he told detectives of it immediately after it took place, need not be accompanied by the particulars of his statement. People *v.* Murphy, 56 Mich. 546.

On a trial for robbery, evidence that the defendant gave the witness some burglars' tools and asked him not to bring them against him, saying that if he did it would go hard with him, was held competent. State *v.* Shannon, 33 Mo. 596.

On a trial of robbery when it appears that the crime was committed on the prosecuting witness and another, who met in town and then drove out to the ranch of the witness, and that during the drive the robbery occurred, the witness, after stating when and where he met his companion, can testify that they took a journey on that day, such statement being preliminary to the ensuing examination. Such witness can testify that, after robbing him, the defendant proceeded to rob his companion, as such evidence is part of the *res gestæ* and does not tend to establish another and distinct offense. People *v.* Nelson, 85 Cal. 421.

Where a robbery is committed by several persons acting in concert, it is proper on the separate trial of one of them to show that the plunder was found with one of the others or in the cell where he had been locked up. People *v.* Whitson, 43 Mich. 419.

In a prosecution for robbery the recognition of the assailant is a circumstance bearing on the merits and is not a mere collateral matter. McGuire *v.* People, 44 Mich. 286.

A complaint of robbery made to a policeman immediately after its committal is admissible as part of the *res gestæ*. Driscoll *v.* People, 47 Mich. 413.

On a trial for robbery committed in a certain hotel it is competent for the State to prove by the prosecutor that he hurried down from the hotel and met a policeman on the street, to whom he made complaint that he had been robbed; and, by the policeman, that the prosecutor came down to him on the street, and said that he had been robbed at certain hotel; that a certain named person had taken his money, and that the accused was present. The evidence indicating that all this took place immediately after the criminal act, and as a natural and probable consequence therefrom, it was admissible as part of the *res gestæ*. Lumpkin *v.* State (Ga. 1891), 13 S. E. Rep. 523. See also State *v.* Ah Loi, 5 Nev. 99.

Where one of several defendants jointly indicted for robbery was tried separately, and the prosecuting witness testified that the offense was committed by several persons, certain of whom, besides defendant, he knew, it was error for the court to refuse to permit defendant's counsel to ask the witness who those persons were, since their identification would be to establish a part of the *res gestæ* of the robbery. Morgan *v.* State (Ohio 1891), 27 N. E. Rep. 710.

On the trial of an indictment against A for robbery, there being evidence tending to show a conspiracy between A and B, it may be shown that B was found soon after the robbery with pistols in his possession covered with blood. People *v.* Ward, 77 Cal. 113.

In Farris *v.* State (Tex. 1888), 9 S. W. Rep. 487, it was held that it might be shown that the defendant acted with another person, this being a statutory offense distinguishable from that committed where one robs alone.

For discussions as to the competency of certain evidence offered on the trial of indictments for robbery, see Crumes *v.* State, 28 Tex. App. 516; Moses *v.* State, 88 Ala. 78; Clark *v.* State, 28 Tex. App. 189; Gregg *v.* State (Tex. 1889), 12 S. W. Rep. 732; State *v.* Fallon (N. Dak. 1892), 52 N. W. Rep. 318.

Incompetent Evidence.—In Rex *v.* Lloyd, 4 C. & P. 233, it was held that, on an indictment for robbery, the declaration *in articulo mortis* of the party robbed was not admissible in evidence.

A and B while riding in a gig together, were robbed at the same time,

A of his money, and B of his watch, and violence used towards both. There was an indictment for the robbing of A, and another indictment for the robbing of B. *Held*, that on the trial of the first indictment, evidence might be given of the fact of the loss of the watch by B, and that it was found on one of the prisoners, but that no evidence ought to be given of any violence offered to B by the robbers. Rex *v.* Rooney, 7 C. & P. 517.

The defendant in a trial for robbery was arrested at a place far distant from the scene of its commission, forty-one days thereafter. *Held*, that evidence that, at the time of his arrest, burglars' tools were found on his person was incompetent, it not appearing that like tools were used in aiding the commission of the offense charged. People *v.* Sansome, 84 Cal. 449.

On a trial for robbery the prosecuting witness testified that he was taken by the prisoner to a house of ill-fame and thence into the street where he was robbed. The defense then sought to show that the prisoner was not accustomed to visit such places. *Held*, immaterial. People *v.* Becker, 48 Mich. 43.

In a prosecution for robbery it was shown that after the robbery, the complaining party went into a house in the door of which was a woman standing. *Held*, that the witness could not be cross-examined as to the reputation of this woman as a prostitute, thief and brothel keeper. People *v.* Whitson, 43 Mich. 419.

Although the prosecutor was intoxicated when he was robbed, it was not competent evidence for the accused that three nights previous thereto he was in a saloon intoxicated, and complained that two men were trying to rob him, but that he was prepared for them and only carried two or three dollars in his pocket. This was immaterial to the issue on trial, and was not admissible to discredit the prosecutor, who had testified that he did not go into the saloon and had not made the statements attributed to him. Nor was it admissible because tending to show that he was in a state of drunkenness for several days prior to the alleged robbery, and while in that state was under the delusion that he was being robbed. Lumpkin *v.* State (Ga. 1891), 13 S. E. Rep. 523.

Evidence that the person making the arrest said to some third persons, on the night of the alleged robbery, that the defendant was a "footpad," and that, after the defendant was taken to the police station, the prosecuting witness met him there and said he would prosecute him, was incompetent. State *v.* O'Connor (Mo. 1891), 16 S. W. Rep. 510.

On a trial for robbing a woman at 10:30 o'clock at night, as she was on her way from a depot, carrying a valise, the testimony of a policeman, offered by the defense, that he had seen a colored man in the yard of the railroad at 3 o'clock on the following morning, was irrelevant and properly excluded. Thompson *v.* Com. (Va. 1891), 13 S. E. Rep. 304.

In State *v.* Davidson, 30 Vt. 377, the only evidence against the respondent, who was indicted for highway robbery, was entirely circumstantial, both to prove the *corpus delicti* and the guilt of the respondent. The prosecution was permitted by the court to introduce in evidence on the trial, an inquiry made of the witnesses by the person supposed to have been robbed, directly after the alleged crime must have been committed, to the effect whether the witnesses had seen the respondent, in whose company the person supposed to have been robbed had been a short time previous. *Held*, that this inquiry was entirely incompetent to prove the *corpus delicti*, and should not have been suffered to go to the jury without instructions to that effect.

Testimony of Person Robbed.—The prosecutor may testify to his belief that he would be shot if he did not surrender the property. Dill *v.* State, 6 Tex. App. 113.

In a prosecution for robbery it is competent to show, by the person robbed, that, at the time of the robbery, he was "scared." Long *v.* State, 12 Ga. 293.

Evidence Sufficient to Support Conviction.—Evidence of footmarks is, *per se*, insufficient evidence on which to convict of a robbery. Reg. *v.* Britton, 1 F. & F. 354.

On the trial of an indictment charging the defendant with the crime of robbery in the first degree, it appeared that the captain of a schooner, lying in the East river near the city of New York, heard a noise at midnight on the deck, which, although one of the hatches of the boat had been fastened down, he succeeded in reaching from the cabin, whereupon the defendant, who was on

V. INSTRUCTIONS.—So the rules governing instructions to juries, on trials for robbery, depend on the principles stated above con-

the deck, pointed a pistol at him and ordered him to go below, or he would blow his brains out; thereupon the captain struck him and he fell overboard, and two other men with him jumped into a boat and rowed away after pelting the captain with stones. After they had departed the captain found that certain articles had been taken from the boat. The indictment charged that the defendant, with force and arms, took the articles in question, in presence of the captain, against his will, by means of putting the said captain in fear of some immediate injury to his person. *Held*, that the evidence was sufficient to sustain a conviction of the defendant under such an indictment. People *v.* Glynn, 54 Hun. (N. Y.) 332.

On a trial for robbery the evidence showed that the prosecuting witness, with a ten-dollar bill in his pocket, while going through an alley to the rear of a saloon, was accosted by the defendant, a stranger, who, after requesting the witness to attend a dance, and to "set 'em up," hit him in the face with a brick, knocking him down and rendering him unconscious; that, on regaining consciousness, he got up and went into the street, where, finding an acquaintance, he went back with him to the alley, where he found the defendant, whom, after a time, he accused of being his assailant. The witness went to the mayor's office and then back to the saloon, where his wounds were dressed, at which time he discovered that his pocket was cut and his money missing. *Held*, while the evidence was weak in some particulars, the court, on appeal, would not disturb the judgment of conviction. M'Carty *v.* State, 127 Ind. 223.

On a trial for robbery, the commission of the crime at night, by a masked man, was clearly proved, and two witnesses who were present at the time, identified the defendant as the robber, recognizing him by his voice. They were corroborated by the testimony of a deceased witness, given at the preliminary examination, and by evidence showing that the defendant left his room, about two miles from the place of the robbery, about 10 o'clock of the night when the crime was committed. The only defense was an alibi, which was not clearly proved. *Held*, the evidence justified conviction. Ogden *v.* People (Ill. 1890), 25 N. E. Rep. 755.

At a trial for robbery the defendant was identified by the robbed man, who had known him for years, and by another witness. Several witnesses for the defense testified that the defendant was in another part of town when the robbery occurred. *Held*, that a judgment of conviction should not be rendered as contrary to the evidence. State *v.* Sepult (Iowa 1890), 46 N. W. Rep. 748.

In State *v.* Bradburn, 104 N. Car. 881, it appeared that the defendant and another person enticed A into the woods, knocked him down, and took his money, and that the defendant then proposed to kill A for the purpose of concealing the crime. It was held that a conviction was justified.

See, generally, for evidence held sufficient to support a conviction, People *v.* McElroy, 60 Hun (N. Y.) 577; People *v.* Barry, 90 Cal. 41; People *v.* Lum Yit, 83 Cal. 130.

For evidence held sufficient to justify a verdict of guilty of attempt to rob, see People *v.* O'Hara, 51 Hun (N. Y.) 640.

For discussions as to the sufficiency of certain evidence to support a conviction, see Wheeler *v.* Com., 86 Va. 658; State *v.* Sullivan, 9 Mont. 174.

Miscellaneous Matters of Evidence.—In People *v.* Massett, 55 Hun (N. Y.) 606, it was held that robbery in the third degree was not shown by evidence of robbery committed by force and violence, the statute making a distinction.

The force and intimidation which under the Ga. Code 4389 are essential elements at the time of robbery, are not shown by evidence that the defendant snatched money from A and passed it to a confederate who carried it off. Doyle *v.* State, 77 Ga. 538.

For evidence requiring a verdict of acquittal of one indicted for the robbery of money from the person, see People *v.* O'Neill, 51 Hun (N. Y.) 640.

For evidence such as to justify the court in refusing to direct an equittal, see Hess *v.* Com. (Ky. 1887), 5 S. W. Rep. 751.

See for discussions on general questions of evidence, State *v.* McAndrews, 15 R. I. 30; State *v.* Roach (Mont. 1891), 28 Pac. Rep. 260.

cerning the elements of the crime. Miscellaneous applications of these rules will be seen in the note.[1]

ROGATORY (LETTERS).—See LETTERS ROGATORY, vol. 13, p. 266.

ROGUE—(*Compare* VAGRANT).—A French word, which in that language signifies proud, arrogant. In some of the ancient *English* statutes it means an idle, sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants.[2]

ROLL—(See also RECORDS).— 1. A schedule of parchment which may be turned up with the hand in the form of a pipe or tube.[3]

2. The record of a court or public office.[4]

ROLLING STOCK (See also CHATTEL MORTGAGES, vol. 3, p. 183; FRANCHISES, vol. 8, p. 634; RAILROADS, vol. 19, p. 882; RAILROAD SECURITIES, vol. 19, p. 716; REAL PROPERTY.) embraces the movable property belonging to a railroad. More particularly such property as in the ordinary operation of the road is taken from one part of the line to another, such as cars, locomotives, etc.[5]

1. Instructions.—In Woods *v.* State, (Miss. 1889), 6 So. Rep. 207, an instruction which omitted to charge concerning intent was held erroneous.

In McIntire *v.* Com. (Ky. 1887), 4 S. W. Rep. 1, instructions were held sufficient, although they did not state specifically how the person robbed must be put in fear.

In Com. *v.* White, 133 Pa. St. 182, an instruction which omitted, in defining the crime of robbery, to speak of the felonious intent was held bad.

See, generally, for instructions held correct, Brown *v.* State (Neb. 1892), 51 N. W. Rep. 1028; Barnard *v.* State (Ala. 1889), 6 So. Rep. 752; for instructions held insufficient, see Com. *v.* White, 133 Pa. St. 182; State *v.* Sullivan, 9 Mont. 174.

Authorities.—Wharton on Criminal Law; Bishop on Criminal Law; Harris on Criminal Law; Russell on Crimes and Misdemeanors; Hale, Pleas of the Crown; East, Pleas of the Crown.

2. Bouv. L. Dict.

Libel and Slander.—To say to one "thou art a traitorly rogue" has been held to be actionable slander in *England.* Brunt *v.* Spencer, 2 Keble 47. But in the *United States* the word is generally not actionable, *per se*, unless there is some local statute against "rogues." LIBEL AND SLANDER, vol. 13, p. 334; Bouv. L. Dict.

3. Jacob's L. Dict. *followed* in Colman *v.* Shattuck, 2 Hun (N. Y.) 502; *affirmed* 62 N. Y. 348.

4. Judgment Roll.—See RECORDS.

5. Ohio, etc., R. Co. *v.* Weber, 96 Ill. 448; 5 Am. & Eng. R. Cas. 101.

Rolling Stock is Personalty.—"Where the question has been directly presented, whether the rolling stock of a railroad, included in a mortgage of its roadbed and franchises, is real or personal property, the great weight of authority is in favor of its being considered as personalty. In this State the point was directly decided by the supreme court in State Treasurer *v.* S. & E. R. Co., 4 Dutch. (N. J.) 21, where it was held that the phrase, 'road and equipments,' in a railroad charter, did not include its rolling stock; and, in the opinion of Chief Justice Green, engines and cars were declared to be no more appendages of a railroad than wagons and carriages were appendages of a highway—both were equally essential to the enjoyment of the road—neither constituted any part of it. Furthermore, the third section of the act of March 24th, 1869, which is now the thirty-eighth section of the act concerning mortgages (Rev. p. 709), contains a plain legislative recognition of the rolling stock of railroads as chattels—to be considered as such when covered by mortgage." Williamson *v.* New Jersey, etc., R. Co., 29 N. J. Eq. 327.

ROOM—(See also BURGLARY, vol. 2, p. 659; LODGINGS AND APARTMENTS, vol. 13, p. 1003; TENEMENTS).—See note 1.

ROOTS.—See note 2.

ROUND.—See note 3.

ROUT—(See also AFFRAY, vol. 1, p. 315; RIOT; UNLAWFUL ASSEMBLY).—A rout is a disturbance of the peace by three or more persons, who, having assembled together unlawfully, with an intention to do that which, if done, would make them rioters, make, toward the execution of their purpose, an advance or motion which, nevertheless, falls short of execution.[4]

ROUTE—(See also RAILROADS).—A way used for going from one place to another. And, corresponding with its defined mean-

1. Room and Floor. — "The words 'first floor' (in a lease) define the lower and upper boundaries of this (a tenement); but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from the word 'room.' 'Floor' means a section of the building between horizontal planes. The words 'in building' show that the section is of the whole building and not of a part of it. The word 'room' includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside lateral walls, at least, when they constitute the walls of another room, as clearly as the words 'first floor' exclude the flooring of the story above it." Lowell *v.* Strahan, 145 Mass. 8; 1 Am. St. Rep. 425. In that case the lessee of "the first floor in a building" permitted a third person to place a sign upon the outside wall. It was held that his lease included the outside wall.

A Room Is Real Property.—So held in White *v.* White, 16 N. J. L. 202. In that case the testator ordered that his wife should have one room in his dwelling-house. This was held to be a devise of real property so as to bar the wife's right of dower, she neglecting to decline the devise within six months after probate, as provided by the *New Jersey* statute.

In Insurance Policy.—In his application for an insurance policy upon a manufactory, the assured affirmed that there were casks of water in each "room." It was held that parol evidence was admissible to show that in the general use of language among manufacturers, the whole of a loft or story appropriated to a particular department was called "one room." although the same was divided by partitions with doors. Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192.

2. In an Insurance Policy. — See MARINE INSURANCE, vol. 14, p. 330.

3. Round.—A grant of land was described in a patent as extending four English miles "round" five great plains, which were named. It was held that this did not necessarily imply that the boundaries of the grant were circular. The court by Thompson, J., said: "This term 'round' may, however, grammatically as well as in common parlance, be satisfied by giving land on every side of the plains, let the exterior lines be either circular or straight." Jackson *v.* Reeves, 3 Cai. (N. Y.) 298. See generally, BOUNDARIES, vol. 2, p. 495.

4. 4 Bl. Comm. 140; Hawk. Pl. Cr., ch. 65, § 14. Unlawful assemblies, routs, and riots are three allied disturbances of the public peace. If the unlawful assembly moves forward toward the execution of its design it is a rout; an actual execution of the design is a riot. Hawk. Pl. Cr., ch. 65, § 9. In a *South Carolina* case (State *v.* Sumner, 2 Spears (S. Car.) 599), where the indictment charged a riot and the evidence was that two of the defendants were about to engage in a prize fight, for which all preparations had been made, the third defendant being a second, it was held that the assembly with a common intent to commit a breach of the peace being shown, and nothing but blows being necessary to

ing, its common acceptation excludes terminal points and makes it dependent on them.[1]

ROYALTIES.—(See also LICENSE (PATENT LAW), vol. 13, p. 571; PATENTS, vol. 18, p. 138; MINES AND MINING CLAIMS, vol. 15, p. 499).—In *English* law, regalities, prerogatives of the king, etc.[2] Sums paid to the lessor of a mine or the grantor of a patent by the lessee or grantee, proportionate to the output of the mine or the number of patented articles manufactured.[3]

Also a certain sum for each volume sold stipulated for by the author of a copyrighted book in return for a grant of the copyright or of the right to publish.

RUBBISH.—See note 4.

RUDELY.—In a rude manner; coarsely; uncivilly; violently.[5]

RULE.—1. *v.* This verb has two significations: *a.* To command or require by a rule of court; as to rule the sheriff to return the writ; to rule the defendant to plead. *b.* To settle or decide a point of law arising upon a trial at *nisi prius;* and when it is said of a judge presiding at such trial that he "ruled" so and so, it is meant that he laid down, settled, or decided such and such to be the law.[6]

2. *n. a.* A rule is that which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things.[7]

b. A regulation made by a court of justice or public office with reference to the conduct of business therein.[8]

constitute the offense of riot, the case was one of rout, and that a general verdict of guilty was sufficient.

1. Attorney-Gen'l *v.* West Wisconsin R. Co., 36 Wis. 494; RAILROADS, vol. 19, p. 829.

Most Direct Route.—See MOST DIRECT ROUTE, vol. 15, p. 886.

2. Attorney-Gen'l *v.* Mercer, 8 App. Cas. 778.

3. Royalty is a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind—that is, of part of the produce of the exercise of the right. Van Mining Co. *v.* Overseers, 1 Ex. Div. 310.

4. As used in an *English* statute "rubbish" was held to be things which have become valueless to the owner and the property in which he has abandoned. Filbey *v.* Combe, 2 M. & W. 677.

5. State *v.* Lawrence, 19 Neb. 307.

6. Black's L. Dict.

7. Webst. Dict. *followed* in South Florida R. Co. *v.* Rhoads, 25 Fla. 40.

8. Sweet L. Dict.

Rules of Court—(See also COURTS, vol. 4, p. 450).—A rule of court means uniformity—a regulation in practice applying alike to all suitors, established and fixed, as much so as a statute itself, and known to all litigants and attorneys. Spangler *v.* Atchison, etc., R. Co., 42 Fed. Rep. 306.

Rules of court are understood to be orders made by a court having competent jurisdiction. They are either general or special; the former are the laws by which the practice of a court is governed, the latter are special orders made in particular cases. Owens *v.* Ranstead, 22 Ill. 173. See also Deming *v.* Foster, 42 N. H. 178; Dougherty *v.* Thayer, 78 Pa. St. 172.

The construction of its own rules by a court is generally conclusive. Nevin *v.* Morrison (Pa. 1889), 18 Atl. Rep. 636; Coleman *v.* Nantz, 63 Pa. St. 178.

c. An order or direction of a court made in an action or other proceeding; usually made at the instance of one party to an action, and directed to the opposite party or to a ministerial officer commanding him to do some act, or to show cause why some act should not be done. Such rules are generally made incidentally in the trial of a cause, or upon interlocutory proceedings. In this sense the rule is either a rule *nisi* or a rule absolute.

A rule *nisi*, or a rule to show cause, commands the party to show cause why he should not do the act required or why the object of the rule should not be enforced. It is in the form of an order that the relief desired shall be given, unless (*nisi*) sufficient cause is shown against it; and, if sufficient cause is not shown, the rule becomes absolute, final, and imperative.

A rule absolute is opposed to a rule *nisi*. It commands the subject-matter of the rule to be at once enforced, and is not open to argument.

d. "Rule" sometimes means a rule of law. Thus we speak of the Rule against Perpetuities, the Rule in Shelley's Case, etc.[1]

RULE ABSOLUTE.—See RULE.

In support of the proposition that the "rules of court" must not conflict with the constitution or law of the land, see, in addition to cases cited under COURTS, vol. 4, p. 451, Doe *v.* Winn, 5 Pet. (U. S.) 242; Hickernell *v.* First Nat. Bank, 62 Pa. St. 147; Cates *v.* Mack, 6 Colo. 403; State *v.* Posey, 17 La. Ann. 252; 87 Am. Dec. 525; The Hiram, 23 Ct. of Cl. 431.

Rules of court "are but 'a means to accomplish the ends of justice,' and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it." Symons *v.* Brunnell, 80 Cal. 330. See also The St. Lawrence, 1 Black (U. S.) 527.

But a court must not arbitrarily except a particular cause from the operation of a rule without notice to the party affected or his attorney. Maloney *v.* Hunt, 29 Mo. App. 382; Owens *v.* Ranstead, 22 Ill. 173. And in Consolidated, etc., R. Co. *v.* O'Neill, 25 Ill. App. 326, the court by Bailey, J., said: "The rules of court, so long as they remain in force, constitute rules of law regulating the practice in the court by which they are adopted, and while they may be abrogated or modified by the court at its pleasure, so long as they are in force, they should be followed, and litigants and their solicitors are not chargeable with negligence in assuming that such rules will be pursued and enforced."

In fine, a valid rule until abrogated is the law of the court, and cannot be disregarded in a particular case, unless discretion to do so is given by it to the presiding judge. Hughes *v.* Jackson, 12 Md. 450; Wall *v.* Wall, 2 Har. & G. (Md.) 79; Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468; Thompson *v.* Hatch, 3 Pick. (Mass.) 512; Tripp *v.* Brownell, 2 Gray (Mass.) 402; Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89; Walker *v.* Ducros, 18 La. Ann. 703; Ogden *v.* Robertson, 15 N. J. L. 124; Conradi *v.* Conradi, L. R., 1 P. & M. 163.

"It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court." Duncan *v.* U. S., 7 Pet. (U. S.) 451; Fullerton *v.* Bank of U. S., 1 Pet. (U. S.) 604. See also Maloney *v.* Hunt, 29 Mo. App. 383. But there are decisions and *dicta* to the effect that a rule of court cannot rest in parol, but must be entered of record and perhaps published. Owens *v.* Ranstead, 22 Ill. 161; Risher *v.* Thomas, 2 Mo. 98; State *v.* Ensley, 10 Iowa 149.

1. Sweet L. Dict.

RULE-DAYS are days set apart periodically for making rules or orders in the clerk's office in causes pending.[1]

RULE IN SHELLEY'S CASE.—See SHELLEY'S CASE (RULE IN).

RULE NISI.—See RULE.

RULE OF COURSE.—A rule which the officers of a court are authorized to grant as a matter of course upon application, without the intervention of the court. Called also side-bar rules and office rules.

RULES OF COURT.—See COURTS, vol. 4, p. 450; RULE.

RULE OF PROPERTY.—A settled legal principle governing the devolution and ownership of property.

RULE TO SHOW CAUSE—(See also RULE).—A rule *nisi*.

RUMOR.—A popular or general report; a current story passing from one person to another, without any known authority for the truth of it.

Rumor is not in general admissible as evidence, but when the question of its existence and not its truth or falsity is material, then evidence of it may be given.[2]

RUN.—See note 3.

RUNNING ACCOUNT—(See also ACCOUNT, vol. 1, p. 109).—An open account.

RUNNING AT LARGE.—See LARGE, vol. 12, p. 898; IMPOUNDING, vol. 10, p. 192. *Compare* ANIMALS, vol. 1, p. 576; FENCES, vol. 7, p. 889.

RUNNING DAYS.—See DEMURRAGE, vol. 5, pp. 544–5, n.; LAY DAYS, vol. 12, p. 974; LIE, vol. 13, p. 626.

RUNNING SWITCH—(See also CROSSINGS, vol. 4, pp. 935, 936; FLYING SWITCH, vol. 8, p. 73).—A running or flying switch is said to consist either in detaching the portion of the train to be switched off while the cars are in motion, or the locomotive without being coupled, may back up to a car, or a portion of a

1. 4 Minor's Ins. 546.

2. Bouv. L. Dict. See also LIBEL AND SLANDER, vol. 13, pp. 376, 402, 440.

3. A statute provided for payment of damages by any person who should set a fire that should "run upon the land of another." *Held*, not necessary that the fire should run along the ground in a traceable and continuous course, but that its spread in an ordinary mode, through natural causes was within the statute. The court by Ellsworth, J., said: "We should do great violence to the statute were we to hold that it meant more by the word 'run' than pass, spread, or communicate in ordinary modes." Ayer *v.* Starkey, 30 Conn. 304, 307.

Run is equivalent to branch in the sense of a small water-course. Well *v.* Bedford, 2 Bibb (Ky.) 354.

In an Indictment.—Where an indictment charged that defendant did "run" the property out of the State instead of using the statutory word "remove," it was held that this did not render the indictment bad. Williams *v.* State, 27 Tex. App. 258.

train, with considerable speed, and, giving it a parting kick, send it off in a desired direction.[1]

RUNNING WITH THE LAND.—See COVENANT, vol. 4, p. 474, *et seq.*; LANDLORD AND TENANT, vol. 12, p. 730; REAL COVENANTS, vol. 19, p. 997.

RUST.—See BILL OF LADING, vol. 2, p. 236.

SABBATH (see also SUNDAY) and Sunday are used indiscriminately to denote the Christian Sabbath.[2]

SABBATH-BREAKING.—See SUNDAY.

SACRIFICE—(See also GENERAL AVERAGE, vol. 8, p. 1295, n.). —See note 3.

SÆVITIA (See also DIVORCE, vol. 5, p. 790), in the civil and ecclesiastical law, is defined to be personal violence actually inflicted or menaced, and affecting life or health.[4] And to this may be added as constituting *sævitia* of another kind; when the husband has not actually inflicted any bodily injury, yet practices such obscene and revolting indecencies in the family circle, that a modest and pure-minded woman would find such grievances more intolerable to be borne than the most cruel afflictions upon her person.[5]

SAFE CONDUCT.—A passport, *q. v.*

SAFE-DEPOSIT COMPANIES.—See note 6.

1. Baltimore, etc., R. Co. *v.* Kean, 61 Md. 154; 28 Am. & Eng. R. Cas. 586; Chicago, etc., R. Co. *v.* Dignan, 56 Ill. 490; 1 Thomps. Neg. 452.

2. And. L. Dict., *quoting* State *v.* Drake, 64 N. Car. 591. See also INDICTMENT, vol. 10, p. 547.

Sabbath Night.—See NIGHT, vol. 16, p. 708.

3. In Shepherd *v.* Kottgen, L. R., 2 C. P. Div. 589; 21 Moak's Rep. 484, Brett, L. J., said: "The definition of general average has often been discussed, and the incidents necessary to found a claim for contribution have often been enumerated; and it has been established that general average cannot exist without an intentional sacrifice, but the meaning of the word 'sacrifice,' and what is comprehended by it, has never before been thoroughly considered. . . . Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect to which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely loss to the owner, although the rest of the venture had been saved, there is nothing lost to the owner by the act, and, therefore, there is nothing sacrificed—that is to say, there is no sacrifice." And he states the same proposition in another form thus: "If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average." And see Heye *v.* North German Lloyd, 33 Fed. Rep. 63, where this opinion is commented upon approvingly.

4. DIVORCE, vol. 5, p. 790; Hair *v.* Hair, 10 Rich. Eq. (S. Car.) 173; Briggs *v.* Briggs, 24 S. Car. 380; Beebe *v.* Beebe, 10 Iowa 135.

5. Briggs *v.* Briggs, 24 S. Car. 380.

6. **Care Required of Company.**—Where property in the custody of a safe-deposit company is demanded by third persons under color of process, it becomes the duty of the company to ascertain whether the process is such as requires it to surrender the property; if not, it is its duty to refuse and to offer such resistance to the taking, and adopt such measures for reclaiming it if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of

SAFELY.—See note 1.

right to the property by another without legal process. The court said: "The defendant's officers were not bound to resist the execution of the warrant by the employment of force, but the warrant offered no excuse or justification for the removal of property from the defendant's custody that was not described therein, and hence in this case the police had no right to remove any of the plaintiff's property found in the safe, except possibly the United States bonds. As to all the other property, the defendant could have used such means to prevent its removal as would be proper and justifiable in case the same parties attempted to remove it without having any warrant or legal authority whatever. In carrying away property not called for by or described in the warrant the police and other persons assisting them were trespassers, and we think the defendant's officers neglected to make such opposition to the trespass as they could and should have made under all the circumstances. The police could not have properly proceeded to execute the warrant without first exhibiting it, or at least stating its contents; and it must be assumed that they would have done so if requested. There is no proof and no finding that, after the safe was broken open and the tin box found to contain property not mentioned in the warrant, the defendant's officers called the attention of the police to this fact or forbade its removal. Indeed none of the defendant's officers asked to see the warrant, or informed themselves in regard to its contents, or took any means to ascertain whether the contents of the box or any part of it were called for by the process under which the police assumed to take possession of the property and remove the same from the defendant's custody. They made no attempt to notify the plaintiff of what had transpired, although they had her name and address, and she resided not more than three-fourths of a mile distant. They made no attempt to procure a return of the property, which seems to have been delivered to the district attorney, instead of bringing it before the recorder, according to the command of the warrant, to be 'dealt with according to law.' We think that the defendant's officers neglected to exercise in the care and keeping of the property which the plaintiff had confided to their charge that degree of diligence and fidelity to which they were bound by the terms of the contract under which the property was deposited in the defendant's vaults, as well as by the legal relations which they then assumed to the plaintiff. Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263; Jones *v.* Morgan, 90 N. Y. 4.

"It is, no doubt, true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner. Bliven *v.* Hudson River R. Co., 36 N. Y. 403; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Roberts *v.* Stuyvesant Safe Deposit Co., 123 N. Y. 57; 37 Am. & Eng. Corp. Cas. 575.

Power to Act as Trustee.—Safe deposit and trust companies, having statutory power to receive and hold property in trust, can act as trustees in a mortgage, and in a case germane for the purposes of their incorporation. Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 25 Ohio Law Jour. 375.

Co-tenancy in a Safe.—Plaintiffs' testator and defendant were joint lessees of a safe in the vault of a safe-deposit company. Upon the death of plaintiffs' testator the safe was transferred by the company, with the consent of the defendant, to plaintiffs and defendant jointly. The receipt given plaintiffs bore on its face the following statement: "Safe not relinquished until keys are returned." The keys were not returned to the company. At the expiration of the lease, defendant procured privately from the company a renewal of the lease for his own benefit alone, to the exclusion of the defendants. It was held that this renewal inured to the benefit of the plaintiffs as co-tenants with the defendant. Hackett *v.* Patterson, 16 N. Y. Supp. 170. This decision is interesting as an application of doctrines of real property to a safe in the vaults of a safe-deposit company.

1. Safely and Securely.—Where a declaration stated that the defendant agreed to carry the plaintiff and his

SAFE PORT.—See note 1.

SAFETY.—See note 2.

SAID (see also AFORESAID, vol. 1, p. 319) is defined to mean before mentioned; aforesaid. In contracts, pleadings, and other legal documents, it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term "said" or "aforesaid," or by some similar term.[3]

baggage "safely and securely," it was held that the words "safely and securely" meant "safely and securely, regard being had to the relative rights and duties of the parties," that is to say, the words import only an undertaking to use due care. Ross *v.* Hill, 2 C. B. 877; 52 E. C. L. 870.

1. In Charter Party—(See generally CHARTER PARTY, vol. 3, p. 148).

"It seems that a port into which a ship cannot enter when fully laden is not a 'safe port.'" 1 M. & P. 320, n. (f), *citing* General Steam Nav. Co. *v.* Slipper, 11 C. B. N. S. 493; 103 E. C. L. 492. See further Capper *v.* Wallace, L. R., 5 Q. B. Div. 163. And "although the ship can physically get into it (as far as navigation and what may be called the natural incidents are concerned), yet if that would be at the certain risk of confiscation, then the place is not a 'safe port.'" Blackburn, J., Ogden *v.* Graham, 1 B. & S. 773; 101 E. C. L. 772.

2. Safety, Good Safety, etc., in Marine Insurance.—See MARINE INSURANCE, vol. 14, pp. 344, *et seq.*

3. Bouv. L. Dict., *followed* in Brown *v.* State, 28 Tex. App. 379.

See also Lord *v.* Tyler, 14 Pick. (Mass.) 165. DEFENDANT, vol. 5, p. 517.

"Said" Does Not Necessarily Refer to the Next Antecedent.—"'The reference of the word "said" is to be determined, in any given case, by the sense. The relative "same" refers to the next antecedent in the interpretation of a written instrument. The word "said" does so only when the plain meaning requires it. 2 Kent Com. 555'. In Wilkinson *v.* State, 10 Ind. 372, it was held that the word 'said,' in an indictment, will be referred to the next antecedent only when the plain meaning requires it. Mr. Bishop says: 'Chitty goes on: "The word 'aforesaid,' in general, refers to the last antecedent, but not so invariably as the word 'same,' which is more explicit." . . . This is a sort of criticism little indulged in by modern courts. It may be useful, in rare cases; but at this day and, perhaps, always, the various words of reference, of which the relatives and "there" and "said" are specimens, will be referred to any antecedent plainly required by the sense, whether the writer, in expressing it, framed his sentences according to the rules of grammar or not.' 1 Bish. Crim. Pro. (3d ed.), § 512." Brown *v.* State, 28 Tex. App. 379. See also Southern Mut. Ins. Co. *v.* Pike, 34 La. Ann. 829.

There is no invariable rule of construction which refers the word "said" to the last antecedent, if it be at variance with the context of the will so to apply it. Healy *v.* Healy, 9 Ir. Eq. Rep. 418.

In general, however, "said" has reference to the last antecedent, and will be given that construction, unless it would do violence to the context. For example, where a particular defendant is last named in a paragraph of a complaint, and in a succeeding paragraph the words "the said defendant" are used, without other designation, it will be held that the reference is to the defendant last named. Carver *v.* Carver, 97 Ind. 497; Ellis *v.* Horine, 1 A. K. Marsh. (Ky.) 417; Esdaile *v.* Maclean, 15 M. & W. 277; Wegmore *v.* Wegmore, W. N. (72) 93.

Said Forms No Part of a Noun Before Which It is Placed.—A declaration having given a corporation its true name, to wit, "The Trustees of Antipœda Baptist Church," etc., afterwards referred to it as "The said Trustees of the Antepœda Baptist Church," etc. This was claimed to be a misnomer, it being argued that the name was "the trustees," etc., and not "the said trustees." But the court held that the word "said" was not used as a part of the name of the corporation, but as a word of reference to an antecedent name; and that consequently there was no misnomer. Baptist Church *v.* Mulford, 8 N. J. L. 190.

"Said Company."—See COMPANY, vol. 3, p. 366, n.

SAIL (see also MARINE INSURANCE, vol. 14, p. 364) is a technical word, and means "start on a voyage."[1]

SAILOR.—See SEAMEN.

SALABLE.—See note 2.

SALARY—(*Compare* EMOLUMENT, vol. 6, p. 635; FEE, vol. 7, p. 819; WAGES).—Salary is the periodical compensation to men in official and some other situations. The word "salary" is derived from *salarium* which is from the word *sal*, salt, being an article in which the Roman soldiers were paid.[3]

SALE-NOTE—(See also BROKERS, vol. 2, p. 591; FRAUDS (STATUTE OF), vol. 8, p. 714, n.).—A memorandum of the subject and terms of a sale given by a broker to the buyer and to the seller for whom he acts in making the sale. Sale-notes are also called "bought-and-sold notes."

Said Appeal.—Where it was ordered by the court of queen's bench that an inferior court should hear "the said appeal," it was held that the appeal after being materially altered was not "the said appeal," and the court might refuse to hear it. Reg. *v.* Eyre, 7 E. & B. 619.

1. Barker *v.* M'Andrew, 18 C. B. N. S. 759; 114 E. C. L. 758.

2. Salable Underwoods.—"The word salable has not a very precise definite meaning; it may mean when they are in a fit state for sale, referring to the time when they are cut, or it may mean such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel and other purposes of the estate. Rex *v.* Mixfield, 10 East 224. See also Fitzhardinge *v.* Pritchett, L. R., 2 Q. B. 135; Reg. *v.* Narbeth North, 9 A. & E. 815; 36 E. C. L. 296.

3. Cowdin *v.* Huff, 10 Ind. 85.

Salary is a "reward or recompense for services performed, and is usually applied to the reward paid to a public officer for the performance of his official duties." Bouv. L. Dict., *followed* in State *v.* Barnes, 24 Fla. 29.

As to what will constitute a "salary," see Castle *v.* Lawlor, 47 Conn. 345.

Salary and Wages Distinguished.—"Salary" and "wages" are regarded by some authorities as synonymous terms, while others attempt to distinguish them. Thus in Cowdin *v.* Huff, 10 Ind. 85, "salary" is defined as "per annum compensation," and "wages" as "compensation paid, or to be paid, for services by the day, week, etc." And see People *v.* Myers (N. Y. 1890), 42 Alb. L. J. 332, where the authorities are collected and discussed at length, and this distinction maintained.

And so in Thompson *v.* Phillips, 12 Ohio St. 617, it was held, where the constitution provided that "the general assembly in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished," that it was manifest, "from the change of expression in the two clauses of the section, that the word salary was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense of an annual or periodical payment for services, a payment dependent on the time and not on the amount of the services rendered."

But in Com. *v.* Butler, 99 Pa. St. 542, it was expressly held that a *per diem* compensation allowed to members of the legislature by statute, was a "salary." The court by Sharswood, C. J., said: "According to the most approved lexicographers the words 'wages' and 'salary' are synonymous. They both mean one and the same thing: 'A sum of money periodically paid for services rendered.'" And to the same effect State *v.* Barnes, 24 Fla. 29.

Another distinction sometimes made between "wages" and "salary," and one upon which there seems to be less conflict of authority than upon the one just mentioned, is that the recipient of a "salary" has a more or less honorable position, such as that of a magistrate,

SALES (OF PERSONAL PROPERTY).—(See also BILL OF SALE, vol. 2, p. 275; EXCHANGE, vol. 7, p. 115; FRAUDS, STATUTE OF, vol. 8, p. 704; FRADULENT SALES, vol. 8, p. 786; GIFTS, vol. 8, p. 1313; ILLEGAL SALES, vol. 9, p. 923; IMPLIED WARRANTY, vol. 10, p. 85; JUDICIAL SALES, vol. 12, p. 208; PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 590; RESCISSION, vol. 21, p. 24; SHERIFF'S SALES; STOPPAGE IN TRANSITU; VENDOR AND PURCHASER; VENDOR'S LIEN; WAREHOUSES; WARRANTY.)

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cashier, clergyman, public officer, etc., while "wages" are received by laborers and the less skilled mechanics. This distinction is well drawn by Chief Justice Sharswood in Com. *v.* Butler, 99 Pa. St. 542, where he says: "The truth is, and this the lexicographers seem to hold, that if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. A farmer pays his farm hands, in common speech, wages—whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called a salary. An ironmaster pays his workmen wages, his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire and runs his errands, but he compensates his salesman or clerk by a salary. How can it make any difference in what way the compensation is ascertained?" See also People *v.* Remington, 45 Hun (N. Y.) 329; People *v.* Myers (N. Y. 1890), 42 Alb. L. J. 332; Bell *v.* Indian Live-Stock Co. (Tex. 1889), 11 S. W. Rep. 346; McLellan *v.* Young, 54 Ga. 399; 21 Am. Dec. 276; Gordon *v.* Jennings, 9 Q. B. Div. 45.

By an *Alabama* statute the wages of "laborers and employés" are not subject to garnishment or attachment, except for public dues. In South & N. Ala. R. Co. *v.* Falkner, 49 Ala. 115, it was held that the salary of a president of a railroad company was not exempt from garnishment. The court said: "The president of a railroad company cannot be said to be a 'laborer or employé' within the meaning of the law. The term 'wages' indicates inconsiderable pay without excluding 'salary,' which is suggestive of larger compensation for personal services. But its application to laborers and employés certainly conveys the idea of a subordinate occupation, which is not very remunerative, one of not much independent responsibility, but rather subject to immediate supervision."

Assignments. — The "salary" of a public officer cannot be assigned by anticipation, while the "wages" of a laborer, or the "salary" of any private employé or officer may be so assigned. ASSIGNMENTS, vol. 1, p. 828, *et seq.*; PUBLIC OFFICERS.

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1. DEFINITION.—A sale may be defined as a contract, founded on a money consideration, by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer.[1]

1. See Benj. on Sales (4th ed.), § 1; 2 Bl. Com. 446; 2 Kent Com. (12th ed.) 468; Atkinson on Sales, p. 5; Story on Sales, § 1; Howard *v.* Harris, 8 Allen (Mass.) 298; Williamson *v.* Berry, 8 How. (U. S.) 544.

A sale is defined by Blackstone to be a transmutation of property from one man to another in consideration of some price or recompense in value. 2 Bl. Com. 446. See also Madison Ave. Baptist Church *v.* Baptist Church 46 N. Y. 131; 11 Abb. Pr. N. S. (N. Y.) 132.

Benjamin defines a sale as a transfer of the absolute or general property in a thing for a price in money. Benj. on Sales (6th Am. ed.), § 1. See Wittowsky *v.* Wasson, 71 N. Car. 451; Nance *v.* Metcalf, 19 Mo. App. 189.

A contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold. Williamson *v.* Berry, 8 How. (U. S.) 544; Huthmacher *v.* Harris, 38 Pa. St. 491; 80 Am. Dec. 502.

An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. Bouv. L. Dict.; Black's L. Dict.

A transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration.

The essentials of a sale are; first, a mutual agreement;[1] second, competent parties;[2] third, a money consideration;[3] fourth, a transfer of the absolute or general property in the subject of the sale from the seller to the buyer.[4]

II. FORMATION OF CONTRACT—1. At Common Law—*a.* MUTUAL ASSENT—(1) *In General.*—To constitute a valid contract of sale it is essential that the parties thereto mutually assent to the same thing at the same time.[5] Such assent or agreement may

Story on Sales, § 1; Creveling *v.* Wood, 95 Pa. St. 158; Mackaness *v.* Long, 85 Pa. St. 158.

A sale is a present transfer by mutual agreement of the absolute or general title to certain property for a certain price. 2 Schouler on Pers. Prop. (2d ed.), § 200.

By the term sale is meant the transfer of the property in a thing, whether real or personal, for a price in money, and not in goods or other property. Newmark on Sales, § 2.

A sale is a contract for the transfer of property from one person to another for a valuable consideration; and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties. 2 Kent's Com. 468; Schermerhorn *v.* Talman, 14 N. Y. 117 (where various definitions are collected).

See, for specific statutory definitions, *California* Civ. Code, § 1721; Civil Code of *Louisiana*, art. 2439; Sapp *v.* Brown Co., 20 Kan. 243; Black's L. Dict.

Meaning of Sale as Used in Various Connections.—A policy of insurance upon merchandise provided "that in case of any transfer or termination of interest to the assured in the property by sale or otherwise . . . the policy shall be void," and "that in case of any sale, alienation, transfer, or change of title in the property insured . . . such insurance shall be void." It was held that the giving of a chattel mortgage upon the goods without parting with the possession or the right of possession could not avoid the policy. The words sale, alienation or transfer were construed to mean some act which devests the title absolutely. Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Robt. (N. Y.) 55; 1 Abb. Pr., N. S. (N. Y.) 349.

The condemnation of land under eminent domain proceedings operates as a purchase and sale of the land or of the interest authorized to be taken. Vandermulen *v.* Vandermulen, 108 N. Y. 195.

1. Mutual agreement is one of the essentials of every contract. See CONTRACT, vol. 3, p. 823; Benj. on Sales (4th ed.), §§ 1, 38; Gardner *v.* Lane, 12 Allen (Mass.) 39; Potts *v.* Whitehead, 23 N. J. Eq. 514; Thruston *v.* Thornton, 1 Cush. (Mass.) 91; *infra*, this title, *Mutual.*

2. Competent parties are essential to every valid contract. See Benj. on Sales, §§ 1, 5 *et seq.*; Gardner *v.* Lane, 12 Allen (Mass.) 43; CONTRACT, vol. 3, p. 823; *infra*, this title, *Parties.*

3. A money consideration is what distinguishes a sale from an exchange or barter, or from a gift. See *infra*, this title, *Consideration or Price;* Com. *v.* Davis, 12 Bush (Ky.) 241; 2 Kent's Com. 477; Schenck *v.* Saunders, 13 Gray (Mass.) 37.

4. See *infra*, this title, *Subject of the Sale;* Benj. on Sales (4th ed.), §§ 1, 76 *et seq.*; Wittowsky *v.* Wasson, 71 N. Car. 451.

There must be a transfer of property. Where, therefore, property is put up at auction by a master of a ship, as agent of his owners, and bid in by him to prevent a loss, it is, in contemplation of law, no sale of the property. Barker *v.* Marine Ins. Co., 2 Mason (U. S.) 369.

See also, as to the essential characteristics of a sale, Gardner *v.* Lane, 12 Allen (Mass.) 43; Benj. on Sales (4th ed.), § 1.

5. 1 Parsons on Contr. (7th ed.), p. 475; Falls *v.* Gaither, 9 Port. (Ala.) 605; Pollock on Contracts (4th ed.) *2; Bishop on Contracts (enl'g'd ed.), § 313; 4 Minor's Insts. (2d ed.), p. 17; Dickinson *v.* Dodds, 2 Ch. Div. 463; 16 Moak's Rep. 854; Chinnock *v.* Marchioness of Ely, 4 DeG. J. & S. 638; Gardner *v.* Lane, 12 Allen (Mass.) 43; Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514; 63 Am. Dec. 177; Ketchum *v.* Duncan, 96 U. S. 659; Oakman *v.*

Rogers, 120 Mass. 214; Utley *v.* Donaldson, 94 U. S. 47 (mutual assent as necessary to a modification of the contract as to its formation); Holtzman *v.* Millaudon, 18 La. Ann. 29; Pittsburgh, etc., Coal Co. *v.* Slack, 42 La. Ann. 107; Abbott *v.* Shepard, 48 N. H. 14. See Tucker *v.* Woods, 12 Johns. (N. Y.) 190; 7 Am. Dec. 305; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

Certain cases are sometimes cited as saying that this concurrence of minds need not take place at the same instant of time. Falls *v.* Gaither, 9 Port. (Ala.) 605; Sanford *v.* Howard, 29 Ala. 684; 68 Am. Dec. 101. But what is meant is, that a proposal once made is open to acceptance for a reasonable time, or until it is withdrawn, so that a proposal may remain open for some time, although the proposer has ceased to assent to it because a withdrawal does not take effect until its communication.

A request to "Telegraph how much corn you will sell, with lowest cash price," and a reply "Three thousand cases; one dollar five cents; open one week," to which reply was made, "Sold corn; will see you to-morrow," do not constitute a contract of sale. Lincoln *v.* Erie Preserving Co., 132 Mass. 129; Smith *v.* Gowdy, 8 Allen (Mass.) 566.

Where it is doubtful whether there was a mutual assent, equity will not decree specific performance. Carr *v.* Duval, 14 Pet. (U. S.) 83; Huddleston *v.* Briscoe, 11 Ves. 583.

So long as any material conditions of the contract remain to be agreed upon or there is a misunderstanding or dispute concerning any material particulars, there is no contract. Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Utley *v.* Donaldson, 94 U. S. 47; Jones *v.* Pearce, 25 Ark. 545; Lyman *v.* Robinson, 14 Allen (Mass.) 252; Fuller *v.* Bean, 34 N. H. 303; Stone *v.* Peacock, 35 Me. 388; *infra*, this title, *Executed and Executory Contracts.*

Where the bought and sold notes delivered by a broker to the respective parties to a contract of sale of produce, differ in any material point, no contract is effected. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Pettier *v.* Collins, 3 Wend. (N. Y.) 459.

Pretended Sale.—The mutual assent must be real and not pretended. Therefore a mere colorable sale made with the intention that no title shall be transferred, is void and vests no rights whatever in the pretended purchaser that can affect creditors or subsequent *bona fide* purchasers. Lilienthal *v.* U. S., 97 U. S. 237; Cox *v.* Jackson, 6 Allen (Mass.) 108; Bradley *v.* Hale, 8 Allen (Mass.) 59; Dawson *v.* Wetherbee, 16 Gray (Mass.) 123; Billings *v.* Thomas, 114 Mass. 570. Though such a sale may be valid as between the parties. Dyer *v.* Homer, 22 Pick. (Mass.) 253; Harvey *v.* Varney, 98 Mass. 118; Clemens *v.* Clemens, 28 Wis. 637; 9 Am. Rep. 520; Nichols *v.* Patten, 18 Me. 231; 36 Am. Dec. 713; Andrews *v.* Marshall, 43 Me. 274; 48 Me. 26; Findley *v.* Cooley, 1 Blackf. (Ind.) 262; Moore *v.* Meek, 20 Ind. 484; Springer *v.* Drosch, 32 Ind. 486; 2 Am. Rep. 356; Lawton *v.* Gordon, 34 Cal. 36; 91 Am. Dec. 670; Hoeser *v.* Kraeka, 29 Tex. 450; Davis *v.* Ransom, 26 Ill. 105; See FRAUDULENT SALES, vol. 8, p. 856.

Contract Implied Without Any Expression of Will or Intention.—If, where a contract has been made and goods are delivered, but not in accordance with the terms of the contract, the buyer accepts and retains a part of the goods, he is liable for the price of such part, although prior to the delivery there had been no mutual assent to the new contract. Oxendale *v.* Wetherell, 9 B. & C. 386; 17 E. C. L. 401, where the buyer retained 130 bushels of wheat delivered on a contract to supply 200. See Richardson *v.* Dunn, 2 Q. B. 222; 42 E. C. L. 645; Hart *v.* Mills, 15 M. & W. 85. In this country the same principle is sustained by the weight of authority, though some decisions have been adverse to it. See *infra*, this title, *Delivery; Quantity and Quality to be Delivered.*

Sale by Suit. — Another and more clearly defined instance of a sale taking place without the mutual assent of the parties is where, in an action for the wrongful taking or conversion of personal chattels, there is a recovery followed by satisfaction. Then the property vests in the defendant. Adams *v.* Broughton, 2 Stra. 1078; Bishop *v.* Lady Montague, Cro. Eliz. 824; Cooper *v.* Shepard, 3 C. B. 266; 54 E. C. L. 265; Holmes *v.* Wilson, 10 A. & E. 503; 37 E. C. L. 161; Curtis *v.* Groat, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204; Osterhout *v.* Roberts, 8 Cow. (N. Y.) 43; Fox *v.* Prickett, 34 N. J. L. 13; Thayer *v.* Manley, 73 N. Y. 309; Wooley *v.* Carter, 7 N. J. L. 85; 11 Am. Dec. 520.

be express or may be implied from the language or conduct of the parties,[1] and consists properly of the acceptance of an

It is held in some cases, that under such circumstances the judgment of itself passes the title to the property. Buckland *v.* Johnson, 15 C. B. 145; 80 E. C. L. 145; Broome *v.* Wooton, Yelv. 67; White *v.* Philbrick, 5 Me. 147; 17 Am. Dec. 214; Campbell *v.* Phelps, 1 Pick. (Mass.) 61; 11 Am. Dec. 139; Emery *v.* Nelson, 9 S. & R. (Pa.) 12; Fox *v.* Northern Liberties, 3 W. & S. (Pa.) 103; Merrick's Estate, 5 W. & S. (Pa.) 9; Floyd *v.* Browne, 1 Rawle (Pa.) 121; 18 Am. Dec. 602; Marsh *v.* Pier, 4 Rawle (Pa.) 287; Kenyon *v.* Woodruff, 33 Mich. 315; Brady *v.* Whitney, 24 Mich. 154. But the better doctrine, and the one sustained by the weight of authority in this country, is that the title does not pass until satisfaction of the judgment has been given. Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, where Miller, J., said: "In reference to the doctrine that the judgment alone vests the title of the property converted in the defendant, we have seen that it is not sustained by the weight of authority in this country. It is equally incapable of being maintained on principle. The property which was mine has been taken from me by fraud or violence. In order to procure redress I must sue the wrongdoer in a court of law, but instead of getting justice or remedy I am told that by the very act of obtaining judgment the property which before was mine has become that of the man who did the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice. It is said that the judgment represents the price of the property, and as the plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are in the ordinary contract of sale concurrent acts." See Spivey *v.* Morris, 18 Ala. 254; 52 Am. Dec. 224; Goldsmith *v.* Stetson, 39 Ala. 183; Sanderson *v.* Caldwell, 2 Aik. (Vt.) 203; McGee *v.* Overby, 12 Ark. 164; Hepburn *v.* Sewell, 5 Har. & J. (Md.) 211; 9 Am. Dec. 512; Third Nat. Bank *v.* Boyd, 44 Md. 66; 22 Am. Rep. 35; Thomas *v.* Sternheimer, 29 Md. 268; Baltimore Marine Ins. Co. *v.* Dalrymple, 25 Md. 307; Dearth *v.* Spencer, 52 N. H. 213; Smith *v.* Smith, 50 N. H. 212; Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Elliott *v.* Hayden, 104 Mass. 180; Jones *v.* M'Neil, 2 Bailey (S. Car.) 466; Smith *v.* Alexander, 4 Sneed (Tenn.) 482; Barb *v.* Fish, 8 Blackf. (Ind.) 481; Sharp *v.* Gray, 5 B. Mon. (Ky.) 4; Atwater *v.* Tupper, 45 Conn. 144; 29 Am. Rep. 674; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; McReady *v.* Rogers, 1 Neb. 127; 93 Am. Dec. 333; Brinsmead *v.* Harrison, L. R., 6 C. P. 584; Freeman on Judgments, § 237. And further, the judgment, it seems, must be for the full value of the property. Dearth *v.* Spencer, 52 N. H. 213; Baldwin *v.* Bradley, 69 Ill. 32.

1. Assent Need Not be Expressed.—2 Bl. Com. 443; Joyce *v.* Swann, 17 C. B. N. S. 84; 112 E. C. L. 84; ("grumbling assent"); Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19; Kinney *v.* South & N. Ala. R. Co., 82 Ala. 368; State *v.* Duckworth, 1 Winst. (N. Car.) 243; Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246; 29 Am. Rep. 28; Pickrel *v.* Rose, 87 Ill. 263; Street *v.* Chapman, 29 Ind. 142; Bruce *v.* Tolton, 4 Ont. App. 144; Taylor *v.* Jones, 1 C. P. Div. 87; 16 Moak's Rep. 437 (contract implied from acceptance of goods); Brogden *v.* Metropolitan R. Co., L. R., 2 App. Cas. 666; 20 Moak's Rep. 171. *Compare* Thruston *v.* Thornton, 1 Cush. (Mass.) 93. A familiar instance of implied acceptance is seen in auction sales. The fall of the hammer indicates the auctioneer's acceptance of the bid or offer. Payne *v.* Cave, 3 T. R. 148. See AUCTIONS AND AUCTIONEERS, vol. 1, p. 983.

Where the defendant called at the plaintiff's place of business with a certain paper-hanger, examined wall paper and prices, and selected such as he wanted, expressing himself as satisfied with the prices, and gave instructions as to quantity and to deliver it to the paper-hanger, whom he would send for it, which was done the next morning, but after it had been taken to his home and remained there several days he refused to allow it to be used or pay for it, it was held that the selection of the

offer.[1] These rules are not peculiar to the contract of sale, but apply to contracts generally.

(2) *Offer and Acceptance.*—The offer must be distinct;[2] if it contemplates the arrangement of other conditions, it is a mere

paper and its delivery according to the instructions of the defendant to his agent, who accepted and took it away, constituted a completed sale at the stipulated prices. Rickey *v.* Stewart, 45 Minn. 437.

In Orme *v.* Cooper, 1 Ind. App. 449, it appeared that the plaintiff sent goods to defendant for the latter to sell, and subsequently sent him a proposal to sell to him at the fair market value of the goods. The defendant made no reply to the offer, but kept the goods, and it was held that in so doing he presumably accepted the proposition and was liable for the price mentioned therein.

So where one merchant sent goods to another, and the latter, disclaiming to have purchased them, permits a third person to take them and use a portion, although he may afterwards recover the residue from such person and return them to the sender, these are such acts of ownership as will make him liable as the purchaser of the goods. Bartholomae *v.* Paull, 18 W. Va. 771.

1. See CONTRACT, vol. 3, p. 841.

An offer of itself never constitutes a contract; there must always be an acceptance. See Slaymaker *v.* Irwin, 4 Whart. (Pa.) 369; Collins *v.* Baumgardner, 52 Pa. St. 461; McDonald *v.* Bewick, 51 Mich. 79; Lancaster *v.* Elliott, 28 Mo. App. 86; Tucker *v.* Woods, 12 Johns. (N. Y.) 190; 7 Am. Dec. 305; Craig *v.* Harper, 3 Cush. (Mass.) 159; Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224; Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149. See People *v.* Taylor, 2 Mich. 250; Thruston *v.* Thornton, 1 Cush. (Mass.) 91.

Where the defendants wrote to plaintiff offering to sell him a cargo of *good* barley, and the plaintiff replied accepting the offer to sell and saying that they expected "*fine* barley and *full weight*," it appearing that the terms *fine* and *good* had a particular and different meaning and were well known to the trade, the plaintiff was nonsuited on the ground that he had not accepted the defendant's offer of good barley but demanded fine barley. Hutchinson *v.* Bowker, 5 M. & W. 535.

All that passed between a husband and wife in regard to an alleged sale by the former to the latter was an offer to sell on condition that she should pay a note made by him. She did not at any time accept the offer, nor did she subsequently pay the note nor relieve the husband from liability on it. It was held that there was no sale, that the adding of her name to the note, though she thereby became liable upon it, would not be doing what the offer required. Johnson *v.* Jacobs, 42 Minn. 168.

An offer once rejected or revoked is of no effect unless renewed, and a subsequent acceptance creates no new contract. Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149.

2. Thus in Moulton *v.* Kershaw, 59 Wis. 316; 48 Am. Rep. 516, there was a letter to a firm announcing that the writers had a large amount of salt for sale at a special price, the letter concluding, "Shall be pleased to receive your order." The firm replied, "You may ship two thousand barrels of fine salt as offered." It was held that there was no contract; the first letter being not a distinct proposal, but merely an advertisement. So also in Smith *v.* Gowdy, 8 Allen (Mass.) 566. A wrote to B asking what quantity of goods he had on hand and at what price. B replied, "We have on hand about a ton. Our price is 3½ cents." A wrote back, "We will take the rags at the price named." There was no sale, because B's letter was not a distinct proposal. See also, for similar cases, Slaymaker *v.* Irwin, 4 Whart. (Pa.) 369; Beaupré *v.* Pacific, etc., Tel. Co., 18 U. C. Q. B. 60.

See Cheney Bigelow Wire Works *v.* Sorrell, 142 Mass. 442, for a curious mistake in an offer to buy. A sent a postal card to B as follows, "Please send us *pice* of counter screen like draft," upon which was a draft of the screen with measurements. It was held that the offer was unmeaning and the court properly refused to submit it to the jury whether the letters *pice* meant "piece" or "price." The letters meant nothing, and neither the court nor the

proposal to enter into an agreement, and does not become binding upon an acceptance.[1] Until it is accepted it is revocable at the

jury could construe them to mean piece.

Price-lists, Business Circulars, Catalogues, etc.—The question has sometimes arisen as to whether the publication of price-lists or advertisements of goods offered for sale constitutes a technical offer, which, upon acceptance, makes a complete contract. In one case it has been so held. Schenectady Stove Co. *v.* Holbrook, 30 Hun (N. Y.) 86; *affirmed* in 101 N. Y. 45. But the correct rule seems to be that such publications are nothing more than a mere invitation to enter into negotiations, and an acceptance of them cannot of itself create a binding contract. See Moulton *v.* Kershaw, 59 Wis. 316; 48 Am. Rep. 516.

In R. E. Lee Silver Min. Co. *v.* Omaha, etc., Smelting, etc., Co., 16 Colo. 118, a smelting company in writing offered "for the product of the mines" of a mining company a certain price for a given time, and the offer was accepted by the mining company, the writing being signed by the general manager of each company. It was held that here was a contract of sale for the time and at the price named, and that the sale was upon a sufficient consideration.

1. Wardell *v.* Williams, 62 Mich. 50; 4 Am. St. Rep. 814. See also CONTRACT, vol. 3, p. 842.

Thus, where a party wrote to the mayor of a city, "We will take your bonds at par, you to furnish us with written opinions of your city attorney as to the legality of the bonds, etc.," the proposition, being conditioned on an opinion of the city attorney that the bonds were valid, was not properly an offer, and therefore the city was not bound by its acceptance. Coffin *v.* Portland, 43 Fed. Rep. 411.

If a letter, offering to buy goods, contains alternative propositions, the seller has the right to elect which he will accept, and the buyer will be bound by it; and whether (in an action for the price of the goods) the seller elected the one or the other of the propositions may be put in issue by the defendant by his proof, and must be left to the jury. Woolbright *v.* Sneed, 5 Ga. 167.

In answer to a letter from a real estate agent that he had "hit on" a desirable piece of property which could be bought on certain terms, and advising a response by wire if purchase was desired, a telegram sent to such agent, even though in the form of an absolute acceptance, does not complete the contract; the letter is to be regarded as one of advice merely rather than a distinct proposal. Alexander *v.* Western Union Tel. Co., 67 Miss. 386.

In all cases proposals are to receive a reasonable construction. Thus, in Butler *v.* Moses, 43 Ohio St. 166, the proposition to sell goods was sent by letter, which, by mistake, was ambiguous in its terms. Knowing such ambiguity the receiver of the letter, claiming an improbable meaning unreasonably favorable to himself, and not intended by the sender, ordered the goods without notice to the sender, or inquiry of him as to his interpretation of the proposal. It was held that the communications did not constitute a contract, and that the receiver of the goods was liable for their value upon his implied promise to pay.

But if a proposal is susceptible of two constructions and the acceptor fairly and honestly adopts one of them and acts upon it, the proposer cannot waive his obligation by insisting that he intended his proposal to bear another construction. Ireland *v.* Livingston, L. R., 5 H. L. Cas. 395; 2 Moak's Rep. 424.

The complainant and defendant were co-partners, and had been negotiating for the purchase by one or the other of his co-partner's interest in the firm assets and business. During these negotiations, the complainant made a written offer to the defendant to buy or sell for a certain price, the purchaser to assume all company liabilities, and to give sufficient security for their payment, and of the purchase price. On the next day the complainant's offer in writing was accepted by the defendant on the "terms mentioned therein," who afterwards claimed that the letters constituted a complete sale, and refused to have anything more to do with the joint business. It was held that the letters did not constitute a completed sale; that the complainant's offer looked towards further agreements as to security for the purchase price and indemnity for the payment of the firm debts, and was only one of the steps leading to a sale, and contemplated a meeting of the parties, if accepted, and

will of the party making it;[1] and this is so even though he has expressly promised that it shall be open until a specified time, provided such promise is founded on no consideration, in which case it constitutes a mere option and no rights are secured by it until its acceptance.[2] In case of an acceptance by letter, the contract is complete from the moment such letter is deposited in the

a completion of the transaction. Gates *v.* Nelles, 62 Mich. 444.

1. Revocation of Offer.—See Summers *v.* Mills, 21 Tex. 77; Weiden *v.* Woodruff, 38 Mich. 130; Aldine Press *v.* Estes, 75 Mich. 100; Quick *v.* Wheeler, 78 N. Y. 300; Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264; 26 Am. Dec. 344; Johnson *v.* Filkington, 39 Wis. 62; Baker *v.* Holt, 56 Wis. 100; Head *v.* Diggon, 3 M. & R. 97; Great Northern R. Co. *v.* Witham, L. R., 9 C. P. 16; Hochster *v.* Baruch, 5 Daly (N. Y.) 440; Dix *v.* Shaver, 14 Hun (N. Y.) 392; School Directors *v.* Trefethren, 10 Ill. App. 127; National Refining Co. *v.* Miller (S. Dak. 1891), 47 N. W. Rep. 962. See generally AUCTIONS AND AUCTIONEERS, vol. 1, p. 998; CONTRACT, vol. 3, p. 850.

2. The leading case on this point is Cooke *v.* Oxley, 3 T. R. 653. Here the defendant proposed to sell to the plaintiff 266 hogsheads of tobacco at a certain price, and the plaintiff desired the defendant to give him time to agree to or dissent from the proposal until the hour of four in the afternoon; to which the latter agreed. Thereupon the defendant proposed to the plaintiff to sell and deliver the tobacco on the terms aforesaid if the plaintiff would agree to purchase it upon such terms and would give notice thereof to the defendant before the hour of four in the afternoon. Plaintiff averred that he did agree to purchase the same and did give notice thereof to the defendant before the time specified, but that the defendant refused to sell and deliver according to his promise. It was held that the promise made by the defendant was without consideration and not binding upon him. Per Kenyon, C. J.: "Nothing can be clearer than that at the time of entering into the contract the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum*." Per Buller, J.. "It is impossible to support this declaration in any point of view. In order to sustain a promise there must be either a damage to the plaintiff or an advantage to the defendant; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock, but there is no pretense for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with. But it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale or even that the goods were kept till that time."

This decision has met with much unfavorable criticism, both on the part of the text writers and the courts of this country. Story, while admitting the rule as laid down by it, argues that it is not consonant with justice and the agreement of the parties. "The reason which is given, that the offer is without consideration and gratuitous until accepted, does not seem to be well founded. The consideration is the expectation or hope that the offer will be accepted, and this is sufficient legally to support a promise. The agreement is therefore to be looked upon as an engagement by the one party that he will not sell within a certain time on consideration that the other party will consider the matter and not give a refusal at once. Again, the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination and to inquire into the value of the goods offered, and this inconvenience assumed by him is sufficient consideration for the offer." Story on Sales, § 127; see Bell's Inqu., 32 *et seq.* In a note to 2 Kent's Com. p. 477, it is said that "the criticisms which have been made upon Cooke *v.* Oxley, 3 T. R. 653, are sufficient to destroy its authority." And in Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224, it is said that "if the case has not been directly overruled, it has certainly in later cases been entirely disregarded and cannot now be considered as any authority." Notwithstanding the attack made upon the decision the principle has been followed in the later English and American cases with the quali-

post, and neither party can retract though the letter may not reach his correspondent.[1] The revocation, to be operative, must

fication laid down in a succeeding clause of the text, viz., that a retraction must be communicated to the party to whom the offer was made.

It must be remembered that in the declaration in this case there was no allegation that the offer of sale was left open until the time had elapsed, but only that the party proposing had promised to leave it open. Had there been such an allegation the decision might have been different, the court deciding not that the contract would not have been completed if the offer had remained open, but that there was nothing to show that it was open at the time of the acceptance. Benjamin, commenting on the case, says: "The plaintiff's action was contested by the court on two theories: first, that it was for a breach of promise to leave the offer open, or, secondly, that it was for a breach of a contract that became complete by the plaintiff's acceptance of an offer that has actually remained open. On the first theory it was held that the declaration was insufficient because it alleged no consideration for the promise; on the second, that the declaration was insufficient because it did not allege that the defendant had actually left the offer open for an acceptance as he had promised." Benj. on Sales (6th ed.) 67.

Routledge *v.* Grant, 4 Bing. 653; 15 E. C. L. 99, fully sustains the decision. In this case Best, C. J., said that in case of a proposal by one party to take property on certain terms, where six weeks are given on one side to accept the offer, the other has six weeks to retract it; one party cannot be bound without the other, and cites Cooke *v.* Oxley, 3 T. R. 653, as expressly deciding the point. See also Head *v.* Diggon, 3 M. & R. 97; Smith *v.* Hudson, 6 B. & S. 431; 118 E. C. L. 429; Taylor *v.* Wakefield, 6 E. & B. 765; 88 E. C. L. 765; Payne *v.* Cave, 3 T. R. 148 (a case of a bidder at an auction withdrawing his bid before the hammer was down); Great Northern R. Co. *v.* Witham, L. R., 9 C. P. 16.

In Dickinson *v.* Dodds, 2 Ch. Div. 463; 16 Moak's Rep. 854, the owner of certain property signed a document purporting to be an offer to sell it at a fixed price. A postscript was added: "This offer to be left over until Friday 9 A. M." The plaintiff intended to accept the offer, but, thinking that he had until 9 A. M. on Friday to make his acceptance, did not signify it immediately. On Thursday the property was sold to another party. It was held that the plaintiff could not maintain his action, as no contract had been completed between the parties. The document was merely an offer which was revocable at the will of the party making it.

The case of Adams *v.* Lisdell, 1 B. & Ald. 681, has been cited as directly overthrowing the authority of Cooke *v.* Oxley, 3 T. R. 653; but there is really no conflict between the two decisions, as the former case involved a negotiation carried on through the post, as pointed out by Best, C. J., in Routledge *v.* Grant, 4 Bing. 653; 15 E. C. L. 99. Among the American cases in support of Cooke *v.* Oxley, 3 T. R. 653, are Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264; 26 Am. Dec. 344, where A proposed to exchange horses with B and give him a specific amount as difference, which proposition B reserved the privilege of determining upon by a certain day. Before that day A gave notice that he would not conform to the proposed contract, and it was held that no action lay in favor of B to recover the difference agreed upon. Faulkner *v.* Hebard, 26 Vt. 452; Paddock *v.* Davenport, 107 N. Car. 710; Beckwith *v.* Cheever, 21 N. H. 41; School Directors *v.* Trefethren, 10 Ill. App. 127; Larmon *v.* Jordan, 56 Ill. 204. The case of the Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224, although it impugns the authority of Cooke *v.* Oxley, 3 T. R. 653, supports the principle really laid down in that case, viz., that a time offer without consideration is not binding upon the other party and may be withdrawn before acceptance.

An offer to sell property not requiring an acceptance of the proposition to be accompanied with the purchase money, though made through an agent, may be recalled without notice being first given to the person to whom it is made. Falls *v.* Gaither, 9 Port. (Ala.) 605.

If, however, it be under seal, a consideration is conclusively presumed, and the party making it is bound by it until its proper withdrawal. Faulkner *v.* Hebard, 26 Vt. 457; SEAL.

1. Adams *v.* Lidsell, 1 B. & Ald. 681; Potter *v.* Sanders, 6 Hare 1; Dun-

be communicated to the party to whom the offer is made before he has signified his acceptance.[1]

lap *v.* Higgins, 1 H. L. Cas. 381; Household F., etc., Ins. Co. *v.* Grant, L. R., 4 Exch. Div. 216; Duncan *v.* Topham, 8 C. B. 225; 65 E. C. L. 225; Vassar *v.* Camp, 14 Barb. (N. Y.) 341, *affirmed* in 11 N. Y. 441; Mactier *v.* Frith, 6 Wend. (N. Y.) 103; 21 Am. Dec. 262; Brisban *v.* Boyd, 4 Paige (N. Y.) 17; Kempner *v.* Cohn, 47 Ark. 519; 58 Am. Rep. 775; Hutchison *v.* Blakeman, 3 Metc. (Ky.) 80; Chiles *v.* Nelson, 7 Dana (Ky.) 281; Moore *v.* Pierson, 6 Iowa 278; 71 Am. Dec. 409; Stockham *v.* Stockham, 32 Md. 196; Wheat *v.* Cross, 31 Md. 99; 1 Am. Rep. 28; Abbott *v.* Shepard, 48 N. H. 14; Winterport Granite, etc., Co. *v.* Schooner Jasper, 1 Holmes (U. S.) 101. See LETTERS, vol. 13, p. 254.

But see the Scottish case of Dunmore *v.* Alexander, 9 Shaw & Dun. 190, where the letter of acceptance and the letter retracting the acceptance reached the proposed seller at the same time, and it was held that there was no contract.

The same rule applies where the offer and acceptance is by telegraph. Trevor *v.* Wood, 36 N. Y. 307; 93 Am. Dec. 511; Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431; Perry *v.* Mount Hope Iron Co., 15 R. I. 380; 2 Am. St. Rep. 902; Haas *v.* Myers, 111 Ill. 421; 53 Am. Rep. 634, where it was held that if by the terms of the agreement there is something else to be done besides the mere acceptance in order to complete the bargain, as, for example, placing purchase money to the credit of the vendor, the mere acceptance by posting a letter or sending a telegram is not sufficient.

Where defendants proposed to the plaintiffs by letter as follows, "We will engage to furnish you a boat load of flour the last of next week at $4.75 f. o. b.," and this proposition was immediately answered in these words, "We will take the boat load of flour per your proposition of the 30th," it was held that this was a clear and unqualified acceptance by the plaintiffs of the defendants' proposal, and that as soon as the plaintiffs' letter had gone beyond their control the bargain was complete and it became mutually obligatory upon the parties; and, further, that where a letter of acceptance contained an inquiry as to how the purchase money should be remitted, that such inquiry did not qualify the acceptance of the defendants' proposition. Clark *v.* Dales, 20 Barb. (N. Y.) 42.

In Gartner *v.* Hand, 86 Ga. 558, the defendants by letter offered to sell plaintiff certain lumber. The plaintiff replied also by letter offering to buy on certain terms and requesting a reply by cable, which was done, stating the best terms upon which the defendants would sell, and upon receipt thereof the plaintiff cabled back to the effect that they would accept the lumber upon the terms mentioned, and with certain conditions; the defendants replied by cable that the shipment would begin the next week. It was held that the last reply by cable of the defendants was an acceptance and closed the contract, and they could not qualify it by a letter mailed on the same day the telegram was sent.

But if a letter containing an offer requests an answer by return mail and the acceptance is not sent by return mail, the person making the offer may reject it and proceed as if it had never been made. Taylor *v.* Rennie, 35 Barb. (N. Y.) 272. So of an offer by telegram requesting a reply "early to tomorrow" and the acceptance is not received until late in the evening and is not shown to have been dispatched early in the morning. Union Nat. Bank *v.* Miller, 106 N. Car. 347; 19 Am. St. Rep. 538.

And the person offering may make it a condition that his offer shall not be binding upon him until notice of the acceptance is received by him. Fellows *v.* Prentiss, 3 Den. (N. Y.) 520; 45 Am. Dec. 484; Lewis *v.* Browning, 130 Mass. 173. See Maclay *v.* Harvey, 90 Ill. 525; 32 Am. Rep. 35.

1. The Palo Alto, 2 Ware (U. S.) 344, a tacit retraction is not sufficient. Byrne *v.* Van Fienhoven, 6 C. P. Div. 344; Stevenson *v.* McLean, 5 Q. B. Div. 346; 29 Moak's Rep. 341. See Paddock *v.* Davenport, 107 N. Car. 710; Hawkinson *v.* Harmon, 69 Wis. 551.

But in Dickinson *v.* Dodds, 2 Ch. Div. 463; 16 Moak's Rep. 854, it was held that notice *aliunde* that the defendant had agreed to sell the property to a third person was sufficient notice of the retraction of the offer by the defendant. In Anson on Contracts 17, it is said that this case decides that where

The acceptance must be communicated to the party making the offer within a reasonable time,[1] must be uncondi-

the parties are in immediate communication a proposal may be revoked without notice to the person to whom it is made, and cites Cooke *v.* Oxley, 3 T. R. 653; and there may be some ground for this view, since both the cases of Byrne *v.* Van Fienhoven, 5 C. P. Div. 344, and Stevenson *v.* McLean, 5 Q. B. Div. 346; 29 Moak's Rep. 341, arose out of negotiations carried on by correspondence, though it is said in Benj. on Sales (6th ed.), § 41, that "the language then used by the judges, to the effect that 'an uncommunicated revocation is for all practical purposes and in point of law no revocation at all,' is perfectly general, and it is conceived that the rule would equally apply to a case where the parties are in immediate communciation with each other." In this case Mellish, L. J., said that an offer is of course effectually revoked by the death of the party making it, and it seems in such case that the fact of death need not be notified to the other party.

1. Acceptance Must be Communicated.—Acceptance, to be of any effect, must be communicated to the party making the offer. A mere mental assent is not sufficient; the fact that a party intended to accept is of no value where it is not communicated by language or conduct. Brogden *v.* Metropolitan R. Co., L. R., 2 App. Cas. 666; 20 Moak's Rep. 171; Jenness *v.* Mount Hope Iron Co., 53 Me. 23; Trounstine *v.* Sellers, 35 Kan. 447; Beckwith *v.* Cheever, 21 N. H. 41; White *v.* Corlies, 46 N. Y. 467; Emerson *v.* Graff, 29 Pa. St. 358; Borland *v.* Guffey, 1 Grant (Pa.) 394; McDonald *v.* Boeing, 43 Mich. 394; 38 Am. Rep. 199. See CONTRACT, vol. 3, p. 856.

It is even held that an acceptance communicated to a proposer at a place different from that indicated by him is of no effect, although it may be proven that he (the proposer) actually received it. Such an acceptance was a departure from the proposal. Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225.

But there is no sale if the party to whom the offer is made, and to whom time is given to accept, makes preparations to act upon the offer as if accepted without giving notice to the person making it. Thus, where a proposed buyer said he would accept a lot of timber offered him, provided his brother would assist him to pay for it, and the offerer agreed to give him time to decide, but after obtaining the assistance of his brother, he gave no notice to the offerer and the latter sold it to a third party, it was held to be no sale. Beckwith *v.* Cheever, 21 N. H. 41.

Acceptance by Agent.—Notice of acceptance to or by an authorized agent will be a sufficient communication. Trevor *v.* Wood, 36 N. Y. 307; 93 Am. Dec. 511; Mactier *v.* Frith, 6 Wend. (N. Y.) 103; 21 Am. Dec. 262; Booth *v.* Bierce, 40 Barb. (N. Y.) 114. See AGENCY, vol. 1, p. 419.

Compare Craig *v.* Harper, 3 Cush. (Mass.) 159, where there was an offer of the sale of certain books, and a short time afterwards the agent of the party to whom the offer was made demanded a delivery of the books, which was refused, it was held that the proposer might revoke his offer by refusing acceptance, and it was also intimated that the demand by the agent was not an acceptance such as would constitute a contract.

Must be Made Within a Reasonable Time.—The seller's offer must be unequivocally accepted within a reasonable time in order to complete the contract of sale. Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297; Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431; Trounstine *v.* Sellers, 35 Kan. 447; Peru *v.* Turner, 10 Me. 185; Kempner *v.* Cohn, 47 Ark. 519; 58 Am. Rep. 775; Falls *v.* Gaither, 9 Port. (Ala.) 605; Craig *v.* Harper, 3 Cush. (Mass.) 160; Averill *v.* Hedge, 12 Conn. 424; Martin *v.* Black, 21 Ala. 721; Bishop on Contracts (enl'g'd ed.), § 327; Loring *v.* Boston, 7 Met. (Mass.) 409; Stone *v.* Harmon, 31 Minn. 512; Judd *v.* Day, 50 Iowa 247; Emmott *v.* Riddel, 2 F. & F. 142; Trevor *v.* Wood, 36 N. Y. 307; 93 Am. Dec. 511; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Dickinson *v.* Dodds, 2 Ch. Div. 463; 16 Moak's Rep. 854.

What is a reasonable time, may depend upon the facts and circumstances of each case. See REASONABLE TIME, vol. 19, p. 1090; and is a question of law for the court. Craft *v.* Isham, 13 Conn. 41; Averill *v.* Hedge, 12 Conn. 424; in determining which parol evidence of material facts and circumstances known to the parties at the time is admissible. Stone *v.* Harmon, 31 Minn.

tional and unqualified,[1] and must correspond to the terms of

512; 2 Story on Contr. (5th ed.), § 1325; Coates *v.* Sangston, 5 Md. 121; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; see PAROL EVIDENCE, vol. 17, p. 452. See also QUESTIONS OF LAW AND FACT, vol. 19, p. 598.

In the case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, it is presumed that an immediate answer is expected, and an acceptance not within twenty-four hours from the time of receipt is considered not to be within reasonable time, and does not operate to constitute the contract. Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431.

Where it is expressly stated that the offer is open only for a certain time, acceptance must be made within that time, otherwise it is of no effect. Longworth *v.* Mitchell, 26 Ohio St. 334; Curtis *v.* Blair, 26 Miss. 325; 59 Am. Dec. 257; Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224; Potts *v.* Whitehead, 26 N. J. Eq. 55.

In Park *v.* Whitney, 148 Mass. 278, it appeared that the defendant by letter dated May 16, 1884, offered to buy of the plaintiff certain stock "at any time after January 1st, 1886, if at that time" the latter should so desire. It was held that an acceptance of such offer to constitute a sale should have been made by that date or within a reasonable time thereafter, and an acceptance on July 9, 1886, was not within a reasonable time. "The words 'at any time' do not import perpetuity."

1. Acceptance Must be Unconditional. —Appleby *v.* Johnson, L. R., 9 C. P. 158; Crossley *v.* Maycock, L. R., 18 Eq. 180; 8 Moak's Rep. 466; Routledge *v.* Grant, 4 Bing. 653; 15 E. C. L. 99; Hyde *v.* Wrench, 8 Beav. 334; Wortner *v.* Shairp, 4 C. B. 404; 56 E. C. L. 403; Felthouse *v.* Bindley, 11 C. B. N. S. 869; 103 E. C. L. 869; 31 L. J. C. P. 204; Eggleston *v.* Wagner, 46 Mich. 610; Gowing *v.* Knowles, 118 Mass. 232; Maynard *v.* Tabor, 53 Me. 511; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Stotesburg *v.* Massengale, 13 Mo. App. 226; Cartmel *v.* Newton, 79 Ind. 1; Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80; Plant Seed Co. *v.* Hall, 14 Kan. 553; Salomon *v.* Webster, 4 Colo. 353; Northwestern Iron Co. *v.* Meade, 21 Wis. 474; 94 Am. Dec. 557; Carr *v.* Duval, 14 Pet. (U. S.) 77; Snow *v.* Miles, 3 Cliff. (U. S.) 608; Johnson *v.* Stevenson, 26 Mich. 63; Chitty on Contracts (11th ed.), p. 15; Benj. on Sales (4th ed.), §§ 39, 40. See Andrews *v.* Garrett, 6 C. B. N. S. 262; 95 E. C. L. 262. See CONTRACT, vol. 3, p. 852.

In Appelby *v.* Johnson, L. R., 9 C. P. 158; 8 Moak's Rep. 466, the plaintiff, in replying to a proposal by the defendant, went on to stipulate the conditions upon which he would enter into the proposed contract, the defendant replying, "Yours of yesterday embodies the substance of our conversation in terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. I shall, therefore, expect you on Monday." It was held that this correspondence did not establish a contract between the parties.

So, where there was an offer to sell goods on certain terms, bill to be dated December 15, on six months, and buyer said he would accept the offer if the bill would be dated December 31, on six months, there was no proper acceptance, and therefore no contract. Gowing *v.* Knowles, 118 Mass. 232. For a similar case, see Fenno *v.* Weston, 31 Vt. 345.

In Bristol, etc., Aerated Bread Co. *v.* Maggs, 44 Ch. Div. 616, A, by letter, offered to sell his business to B on certain terms, which B accepted by letter. But when a formal memorandum was submitted to him, he added a clause prohibiting A from carrying on a similar business within a certain radius, to which, after some negotiation, A declined to consent. B then offered to complete the contract on the original terms in the letters. It was held that these transactions constituted no complete agreement, and a suit for specific performance could not be sustained.

In response to an offer by plaintiffs to take goods at twenty-four cents, the defendant sent a telegram as follows: "Twenty-five cents or no sale." To this the plaintiffs replied, also by telegram, "Will take them at twenty-five; will send some money on afternoon train." It was held that the words, "Will take them at twenty-five," standing alone, would mean, will take and pay for them immediately, but when there was appended the remainder of the sentence, there was implied, in addition to the indefinite delay of payment, an indefinite

the offer.[1] An acceptance with a condition or qualification delay of taking the hops, and thus the defendant was asked to vary the terms which his proposition imported, to which variance he did not assent. Uhlman *v.* Day, 38 Hun (N. Y.) 298.

An acceptance, in order to bind the parties, must be plain, unequivocal, and unambiguous. Where the plaintiff had certain negotiations with the defendant's agent relative to the sale of property, and finally wrote him a letter in which he does not accept the proposition but instructs him what to do and then adds, "We will fix the writing all satisfactory," such letter was equivocal and ambiguous and there was no binding contract. Goodenow *v.* Barnes, 40 Iowa 561; see Batie *v* Allison, 77 Iowa 314.

Question of Law.—What acts or words constitute an acceptance of a proposal where such acts or words are unequivocal is a question of law for the court. Lancaster *v.* Elliott, 28 Mo. App. 86.

1. Barrow *v.* Ker, 10 La. Ann. 120; Summers *v.* Mills, 21 Tex. 87; Story on Sales, § 136; Potts *v.* Whitehead, 23 N. J. Eq. 512; Tuttle *v.* Love, 7 Johns. (N. Y.) 470; 1 Parsons on Contr. 476–7; Carr *v.* Duval, 14 Pet. (U. S.) 77; Strange *v.* Crowley, 91 Mo. 287; Myers *v.* Trescott, 59 Hun (N. Y.) 395; Myers *v.* Smith, 48 Barb. (N. Y.) 614; Jordan *v.* Norton, 4 M. & W. 155; Felthouse *v.* Bindley, 11 C. B. N. S. 869; 103 E. C. L. 869; Routledge *v.* Grant, 4 Bing. 653; 15 E. C. L. 99; Governor, etc. *v.* Petch, 10 Exch. 610; McIntosh *v.* Brill, 20 Up. Can., C. P. 426; Sawyer *v.* Brossart, 67 Iowa 678; 50 Am. Rep. 371; Eggleston *v.* Wagner, 46 Mich. 610.

"An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand." Potts *v.* Whitehead, 23 N. J. Eq. 512; Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225; Summers *v.* Mills, 21 Tex. 77; Fox *v.* Turner, 1 Ill. App. 153; Huddlestone *v.* Briscoe, 11 Ves. 583.

An offer to sell which requires the payment of money as the condition of acceptance can only be met by the payment of money. Falls *v.* Gaither, 9 Port. (Ala.) 605.

The acceptance must respond to the whole of the offer, and if it be a reply to an offer, accepting some of the terms and rejecting others is no acceptance.

Thus A offered to sell B a quantity of powder of different grades, and also certain caps and fuse, stipulating the prices. B replied accepting the powder on the terms stipulated, but added, "You are too high on your caps and fuse." It was held that B's reply was no acceptance, and that no contract had been formed. Thomas *v.* Greenwood, 69 Mich. 215.

When an offer is made to sell goods at a certain time and place, such offer is not unconditionally accepted as required by an answer which changes the place of delivery, even though all other terms of the offer are complied with. Johnson *v.* Stevenson, 26 Mich. 63.

Sending a Portion Only of Goods Purchased.—Where there is an offer to purchase a specified amount of goods, an acceptance by sending a smaller quantity, or goods of a different character, is not sufficient and does not create a contract. The ownership of the goods remains in the seller. Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Corning *v.* Colt, 5 Wend. (N. Y.) 253; Barton *v.* Kane, 17 Wis. 37; 84 Am. Dec. 728.

But if the smaller amount of goods be accepted the case would come under the rule mentioned in the text—*i. e.*, the qualified acceptance of the original proposal constitutes a new proposal, which, being accepted (implied by retaining the goods sent), creates a contract, and the purchaser acquires an ownership of the goods. See Tiedeman on Sales, § 34, where numerous authorities are cited, though the same reasoning is not adopted by that author. See also Bowker *v.* Hoyt, 18 Pick. (Mass.) 558; Avery *v.* Willson, 81 N. Y. 341; 37 Am. Rep. 503; Hart *v.* Mills, 15 M. & W. 85.

Compare Champlin *v.* Rowley, 13 Wend. (N. Y.) 258; Mead *v.* Degolyer, 16 Wend. (N. Y.) 630; Tipton *v.* Feitner, 20 N. Y. 423; McMillan *v.* Vanderlip, 12 Johns. (N. Y.) 165; 7 Am. Dec. 299; Kein *v.* Tupper, 52 N. Y. 553; 42 How. Pr. (N. Y.) 437; Witherow *v.* Witherow, 16 Ohio 238, where it was held that there can be no recovery for the portion of goods delivered unless good cause can be shown for the non-delivery of the remainder.

annexed does not complete the contract, but constitutes a refusal of the offer[1] and is equivalent to a new proposal, which, on acceptance, may become a valid contract.[2]

Immaterial Variance.—A failure in the acceptance to correspond to the proposal in an immaterial particular will not prevent the completion of the contract. Thus, defendant wrote for ten thousand fire brick "at $24 per thousand, upon the opening of navigation on the Hudson." Plaintiff replied that he would execute the order for such brick "at $24 per thousand, on dock at New York city, upon opening of navigation." As the goods were to arrive from abroad, the reference to delivery on dock created no new proposal, and it did not affect the validity of the acceptance. Brown *v.* Norton, 50 Hun (N. Y.) 248.

Other instances may be seen in Branson *v.* Stammers, 28 W. R. 180; 41 L. T. N. S. 434 (acceptance containing suggestion for drawing up of more formal contract); Phillips *v.* Moor, 71 Me. 78 (hope expressed that buyer will pay a greater price for the hay when hauled); Clive *v.* Beaumont, 1 DeG. & S. 403; Stevenson *v.* McLean, 5 Q. B. Div. 346; 29 Moak's Rep. 341.

In Merriam *v.* Lapsley, 2 McCrary (U. S.) 606, it is held that an acceptance containing a condition, however immaterial, does not complete the contract.

1. Fox *v.* Turner, 1 Ill. App. 153; Nat. Bank *v.* Hall, 101 U. S. 49; Baker *v.* Johnson Co. 37 Iowa 186; Crabtree *v.* St. Paul Opera House Co., 39 Fed. Rep. 746; Cartmel *v.* Newton, 79 Ind. 1; Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149; Merriam *v.* Lapsley, 2 McCrary (U. S.) 606; Baker *v.* Holt, 56 Wis. 200; McCotter *v.* Mayor, etc., of N. Y., 37 N. Y. 325; *aff'g* 35 Barb. (N. Y.) 609; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378; Brecheisen *v.* Coffey, 15 Mo. App. 84; Felthouse *v.* Bindley, 11 C. B. N. S. 868; 103 E. C. L. 868; Fulton Brothers *v.* Furniture Co., 9 Ont. App. 211; Langdellon Contracts, § 18; Tiedeman on Sales, § 34. Thus in Hyde *v.* Wrench, 3 Beav. 334, A offered to sell his land to B for £1,000. B replied, offering him £950, which A rejected; B then accepted the offer at £1,000, but A declined to complete the bargain. It was held that when B made an offer of £950, he virtually refused A's proposal, and could not afterwards take advantage of it. And in Bruce *v.* Pearson, 3 Johns. (N. Y.) 534, it is held that where a person sends an order to a merchant for a particular quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods on shorter credit, there is no sale, and if the goods are lost or destroyed in passage the merchant must bear the loss.

But where the defendant offered a lot of iron at a certain price, the offer to remain open for a certain time, and the plaintiff telegraphed to inquire whether he would accept a less price, it was held that this was not a rejection of the defendant's offer, and the plaintiff having subsequently accepted it before the expiration of the time, the defendant was held bound. Stevenson *v.* McLean, 5 Q. B. Div. 346. See Clark *v.* Dales, 20 Barb. (N. Y.) 42; 29 Moak's Rep. 341. So when the seller expressed a mere hope that the buyer would pay more upon completion of the contract. Phillips *v.* Moor, 7 Me. 78.

In Whiteford *v.* Hitchcock, 74 Mich. 208, it was shown that the plaintiff wrote to the defendant that he would sell him a boat at a named price, but that he would require the purchase money to be secured before delivery of the boat for shipment. In his answer the defendant said that he would secure the purchase money on the delivery of the boat at his place of residence, whereupon the plaintiff telegraphed that he would send it and come himself. It was held that the defendant in his letter agreed to take the boat at the price named by the plaintiff, but he did not propose to secure the payment of the same until it was delivered. In effect he refused the plaintiff's proposition and made him one, and therefore the minds of the parties had not met upon the terms of payment and the contract of sale was not completed.

2. Fox *v.* Turner, 1 Ill. App. 153; Smith *v.* Wetherell, 4 Ill. App. 659; Jenness *v.* Mount Hope Iron Co., 53 Me. 23.

"If a proposition be accompanied with certain conditions or limitations, the acceptance must correspond with it exactly, for if any alteration be suggested, or any exception be made to its exact terms, the provisional acceptance becomes merely a new proposition, which also requires an acceptance." Story on Sales, § 136. See also 1 Parsons on Contr. (7th ed.), p. 400.

(3) *Mistake.*—As mutual assent is necessary to the formation of the contract it follows that an error or mistake of fact in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really agreeing to something different, notwithstanding the apparent mutual assent.[1]

1. 2 Kent Com. 477; Benj. on Sales (6th ed.), § 50; Story on Sales (4th ed.) 148; Davies *v.* Watson, 2 N. & M. 709; Raffles *v.* Wichelhaus, 2 H. & C. 906; Oakman *v.* Rogers, 120 Mass. 214; Gowing *v.* Knowles, 118 Mass. 232; Conner *v.* Henderson, 15 Mass. 319; 8 Am. Dec. 103.

But where the mistake is in relation to a matter wholly collateral, and does not affect the essence of the contract, such contract will not be void. Thus, where A had received into his possession a horse to be sold for B, and wrote to B that the horse had been sick but was doing well and offered a certain price for him and B signified his acceptance by drawing on the purchaser as per agreement, but afterward the latter wrote saying that he did not think the horse was so bad at first, but that it had turned out to be diseased and he would not buy him at any price, it was held that he could not avoid the obligation of the contract because of the mistake. Wheat *v.* Cross, 31 Md. 99; 1 Am. Rep. 28.

And so where the buyer supposes that the article bought will answer a certain purpose, but it fails to do so, he cannot pretend that he did not assent to the bargain. Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bagley, 5 Q. B. 288; 48 E. C. L. 287; Prideaux *v.* Burrett, 1 C. B. N. S. 613; 87 E. C. L. 613.

As to sale being void for want of mutual assent because of mistake as to the existence of the thing sold, see *infra*, this title, *Subject of the Sale*.

See also MISTAKE, vol. 15, p. 625; RESCISSION, vol. 21, p. 53.

There will also be deemed to be no sale when the parties have expressed themselves in language so vague and unintelligible that the court finds it impossible to give any definite meaning to their agreement. So held in Gathing *v.* Lynn, 2 B. & Ad. 232; 22 E. C. L. 63, where by the terms of a contract of sale of a horse the price was to be sixty guineas and "if the horse was lucky to the plaintiff he was to give five pounds more, or the buying of another horse."

Mistake in Subject Matter of Sale.—A mistake as to the subject matter of the contract of sale may be such as to preclude the mutual assent necessary. Sheldon *v.* Capron, 3 R. I. 171; Gardner *v.* Lane, 9 Allen (Mass.) 492; 85 Am. Dec. 779; Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560; Winchester *v.* Howard, 97 Mass. 303; 93 Am. Dec. 93; Hills *v.* Snell, 104 Mass. 173; 6 Am. Rep. 216; Harvey *v.* Harris, 112 Mass. 32; Cutts *v.* Guild, 57 N. Y. 229; Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Ketchum *v.* Catlin, 21 Vt. 191; Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514; 63 Am. Dec. 177; Wheat *v.* Cross, 32 Md. 99; 1 Am. Rep. 28; Sherwood *v.* Walker, 66 Mich. 568; 11 Am. St. Rep. 531; Utley *v.* Donaldson, 94 U. S. 29.

See Chapman *v.* Coles, 12 Gray (Mass.) 141; 71 Am. Dec. 739; see also IMPLIED WARRANTY, vol. 10, p. 85.

In Thornton *v.* Kempster, 5 Taunt. 786, the sale was of ten tons of sound merchantable hemp, but it was intended by the seller to sell St. Petersburg hemp and by the buyer to purchase Rigo Rhine hemp. The broker had made a mistake in describing the hemp to the buyer and the court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject matter of the sale. See Keele *v.* Wheeler, 7 M. & G. 665; 49 E. C. L. 663.

Mistake as to Terms.—Again, the mistake may have been in regard to the terms or price. Greene *v.* Bateman, 2 Woodb. & M. (U. S.) 359; First Nat. Bank *v.* Hall, 101 U. S. 49; Rovegno *v.* Defferari, 40 Cal. 459; Kirk *v.* Wolf Mfg. Co., 118 Ill. 567.

Thus in Phillips *v.* Bistolli, 2 B. & C. 511; 9 E. C. L. 162, the defendant, a foreigner not understanding the English language, was sued for the purchase price, 88 guineas, of some earrings sold at auction, and in his defense alleged that he thought the bid made by him was 48 guineas instead of 88, and the question of fact as to whether the mistake had really been made was left to the jury, as a test of the existence of a contract of sale.

b. PARTIES.—The law relating to the competency of parties to a sale as affected by coverture, infancy, insanity, etc., does not differ from that applicable to other contracts and calls for no

In Rupley *v.* Daggett, 74 Ill. 351, it appeared that the owner of a mare asked $165 for her and the purchaser understood the price asked to be $65 and after taking her home with him refused to pay more. It was held that there was a clear mistake as to the terms and therefore there was no meeting of the minds of the contracting parties, so there could be no sale.

In Hogue *v.* Mackey, 44 Kan. 277, there was a negotiation for the sale of certain property, in which the price was agreed and a partial payment made, the remainder to be paid in instalments. The jury found a special verdict that the seller understood that the instalments were to be paid every thirty days, while the buyer understood that they were to be paid every ninety days. It was held that there had never been any mutual assent, and therefore no contract of sale.

So where the consideration was a promissory note of a certain party and by mutual mistake a note of another party of the same name was given, the contract was set aside for mistake. Parrish *v.* Thurston, 87 Ind. 437.

Mistake as to Identity of Party.—If there is a mistake as to the identity of a party to a sale, it may or may not be void for want of mutual assent. In ordinary cash transactions it is generally immaterial whether a party buys from or sells to one person or another; but if identity is an important element of the sale, as, for instance, in case of sales on credit, and the seller is induced to assent by reason of the buyer's solvency, or where the buyer supposes his seller to be his debtor, and therefore has the right to set off the price, a mistake as to the person dealt with renders the contract void for want of mutual assent. Boulton *v.* Jones, 2 H. & N. 564; *Ex parte* Barnett, 3 Ch. Div. 123; Mitchell *v.* Lapage, Holt 253; Boston Ice Co. *v.* Potter, 123 Mass. 28; Roof *v.* Morrisson, 37 Ill. App. 37; Decan *v.* Shipper, 35 Pa. St. 239; 78 Am. Dec. 334. But see Stoddard *v.* Ham, 129 Mass. 383.

But a person who buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is dealing with his debtor, but is informed before leaving that another person has become the owner of the stock of goods and is selling them on his own account, if he makes no objection at the time, but retains the goods, he cannot afterwards resist an action for the price. Mudge *v.* Oliver, 1 Allen (Mass.) 74.

A party representing himself as connected with a certain firm, contracted with a dealer to furnish so much wool for the firm. He also represented himself to the firm as the son of the dealer who contracted to sell them the wool. The wool arrived at the firm's place of business, was received by the party, and delivered to the firm who paid him for it. The jury found that the sale was not to the party on his own responsibility but as agent for the firm, and it was held that the ownership of the dealer was not divested. Barker *v.* Dinsmore, 72 Pa. St. 427; 13 Am. Rep. 697. See Edmonds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283.

"Where a person passes himself off for another, or falsely represents himself as agent of another for whom he professes to buy, and thus obtains the vendor's assent to a sale and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him. The contracts in cases of this sort are generally held void on the ground of fraud, but they are equally void for mistake, or the absence of the assent necessary to bring them into existence." Benj. on Sales (6th ed.), § 60. See Hardman *v.* Booth, 1 H. & C. 803; Lindsay *v.* Cundy, L. R., 3 App. Cas. 459; Higgins *v.* Burton, 26 L. J. Exch. 342; *Ex parte* Barnett, 3 Ch. Div. 123.

"In cases of this sort the invalidity of the transaction does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important as such when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it . . . But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission. The transaction is void *ab initio*, and fraud does not impart to it against the will of the defrauded party an invalidity that it would not have if the want were due to innocent mistake." Holmes, J., in

special treatment here.[1] The general rule is that no one other than the owner or his lawful representative can make a valid sale.[2] The transfer of negotiable securities constitutes an exception to this rule.[3] In *England* a sale in market overt is said

Rodliff *v.* Dallinger, 141 Mass. 1; 55 Am. Rep. 439.

Omission of Purchaser's Name in an Offer to Buy.—In case of an executory contract of sale where the name of the proposed purchaser is not disclosed in the offer to buy, the seller cannot be bound, since he may defend on the ground that he thought the purchaser was some other person whom he was willing to trust. Whedon *v.* Ames, 28 Mo. App. 243.

See generally on the subject of mistake, MISTAKE, vol. 15, p. 625.

1. See generally CONTRACTS, vol. 3, p. 862; Benj. on Sales (6th ed.), §§ 5–37; Tiedeman on Sales, §§ 16–30; Gardner *v.* Lane, 12 Allen (Mass.) 43. See also DURESS, vol. 6, p. 57; FRAUD, vol. 8, pp. 635 *et seq.*; FRAUDULENT DEBTOR, vol. 8, p. 780; INFANTS, vol. 10, pp. 628 *et seq.*; INSANITY, vol. 11, pp. 132 *et seq.*; INSOLVENCY, vol. 11, p. 208; INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 773.

2. *Nemo dat quod non habet*, and *Nemo plus juris in alium transferre potest quam ipse habet.* See Broom's Leg. Max. (8th ed.) 470; Benj. on Sales (4th ed.), § 6; Whistler *v.* Forster, 14 C. B. N. S. 257; 108 E. C. L. 257; 32 L. J., C. P. 161; Lee *v.* Bayes, 18 C. B. 599; 86 E. C. L. 597; Peer *v.* Humphrey, 2 A. & E. 495; 29 E. C. L. 158 (purchaser of stolen property liable to owner thereof); Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; 48 Am. Dec. 643 (sale of property by bailee); Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Bearce *v.* Bowker, 115 Mass. 132; Bryant *v.* Witcher, 52 N. H. 158 (sheriff's sale of A's property upon an execution against B vests no title in the purchaser); Ventress *v.* Smith, 10 Pet. (U. S.) 176; Prescott *v.* De Forest, 16 Johns. (N. Y.) 159; Smith *v.* Clews, 114 N. Y. 190; 11 Am. St. Rep. 627; McGrew *v.* Browder, 2 Martin (N. S.), (La.) 9; Breckenridge *v.* McAfee, 54 Ind. 141.

The maxim is also stated *qui non habet, ille non dat.* See Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366; 3 Am. Rep. 596.

As to power of an agent to sell the goods of his principal, see AGENCY, vol. 1, p. 331; COMMISSION MERCHANTS, vol. 3, p. 319.

The neglect or refusal of a wholesale dealer to pay the internal revenue tax imposed on him by United States statute, in respect and in proportion to his sales, does not invalidate a sale made by him during the period of his default, or prevent his recovery of the price. Larned *v.* Andrews, 106 Mass. 435; 8 Am. Rep. 346.

3. **Transfer of Negotiable Securities.**—This principle prevails as to money and as to negotiable securities (which circulate as money) because of the incalculable injury to business which must follow an application of the general rule. So that the transfer of a negotiable security to a *bona fide* purchaser for value and without notice vests a perfect title in such purchaser, even though the transferrer had no title whatever. 3 Minor's Insts. 344; Smith's Mer. Law (3d ed.), p. 255; Benj. on Sales, § 15; Crook *v.* Jadis, 5 B. & Ad. 909; 27 E. C. L. 234; Goodman *v.* Harvey, 4 A. & E. 870; 31 E. C. L. 212; Uther *v.* Rich, 10 A. & E. 784; 37 E. C. L. 232; Raphael *v.* Bank of England, 17 C. B. 161; 84 E. C. L. 160; Swift *v.* Tyson, 16 Pet. (U. S.) 1; Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138; Greneaux *v.* Wheeler, 6 Tex. 515; Crosby *v.* Grant, 36 N. A. 273; Mason *v.* Waite, 17 Mass. 563; Spooner *v.* Holmes, 102 Mass. 503; 3 Am. Rep. 491; Wheeler *v.* Guild, 20 Pick. (Mass.) 545; 32 Am. Dec. 231; Seybel *v.* National Currency Bank, 54 N. Y. 288; 13 Am. Rep. 583; Wilson *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 171; *a'ff'd* 120 N. Y. 145; Magee *v.* Badger, 30 Barb. (N. Y.) 246; *a'ff'd* 34 N. Y. 247; Brush *v.* Scribner, 11 Conn. 388; 29 Am. Dec. 30; Helms *v.* Douglass, 81 Mich. 442; Roth *v.* Colvin, 32 Vt. 125.

In Chapman *v.* Cole, 12 Gray (Mass.) 141; 71 Am. Dec. 739, the owner of a gold coin, issued by a private individual, of the value of ten dollars, and current as such in some parts of the country, passed it to another by mistake for a half dollar, and the receiver transferred it to a third person for the same amount. It was held that the original owner might, after demand and a tender of a half dollar, have an action of troyer against the holder.

See generally BILLS AND NOTES,

to constitute an exception, but this doctrine does not obtain in the *United States*.[1] Outside of these exceptions the rule of *caveat emptor* applies, and the real owner of property may recover it from one in possession of it under the sale of one not the owner.[2] It is not always essential to the validity of a sale that the property shall be in the possession of the seller at the time; he may transfer his right and interest though the property be in the adverse possession of a third person.[3] If there is an outstanding lien against the property, the buyer takes subject thereto.[4]

vol. 2, p. 390; NEGOTIABLE INSTRUMENTS, vol. 16, p. 479.

Other Exceptions.—For other modifications of the general rule that no one may make a valid sale of goods except the owner or his lawful representative, see BAILMENT, vol. 2, pp. 46–7; PLEDGE AND COLLATERAL SECURITY, vol. 18, pp. 668, 690, 709; see MASTER OF A VESSEL, vol. 14, pp. 966–969; JUDICIAL SALES, vol. 12, pp. 208 *et seq.*; SHERIFF'S SALES.

1. See Benj. on Sales (6th Am. ed.), § 8, note; Ventrees *v.* Smith, 10 Pet. (U. S.) 176; Towne *v.* Collins, 14 Mass. 500; Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 149; Jones *v.* Nellis, 41 Ill. 482; 89 Am. Dec. 389; MARKET OVERT, vol. 14, p. 458.

2. See *infra*, this title, *Rights of Bona Fide Purchasers; Conditional Sales*.

3. **Sale of Property in Adverse Possession of Another.**—Tome *v.* Dubois, 6 Wall. (U. S.) 548; Shipp *v.* Bowen, 25 Ind. 44; Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Me. 147; 69 Am. Dec. 87; Hall *v.* Robinson, 2 N. Y. 296; McIlvaine *v.* Egerton, 2 Robt. (N. Y.) 422; McKee *v.* Judd, 12 N. Y. 622; 64 A. D. 515; Van Hassell *v.* Borden, 1 Hilt. (N. Y.) 128; Carpenter *v.* Hale, 8 Gray (Mass.) 157; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388; 23 Am. Dec. 688; First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Hubbard *v.* Bliss, 12 Allen (Mass.) 590; Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Harding *v.* Janes, 4 Vt. 462; 1 Parsons on Contr. (7th ed.), p. 523; 3 Minor's Insts., p. 243; Smith's Mer. Law, p. 190; Benj. on Sales (4th ed.), § 6; Newmark on Sales, § 172.

Thus in Brig Sarah Ann, 2 Sumn. (U. S.) 211, the court, by Story, J., said: "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a right of action; but it is the sale of the thing itself, and good to pass the title against every person not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against a wrongdoer." This language is quoted and approved in Tome *v.* Dubois, 6 Wall. (U. S.) 548.

This rule is subject to modification where, by default of the seller or buyer, an innocent purchaser from the holder is defrauded. Pierce *v.* Chipman, 8 Vt. 339.

There are cases, however, which contend that such a sale is but a transfer of a right of action, and in the absence of statutory provision is of no effect, since choses in action are not assignable at common law. Young *v.* Ferguson, 1 Litt. (Ky.) 298; Stogdel *v.* Fugate, 2 A. K. Marsh. (Ky.) 136; M'Goon *v.* Ankeny, 11 Ill. 558; O'Keefe *v.* Kellogg, 15 Ill. 347; Overton *v.* Williston, 31 Pa. St. 160; London *v.* Turner, 11 Leigh (Va.) 403. *Compare* Beach *v.* Derby, 19 Ill. 617.

4. 3 Minor's Inst. 234; Stafford *v.* Whitcomb, 8 Allen (Mass.) 518; Patrick *v.* Meserve, 18 N. H. 300. See EXECUTIONS, vol. 7, p. 143, 151; JUDICIAL SALES, vol. 12, p. 223; CHATTEL MORTGAGES, vol. 3, p. 198; *infra*, this title, *Rights of Bona Fide Purchasers*.

Where an execution has lain dormant in the hands of a sheriff for more than a year, without any actual levy, the sale by the debtor of a specific chattel, for a fair price, and without any fraudulent intent on the part of the purchaser, is valid. Bliss *v.* Ball, 9 Johns. (N. Y.) 132. And if between the time of quashing an execution and issuing a new one the owner sells to the sheriff's keeper in possession, the sale is good. Wellington *v.* Sedgwick, 12 Cal. 469.

An attachment of personal property

c. CONSIDERATION OR PRICE.—A money consideration is an essential element of a sale and constitutes its distinguishing feature.[1] If the consideration is not in money, or its equivalent, but

on mesne process constitutes a mere lien; and the general owner has power to sell the property subject to the lien; such a delivery as he may be able to make, whether actual or symbolical, will be effectual to consummate the contract of sale. Arnold *v.* Brown, 24 Pick. (Mass.) 89; 35 Am. Dec. 296.

See also Wilson *v.* Purcell, 11 Ired. (N. Car.) 502, where a horse was sold and delivered to A, after the vendor had agreed to sell the same horse to B, and had received a part of the purchase-money in accordance with such agreement. It was held that a valid title passed to A.

1. A Money Consideration.—See *supra*, this title, *Definition;* Williamson *v.* Berry, 8 How. (U. S.) 544; Eldridge *v.* Kuehl, 27 Iowa 173; Slayton *v.* McDonald, 73 Me. 50; Kleinpeter *v.* Harrigan, 21 La. Ann. 196; Wolf *v.* Wolf, 12 La. Ann. 529; Schenck *v.* Saunders, 13 Gray (Mass.) 41 ("the distinguishing feature of a sale—a price for the goods or a stipulation by which the price may be fixed"). *Compare* Newmark on Sales, § 60, where it is insisted that a sale is a transfer for a "valuable" consideration.

The rule in the civil law was the same. Insts., lib. III, tit. XXIII, § 1; Benj. on Sales (6th ed.), § 89.

It is not always essential that the price be paid in money; if the price is fixed in money, payment may be made in notes or goods or similar equivalents. Picard *v.* McCormick, 11 Mich. 77, where it was said: "If property be taken at a fixed money price the transfer amounts to a sale whether the price is paid in cash or in goods. Bonnell *v.* Chamberlin, 26 Conn. 492; a case of payment by note; Gunter *v.* Lecky, 30 Ala. 596; Wallace *v.* Agry, 4 Mason (U. S.) 342; South Australian Ins. Co. *v.* Randell, L. R., 3 P. C. 101; Loomis *v.* Wainwright, 21 Vt. 520; Way *v.* Wakefield, 7 Vt. 228; Keiler *v.* Tutt, 31 Mo. 301; Forsyth *v.* Jervis, 1 Stark. 437; Hands *v.* Burton, 9 East 349.

Thus where certain goods were sold to an aggregate amount of $300, in consideration of which the buyer agreed to deliver to the seller on a certain day a certain number of hundredweight of nails at the rate of $5 per hundredweight, the transaction was a purchase of such goods and not an exchange of nails for goods. The price being fixed in money, it might be paid in goods without altering the character of the transaction. Herrick *v.* Carter, 56 Barb. (N. Y.) 41.

Where there is an agreement by one party to exchange his horse for that of another and a certain sum of money in addition, the transaction is a sale and the sum may be recovered in assumpsit on a count for horses sold and delivered. Sheldon *v.* Cox, 3 B. & C. 420; 10 E. C. L. 137; Porter *v.* Talcott, 1 Cow. (N. Y.) 359.

In Massey *v.* State, 74 Ind. 368, the defendant was indicted for the unlawful sale of liquor. It was held that an averment that the defendant did "unlawfully barter and sell" certain intoxicating liquor imported a sale not a barter. The evidence showed that W had in his possession two pool checks which defendant had sold to some one at five cents apiece, which were worth five cents apiece, and were to be taken up in beer. These checks W exchanged for the beer, and it was held that the transaction was not a sale, in that there was no money price. See also Com. *v.* Smith, 102 Mass. 144.

Compare State *v.* Mercer, 32 Iowa 405; Com. *v.* Clark, 14 Gray (Mass.) 367.

In the Roman law, according to Mr. Bell, a sale was not "an immediate transmutation of property but a contract of mutual and personal engagements for the transferrence of the thing on the one hand and the payment of the price on the other without regard to the time of performance on either part, that being left to be regulated by the agreement of the parties, the seller being bound to deliver the thing in property to the buyer at the time agreed on, and the buyer to pay the price in the manner settled between them. The distinction was carefully observed between the direct right of property (*jus in re*) conferred by the delivery, and the indirect right (*jus ad rem*) to demand of a seller delivery of the thing sold. There thus arose out of the contract the double relation of debtor and creditor as to the thing sold, and the price to be paid for it. Corresponding with these relations, two acts were given, both personal and direct, one for the thing sold, the other for the price due,

in goods or chattels, the transaction is an exchange; the distinction between sales and exchanges, however, is of little practical value, and the same general rules of law apply to both.[1] If there is no consideration, the transaction is a gift,[2] but the absence of con-

the claim for the price being absolute on delivery or tender of the thing, and the demand for the thing conditional, provided it had not in the meantime perished without fault of the seller." Bell on Contract of Sale 9; Cunningham *v.* Ashbrook, 20 Mo. 557; Benj. on Sales (6th ed.), § 89; Insts., lib. III, tit. XXIII, § 1.

1. Dowling *v.* McKenney, 124 Mass. 478. See EXCHANGE, vol. 7, p. 115.

A sale differs from a barter or exchange in this, that in the former there is a money price, while in the latter the consideration is not paid in money but in goods or merchandise susceptible of a valuation. Cooper *v.* State, 37 Ark. 418; Com. *v.* Davis, 12 Bush (Ky.) 241; Com. *v.* Clark, 14 Gray (Mass.) 367; Fuller *v.* Duren, 36 Ala. 73; 76 Am. Dec. 318; Coker *v.* State, 91 Ala. 94; Loomis *v.* Wainwright, 21 Vt. 520; Mitchell *v.* Gile, 12 N. H. 390; Lumpkin *v.* Wilson, 5 Heisk. (Tenn.) 555 ("sale" from "barter"); Miller *v.* Grove, 18 Md. 242; Millard *v.* Morse, 32 Pa. St. 506; Howard *v.* Harris, 8 Allen (Mass.) 297.

The definition of "price" displays this distinction: "The consideration in money given for the purchase of a thing." Bouv. L. Dict., *Price;* Pothier, Contrat de Vente, n. 30. See Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131.

In Redfield *v.* Tegg, 38 N. Y. 212, it was held that a real estate broker is entitled to his usual commission for a successful negotiation of the *exchange* of property put in his hands for *sale* when the principal accepts the bargain. See also Speigle *v.* Meredith, 4 Bess. (U. S.) 123; Vail *v.* Strong, 10 Vt. 465, holding that an allegation of sale is not supported by proof of an exchange.

The only practical distinction between a sale and exchange is that where an exchange or barter is agreed upon, if one party omit to deliver the goods stipulated within a reasonable time, no action can be maintained for their money value as in the case of a sale, but it must be for failing to comply with the engagement to deliver. Read *v.* Hutchison, 3 Camp. 353; Harrison *v.* Luke, 14 M. & W. 141; Barbe *v.* Parker, 1 H. Bl. 288; Slayton *v.* McDonald, 73 Me. 50; Mitchell *v.* Gile, 12 N. H. 390. See also Keys *v.* Harwood, 2 C. B. 905; 52 E. C. L. 904, where on the same principle it was held that in case of a contract of service to be performed by A for B, payment to be made in goods, A cannot declare in debt for the value of the service but must sue on the special contract.

In *New York*, one case, Clark *v.* Fairchild, 22 Wend. (N. Y.) 576, opposes this view. Cowen, J., in delivering the opinion, said: "I am inclined to think that though the compensation for the goods or other things which you advance is to be rendered in services or some other specific thing, if the promising to render is in default, you may sue in *indebitatus assumpsit* for the price of the thing advanced."

Again, in *Vermont* the same doctrine was held in an early case, Way *v.* Wakefield, 7 Vt. 223, where Collamer, J., said: "Whenever there are goods sold, work done or money passed, whatever stipulations may have been made about the price, or mode, or time of payment, if the terms have transpired, so that money has become due, the general count may be maintained. And this is sustained in that State by the following cases: Wainwright *v.* Straw, 15 Vt. 215; 40 Am. Dec. 675; Loomis *v.* Wainwright, 21 Vt. 520; Vail *v.* Strong, 10 Vt. 465.

A prohibition of sales has been usually considered to embrace gifts or exchanges as well. Com. *v.* Clark, 14 Gray (Mass.) 367; Howard *v.* Harris, 8 Allen (Mass.) 297; State *v.* Mercer, 32 Iowa 405 (sale of liquor to club members upon presentment of tickets); Rickart *v.* People, 79 Ill. 85 (sale disguised as a gift); Coker *v.* State, 91 Ala. 92; U. S. *v.* Wittig, 2 Law. (U. S.) 466. So delivery and receipt of the articles forbidden to be sold, made as payment for services performed, is a sale within the statute. Mason *v.* Lothrop, 7 Gray (Mass.) 355.

But a different view is taken in some cases. Massey *v.* State, 74 Ind. 368 (liquor paid for in pool checks—not a sale); Stevenson *v.* State, 65 Ind. 409; *Ex parte* Beaty, 21 Tex. App. 426. See also Marmont *v.* State, 48 Ind. 21.

2. Bouv. L. Dict., *Price;* Pothier,

sideration is not to be presumed from the mere fact that none is provided for. In such case the law implies a promise to pay a reasonable price for goods received,[1] and it seems that this

Contrat de Vente, n. 18; Parkinson *v.* State, 14 Md. 184; 74 Am. Dec. 522; Gray *v.* Barton, 55 N.Y. 68; 14 Am. Rep. 181. See GIFTS, vol. 8, pp. 1308 *et seq.*

In Keller *v.* State, 23 Tex. App. 259, it was held that proof of a gift of intoxicating liquor on Sunday does not support a conviction under a statute prohibiting the sale of such liquors. *Compare* however, INTOXICATING LIQUORS, vol. 11, p. 752.

1. Valpy *v.* Gibson, 4 C. B. 837; 56 E. C. L. 836; Acebal *v.* Levy, 10 Bing. 376; 25 E. C. L. 170; Joyce *v.* Swann, 17 C. B. N. S. 100; 112 E. C. L. 101; Hoadly *v.* M'Laine, 10 Bing. 482; 25 E. C. L. 210; McEwen *v.* Morey, 60 Ill. 32 (reasonable price is market price at time and place of delivery); James *v.* Muir, 33 Mich. 223; Lyles *v.* Lyles, 6 Har. & J. (Md.) 273; Fenton *v.* Braden, 2 Cranch (C. C.) 550; Taft *v.* Travis, 136 Mass. 95.

The agreement is to pay the reasonable worth of the articles at the time of the sale, without reference to any subsequent rise in value. Hill *v.* Hill, 1 N. J. L. 261; 1 Am. Dec. 206; Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441; 22 Am. Dec. 82. See also Elmore *v.* Kingscote, 5 B. & C. 583; 12 E. C. L. 327.

What is a reasonable price under such circumstances is a question depending entirely upon the facts in the case and is necessarily for the determination of the jury. Acebal *v.* Levy, 10 Bing. 383; 25 E. C. L. 174. See QUESTIONS OF LAW AND FACT, vol. 19, p. 598. It is usually, though not necessarily, the market price at the time and place of the sale or delivery. Fenton *v.* Braden, 2 Cranch (U. S.) 550; McEwen *v.* Morey, 60 Ill. 32; Acebal *v.* Levy, 10 Bing. 376; 25 E. C. L. 170 ("current price of the day may be highly unreasonable, from accidental circumstances"); Kountz *v.* Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 689, where it was also held that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. See Blydenburgh *v.* Welshe, Baldw. Rep. (Pa.) 331.

The case of Lovejoy *v.* Michels, 88 Mich. 15, was an action for certain knives sold and delivered without any express agreement as to price. It was held on appeal that prices scheduled by an association of all the knife makers in the country, formed for the purpose of keeping up the prices of goods, could not be taken as the market price of goods in such sense as to bind the purchaser in this case, and that he could prove the price thus fixed to be unreasonable.

In Greene *v.* Bateman, 2 Woodb. & M. (U. S.) 359, there was a misunderstanding as to the price, after delivery of the shingles sold. The buyer offered to return them or to pay the price offered. The seller refused and insisted on being paid his own price. The buyer then kept the shingles and sold them. It was held that the seller might recover, as a reasonable price, the proceeds of the sale after deducting a fair compensation to the buyer.

There is no implied contract that the buyer shall pay the seller for any services in relation to the property, rendered previous to the completion of the sale by delivery. Cole *v.* Kerr, 20 Vt. 21.

Evidence as to Reasonable Value Where Price Is in Dispute.—Where there is a dispute between the parties as to the price agreed on, evidence as to the reasonable value of the property is admissible as tending to show which party is right. Bradbury *v.* Dwight, 3 Met. (Mass.) 31; Saunders *v.* Clark, 106 Mass. 331; Upton *v.* Winchester, 106 Mass. 331; Norris *v.* Spofford, 127 Mass. 85; Johnson *v.* Harder, 45 Iowa 677; Hillenbrand *v.* Wittkemper, 79 Ind. 180; Fry *v.* Tilton, 11 Neb. 456; Wickes Bros. *v.* Swift Electric Co., 70 Mich. 322; Bell *v.* Radford, 72 Wis. 402; Kidder *v.* Smith, 34 Vt. 295; Kimball *v.* Locke, 31 Vt. 683; Boyd *v.* Gunnison, 14 W. Va. 1 (competent to show market value within a reasonable time before or after the sale); Gilbert *v.* Manning, 54 Hun (N. Y.) 99. See also Brewer *v.* Housatonic R. Co., 107 Mass. 277; Valpy *v.* Gibson, 4 C. B. 837; 56 E. C. L. 835; Allison *v.* Horning, 22 Ohio St. 138.

But the correctness of this doctrine is denied in the case of Illinois Linen Co. *v.* Hough, 91 Ill. 63. The facts in

implied promise extends to executory as well as to executed contracts of sale.[1]

The price must be real and not nominal,[2] and must either be fixed or susceptible of being ascertained without further negotiations between the parties.[3]

that case were that an article had been sold and delivered under a special contract, in which the price was fixed by the parties; but a conflict of evidence arose as to exactly what that price was. The court by Sheldon, J., said: "The only question arising was, what was that price which was agreed upon? This the jury should have determined upon the weighing of the testimony and passing upon the credibility of the witnesses. Because there was contradictory evidence upon the point, the jury should not have been encouraged, as they were here, by instruction from the court, to decline the more difficult task of a determination upon conflicting testimony of what the contract was and adopt the easier mode of saying what was a reasonable price."

In Norton *v.* Willis, 73 Me. 580, it is said that evidence is admissible to show at what price property has actually been sold as tending to show its market value, and this is the correct rule of law. Warren *v.* Wheeler, 21 Me. 484; Watts *v.* Sawyer, 55 N. H. 38; Hildreth *v.* Fitts, 53 Vt. 684; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Brigham *v.* Evans, 113 Mass. 538; Campbell *v.* Woodworth, 20 N. Y. 499; *reversing* 26 Barb. (N. Y.) 648; Newlan *v.* Dunham, 60 Ill. 233.

Where the price paid for one animal was another animal, it is said that the age, appearance, and qualities of the latter animal and the price for which it sold are competent to be considered by the jury in determining the value of the former. Carr *v.* Moore, 41 N. H. 131.

In Clark *v.* Miller, 4 Wend. (N. Y.) 628, drovers were sued for the price of cattle intrusted to them to be sold. It was held that the jury was warranted in allowing the highest sum, according to the evidence, if the defendant neglected to show the prices for which the cattle were sold.

1. In Acebal *v.* Levy, 10 Bing. 376; 25 E. C. L. 173, Tindall, C. J., said: "Whether in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price by inferring that the parties must have intended to sell and to buy at the reasonable price, may be a question of some difficulty. Undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendants, in order to prevent the injustice of the defendant taking goods without paying for them. But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession or under the control of the seller." In a later case it is distinctly held that such a presumption arises in case of executory contracts of sale. Hoadly *v.* M'Laine, 10 Bing. 482; 25 E. C. L. 208; Valpy *v.* Gibson, 4 C. B. 837; 56 E. C. L. 837; Benj. on Sales (6th ed.), § 85; James *v.* Muir, 33 Mich. 223; See Shealy *v.* Edwards, 73 Ala. 175; 49 Am. Rep. 43.

Does Not Apply in Action for Refusal to Deliver.—The rule of the text does not apply in an action by the buyer for damages for refusal to deliver. In such case the measure of damages is the difference between the contract price and the market value. If the implied contract price, therefore, is the market value, evidently there can be no damages. Trunkey *v.* Hedstrom, 131 Ill. 208.

2. 2 Kent's Com. (13th ed.), p. 477; Bouv. L. Dict., *Price*, Pothier, Contrat de Vente, n. 18; See INADEQUATE CONSIDERATION, vol. 10, pp. 325, *et seq.*

3. The principle has already been laid down that so long as any material part of the agreement remains to be arranged by further negotiation there is no mutual agreement and consequently no contract. Fuller *v.* Bean, 34 N. H. 290; Wittowsky *v.* Wasson, 71 N. Car. 451; McCandlish *v.* Newman, 22 Pa. St. 460; Bigley *v.* Risher, 63 Pa. St. 152; Hutton *v.* Moore, 26 Ark. 382; see *supra*, this title, *Mutual Assent*.

In Callaghan *v.* Myers, 89 Ill. 566, it is said that the fact that the price has not been fixed does not necessarily prevent the title from passing, but is merely a fact to be considered by the jury in

It frequently occurs that the parties agree that the price of goods shall be fixed by valuers appointed by them. In such cases, the price when so fixed is as much a part of the contract as if fixed by the parties themselves.[1] Until, however, the price

determining whether or not the title has passed.

Where there is no provision as to the price or consideration, but the parties rest upon the terms implied in law that a reasonable price will be paid, it seems that the price is sufficiently fixed within the meaning of the rule. See Cunningham *v.* Ashbrook, 20 Mo. 559; Hill *v.* Hill, 1 N. J. L. 261; 1 Am. Dec. 206; Hoadly *v.* M'Laine, 10 Bing. 482; 25 E. C. L. 208; Valpy *v.* Gibson, 4 C. B. 837; 56 E. C. L. 836; McEwen *v.* Morey, 60 Ill. 32.

It is a maxim that *Id certum est, quod certum reddi potest*, so that if the price can be made certain without further negotiation between the parties, it is sufficient. Vroom's Leg. Max. (8th ed.), p. 624; Bouv. L. Dict., *Price*; Fuller *v.* Bean, 34 N. H. 304; Cunningham *v.* Ashbrook, 20 Mo. 553; Gordon *v.* Whitehouse, 18 C. B. 747; 86 E. C. L. 747; McConnell *v.* Hughes, 29 Wis. 537. See Keiler *v.* Tutt, 31 Mo. 301.

All that the law requires is that the contract furnish a criterion for ascertaining the price, leaving nothing in relation thereto for further negotiation between the parties. Story on Sales, § 220.

Thus in Cunningham *v.* Ashbrook, 20 Mo. 553, there was nothing remaining to be done except to weigh the hogs which had been sold. Since this could be done without further intervention of the parties, the contract was considered complete and the property passed to the buyer.

When a horse is sold and delivered to the purchaser "for a reasonable price to be afterwards agreed on," the title at once passes; and the fact that they cannot afterwards agree on a reasonable price makes no difference and does not enable the seller to recover the animal by action. Greene *v.* Lewis, 85 Ala. 221; 7 Am. St. Rep. 42.

In McConnell *v.* Hughes, 29 Wis. 537, it appeared that A bargained and sold to B a certain quantity of wheat at a price ten cents per bushel less than the Milwaukee price should be on any day thereafter which A should name. The wheat was delivered in pursuance of this contract, and was destroyed by fire before A had named the day with reference to which the price should be determined. It was held that the property in the wheat had passed to B and that A, having afterwards named such day, was entitled to the payment of the price fixed. See also Ames *v.* Quimby, 96 U. S. 324 (price to be regulated by price of gold); Lonergan *v.* Stewart, 55 Ill. 44; McBride *v.* Silverthorn, 11 Up. Can., Q. B. 545 (highest market price, whenever seller may demand payment); Rourke *v.* Bullens, 8 Gray (Mass.) 549; Richardson *v.* Olmstead, 74 Ill. 213; Cunningham *v.* Brown, 44 Wis. 72 (price fixed as "the same as similar articles may bring afterward at auction").

In Phifer *v.* Erwin, 100 N. Car. 60, it was held that where mortgaged goods are taken by the assignee of a note and mortgage as part payment of the note, with an agreement that whatever was collected from the goods should be applied to the note, the transaction was a sale, as the price could be definitely arrived at.

In Gordon *v.* Whitehouse, 18 C. B. 747; 86 E. C. L. 747, there was an agreement between A and B that B should buy of A a certain plant at a valuation to be made by A and a person appointed by B. Under this agreement, B was put into possession, and A and one J, who represented B, met and proceeded to value, having a list of the articles to be valued, and as to all of which except certain timber the prices were finally agreed upon. As to the timber, the price per foot and the superficial measurement alone were agreed upon, the calculation of the cubical contents and the carrying out of the amount being left to be made by B's foreman. A and J never met again, and did not agree upon the sum total. It was held that the evidence was sufficient to show that a valuation had been made by A and J on the principle of *Id certum est quod certum reddi potest.*

See also Bradley *v.* Michael, 1 Ind. 552, where the price for certain cattle was "four hundred dollars and as much more as they should come to at four cents per pound when weighed after being slaughtered."

1. Benj. on Sales (6th ed.), § 87; Brown *v.* Bellows, 4 Pick. (Mass.) 189;

has been so fixed there is no completion of the contract, and the property does not pass,[1] even though one of the parties should himself be the cause of the prevention of the valuation,[2] unless the contract has been executed by a delivery of the thing sold to the buyer, in which case the price is considered to be fixed at a reasonable value.[3]

Mere inadequacy of consideration is not sufficient to invalidate a sale unless it be so gross as to amount to fraud or imposition.[4]

Mason *v.* Phelps, 48 Mich. 126; Newlan *v.* Dunham, 60 Ill. 233; Central Military Track R. Co. *v.* Spurek, 24 Ill. 587; Norton *v.* Gale, 95 Ill. 533; 35 Am. Rep. 173; Flagg *v.* Mann, 2 Sumn. (U. S.) 539; Tew *v.* Harris, 11 Q. B. 7; 63 E. C. L. 7; 11 Jur. 947; Thurnell *v.* Balbirnie, 2 M. & W. 786; 1 Jur. 847.

See also Nutting *v.* Dickinson, 8 Allen (Mass.) 540; Bass *v.* Veltum, 28 Minn. 512, in which case there was an agreement that the price be governed by the price at the Chicago Exchange. Easterlin *v.* Rylander, 59 Ga. 292.

In Thurnell *v.* Balbirnie, 2 M. & W. 786; 1 Jur. 847, the valuation was to be made by A and B. In the absence of evidence that A was prevented by the opposite party from making the valuation, it was held that a valuation by B alone was insufficient.

A power given to a third person to fix the price of goods sold, in discharge of a pre-existing debt, is irrevocable; its execution in such a case is necessary to effectuate an arrangement for the security of a creditor. Smyth *v.* Craig, 3 W. & S. (Pa.) 14.

Party as a Valuer.—In Woodburn Sarven Wheel Co. *v.* Philbrook, 76 Ind. 516, the buyer agreed to purchase timber on the representations of the seller as to quality and quantity. It was insisted in an action for the price of the timber that the court erred in admitting evidence tending to show that the seller occupied a duplex and inconsistent relation, that of seller and of agent. The objection, however, was not sustained.

1. Hutton *v.* Moore, 26 Ark. 382; Scott *v.* Whitney, 41 Wis. 504; Fuller *v.* Bean, 34 N. H. 304; Moakes *v.* Nicolson, 19 C. B. N. S. 290; 115 E. C. L. 290; Benj. on Sales (4th ed.), § 87 and cases cited. See also Scott *v.* Corporation of Liverpool, 3 DeG. & J. 334.

2. Benj. on Sales (6th ed.), § 87; Vickers *v.* Vickers, L. R., 4 Eq. 529.

3. The seller may recover upon a *quantum meruit* in such a case, even though no valuation is ever made. Thus in Clarke *v.* Westrope, 18 C. B. 765; 86 E. C. L. 764, a landlord engaged, upon the tenant's quitting the farm, to purchase all the hay and produce of the farm that might be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides. Before a valuation was made, however, the incoming tenant consumed a large portion of the produce. It was held that the seller was entitled to maintain an action upon a *quantum meruit.* See also Wittowsky *v.* Wasson, 71 N. Car. 456; Humaston *v.* American Tel. Co., 20 Wall. (U. S.) 20. This latter case was one in which A had been paid a certain price for his articles by B, and was promised more according to the value they should subsequently be shown to possess, such increased value to be determined by a referee. Before the determination B revoked the authority given the referee, thereby making the valuation impossible. It was held that A might have the court and jury to determine the *quantum valebant.* Smyth *v.* Craig, 3 W. & S. (Pa.) 14.

Agreement for a Valuation Not a Submission to Arbitration.—In Bos *v.* Helsham, L. R., 2 Exch. 72, it was held that an agreement that the price should be fixed by valuers was not equivalent to a submission to arbitration, and so where one party had appointed a valuer and the other refused to do so, the one appointed could not act as sole arbitrator. See Turner *v.* Goulden, L. R., 9 C. P. 57. But valuers who accept the office for compensation may be held liable in damages for default in performing their duties. Jenkins *v.* Betham, 15 C. B. 189; 80 E. C. L. 168; Cooper *v.* Shuttleworth, 25 L. J., Exch. 114.

4. Duncan *v.* Sanders, 50 Ill. 475 (judicial sale); Baldwin *v.* Dunton, 40 Ill. 188; Heberer *v.* Heberer, 67 Ill. 253 (judicial sale); Berry *v.* Lovi, 107 Ill. 612 (same); Lloyd *v.* Scott, 4 Pet. (U. S.) 205 (sale of an annuity);

d. SUBJECT OF THE SALE.—The last element of a valid sale is the transfer of the general or absolute property in the thing sold from the seller to the buyer.[1] If, then, at the time of the sale the subject has ceased to exist, there is no contract, and if a price has been paid it may be recovered.[2] If there is even a partial destruction of the subject of the sale, the same rule applies, though, it seems, the buyer has the option of taking the thing sold at a proportionally reduced valuation.[3] Whether a valid sale can be made

Waller *v.* Cralle, 8 B. Mon. (Ky.) 14; Hind *v.* Holdship, 2 Watts (Pa.) 104; 26 Am. Dec. 107; Harrington *v.* Wells, 12 Vt. 505. See also CONTRACT, vol. 3, p. 831; INADEQUATE CONSIDERATION, vol. 10, p. 325 *et seq.* RESCISSION, vol. 21, p. 53.

In Follett *v.* Rose, 3 McLean (U. S.) 332, it was said that "inadequacy of consideration does not invalidate a contract unless it be so gross as to strike everyone with a presumption of fraud."

1. Pothier, Contrat de Vente, n. 4; Gardner *v.* Lane, 12 Allen (Mass.) 43; Story on Sales, § 8. See *supra*, this title, *Definition.*

2. "There must be a thing sold which forms the subject of the contract. If, then, ignorant of the death of my horse, I sell it, there is no sale for want of the thing sold. For the same reason, if, when we are in Paris, I sell you my house, both being ignorant that it has been wholly or in great part burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain but only the remainder of it." Pothier, Contrat de Vente 4; Benj. on Sales (6th ed.), § 74; Story on Sales (4th. ed.), § 184, note; Thompson *v.* Gould, 20 Pick. (Mass.) 139.

The doctrine of the text is sustained in many cases. See Kelly *v.* Bliss, 54 Wis. 187 (destruction of property by fire); Franklin *v.* Long, 7 Gill & J. (Md.) 407 (suicide of slave sold, before completion of the contract); Young *v.* Bruces, 5 Litt. (Ky.) 324; Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415 (buyer not allowed to recover damages for non-delivery where property was destroyed before completion of the contract); Gibson *v.* Pelkie, 37 Mich. 380 (sale of a judgment); Strickland *v.* Turner, 7 Exch. 208; 22 L. J. Exch. 115 (sale of an annuity dependent upon a life made after such life had expired); Smith *v.* Myers, L. R., 7 Q. B. 139; 1 Moak's Rep. 42, *aff'g* L. R., 5 Q. B. 429 (destruction of cargo sold—buyer held not entitled to another cargo of the same commodity); Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589; Hastie *v.* Couturier, 9 Exch. 102; 5 H. L. Cas. 673; Cochrane *v.* Willis, L. R., 1 Ch. 58; 35 L. J. Ch. 36; Barr *v.* Gibson, 3 M. & W. 390; Hitchcock *v.* Giddings, 4 Price 135 (seller bound to know that he actually has that which he professes to sell). Harris *v.* Nicholas, 5 Munf. (Va.) 483.

Grounds of the Doctrine.—The grounds upon which this principle rests have been variously stated. In some cases it is said that it rests upon the ground that there is in every sale an implied warranty of the existence of the thing sold. See Lile *v.* Hopkins, 12 Smed. & M. (Miss.) 299; 51 Am. Dec. 115. Other authorities have it that there is no sale because of a want of mutual assent. See Benj. on Sales (6th ed.), § 77; 1 Fonbl. Eq. 114. The true ground, however, seems to be apparent, *i. e.*, that one of the essential elements of a valid sale being wanting, there is no sale. So that if there be no proper subject of sale, the transaction falls just as if there were no mutual assent or no competent parties. Gardner *v.* Lane, 12 Allen (Mass.) 43. See also the reasoning adopted in Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 86; Gardner *v.* Lane, 9 Allen (Mass.) 499; 85 Am. Dec. 779; Allen *v.* Hammond, 11 Pet. (U. S.) 72.

See also IMPLIED WARRANTY, vol. 10, p. 116.

3. Story on Sales (4th ed.), § 184; 2 Kent Com. (13th ed.), pp. 469-70; Pothier, Contrat de Vente, n. 4; Curtis *v.* Hannay, 3 Esp. 82 (by Lord Eldon); Chambers *v.* Griffiths, 1 Esp. 150.

But it has been insisted that the contract will still bind the buyer and that his only remedy is for a breach of warranty. Lile *v.* Hopkins, 12 Smed. & M. (Miss.) 301; 51 Am. Dec. 115; Morgan *v.* Richardson, 1 Camp. 40, note;

of property not yet in existence, or not yet acquired, must depend upon the character of such property. If it has a potential existence, for example, the natural product or expected increase of property already belonging to the seller, it may be the subject of a sale.[1] Instances of this may be seen where one sells the crops to be grown on his fields,[2] the wool to be cut from his

Tye *v.* Gwynne, 2 Camp. 346; Howell *v.* Wilson, 2 Blackf. (Ind.) 419; Barr *v.* Gibson, 3 M. & W. 390; where the sale of a ship not actually destroyed, but wrecked, was held valid. Hawks *v.* Palling, 6 E. and B. 659; 88 E. C. L. 659, where there was a sale of a fee farm rent which turned out not to exist; the sale was held valid on the ground that by the terms of the contract the buyer had assumed the chances.

In Howell *v.* Coupland, L. R., 9 Q. B. 462; 10 Moak's Rep. 110, there was an agreement whereby A agreed to sell to B 200 tons of potatoes, grown on land belonging to A in W, at a certain price per ton, to be delivered the following October and paid for as taken away. In March, A made ready 68 acres, which were planted and were amply sufficient to grow more than 200 tons in an average year. But in August a blight appeared and the crop failed, so that A was able to deliver only 80 tons. B having brought an action for the non-delivery of 120 tons it was held that the contract must be taken to be subject to the implied condition that the party shall be excused if, before a breach, performance becomes impossible from the destruction of the thing sold without the fault of the seller. Taylor *v.* Caldwell, 3 B. & S. 833; 113 E. C. L. 837; 32 L. J. Q. B. 164; Appleby *v.* Myers, L. R., 2 C. P. 651; Rugg *v.* Minett, 11 East 210.

1. Benj. on Sales (4th ed.), § 78; Story on Sales (4th ed.), § 185; Wheeler *v.* Wheeler, 2 Metc. (Ky.) 474; Grantham *v.* Hawley, Hob. 132; Robinson *v.* Macdonnell, 5 M. & S. 228; 2 Kent's Com. (13th ed.), p. 468; Lewis *v.* Lyman, 22 Pick. (Mass.) 437; Bacon's Abr. Grant (D) 3.

See also, for instances illustrating the rule of the text, McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195; 26 Am. Dec. 262 (sale of mare's offspring before conception—valid); Fonville *v.* Casey, 1 Murph. (N. Car.) 389; 4 Am. Dec. 559 (same facts); Hull *v.* Hull, 48 Conn. 250; 40 Am. Rep. 165 (same); Sawyer *v.* Gerrish, 70 Me. 254; 25 Am. Rep. 323; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 10; 29 N. Y. 598 (prospective products of dairy farm); Hodges *v.* Harris, 6 Pick. (Mass.) 360 (sale of goods at sea and their proceeds); Conderman *v.* Smith, 41 Barb. (N. Y.) 406 (sale of prospective dairy products); Headrick *v.* Brattain, 63 Ind. 438; Arques *v.* Wasson, 51 Cal. 620; 21 Am. Rep. 718; Cottle *v.* Spitzer, 65 Cal. 460; 52 Am. Rep. 305; Andrew *v.* Newcomb, 32 N. Y. 417.

Distinguished from Rule as to Sale of Unspecified Chattels.—The doctrine in this connection is apt to be confused with the subject of sales of unspecified chattels. Wherever there is a sale of chattels not specific, the contract is executory merely until it becomes executed by the selection and separation of the exact quantity of goods sold. But there is nothing in this rule to prevent parties making an executed contract of sale of property not existing. Though the subject of the sale does not exist, it is sufficiently specific, and the title vests immediately upon its coming into existence. Thus, a contract for the sale of cotton, the greater part of which is ungathered, to be delivered to the purchaser at a specified place as soon as it can be gathered and ginned, is executory, and does not vest a title to the cotton in the purchaser so as to enable him to maintain trover. Screws *v.* Roach, 22 Ala. 675. While, on the other hand, a sale of an entire crop of cotton to be grown on certain land is an executed one and vests the title immediately. Bellows *v.* Wells, 36 Vt. 599; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 10; 29 N. Y. 598; Carter *v.* Jarvis, 9 Johns. (N. Y.) 143.

2. Briggs *v.* U. S., 143 U. S. 346; Smith *v.* Atkins, 18 Vt. 461; Sanborn *v.* Benedict, 78 Ill. 309; Blackwood *v.* Cutting Packing Co., 76 Cal. 212; Stephens *v.* Tucker, 55 Ga. 543; Gittings *v.* Nelson, 86 Ill. 591; Bellows *v.* Wells, 36 Vt. 599 (sale of growing crops); Heald *v.* Builders' Mut. F. Ins. Co., 111 Mass. 38; Jones *v.* Webster, 48 Ala. 109; 2 Rolle's Abr. 48; Wilkinson *v.* Ketler, 69 Ala. 435; Moore *v.* Byrum, 10 S. Car. 452; 30 Am. Rep. 58;

sheep,[1] the earnings of an engagement of service already entered into,[2] etc. But if the property has not a potential existence, and is afterward to be acquired, it can only be the subject of an executory contract of sale, and not of an actual sale.[3] This

Hansen *v.* Dennison, 7 Ill. App. 73; Wyatt *v.* Watkins (Tenn. 1877), 16 Alb. L. J. 205; 30 Am. Rep. 67, note.

Compare Cressey *v.* Sabre, 17 Hun (N. Y.) 120, where a mortgage of a certain amount of potatoes yet to be grown was held void. Chissom *v.* Hawkins, 11 Ind. 316.

In Bell *v.* Real Estate Banking Co., 3 Ala. 77, there was a sale of "the entire crop of cotton which I may make during the present year, estimated at one hundred and seven bales." It was held that the insertion of such an estimate did not affect the true character of the contract, which was one for the sale of the whole crop, however much greater or less than the estimate it might be.

It is held in some cases that there may be a sale of crops to take effect at a future day even if they are not yet planted or sown, particularly if the buyer takes possession before the intervention of third persons. Hurst *v.* Bell, 72 Ala. 336; Cotten *v.* Willoughby, 83 N. Car. 75; 35 Am. Rep. 564; Harris *v.* Jones, 83 N. Car. 317; Rawlings *v.* Hunt, 90 N. Car. 270; Everman *v.* Robb, 52 Miss. 653; 24 Am. Rep. 682; Headrick *v.* Brattain, 63 Ind. 438; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9; 29 N. Y. 598.

But the contrary view is sustained by some authorities. Thus, in Comstock *v.* Scales, 7 Wis. 159, a mortgage was executed upon a crop of oats, wheat and corn, about the time some of it was planted but before it presented the appearance of growing corn, and it was there held that the mortgage could only operate upon property in existence at the time of its execution, and that the court below erred in instructing the jury that as soon as the grain was sown it was the subject of mortgage. See Hutchinson *v.* Ford, 9 Bush (Ky.) 318; 15 Am. Rep. 711. Again, where a lease was executed in March between the plaintiff and M of a farm for one year from the first of the next April at a specified rent, and it was stipulated that the plaintiff should have a lien upon the crops as security for said rent, and that M should market the same, it was held that a person who had purchased from M corn raised upon the farm, with knowledge of the plaintiff's claim to a lien thereon, could hold the same as against the plaintiff. Milliman *v.* Meher, 20 Barb. (N. Y.) 37. See Redd *v.* Burrus, 58 Ga. 574; Shaw *v.* Gilmore, 81 Me. 396.

1. This instance has been frequently cited, that one "may sell the wool to be grown upon his own sheep but not upon the sheep of another." Jones *v.* Richardson, 10 Met. (Mass.) 490; Low *v.* Pew, 108 Mass. 350; 11 Am. Rep. 359; 2 Kent's Com. (13th ed.), p. 468, note; Pothier, Contrat de Vente, n. 5, 6; Bacon's Abr. Grant (D) 3; Grantham *v.* Hawley, Hob. 132.

2. **Sale of Prospective Earnings.**—One may assign future earnings arising out of a contract of service already entered into, but not those of a prospective service. In the one case the earnings have a potential existence, though there is a possibility that they may never materialize; in the other there is nothing more than a mere possibility of existence. See Hartley *v.* Tapley, 2 Gray (Mass.) 566; Emery *v.* Lawrence, 8 Cush. (Mass.) 151; Herbert *v.* Bronson, 125 Mass. 475 (case where engagement did not then exist); Hawley *v.* Bristol, 39 Conn. 26; Augur *v.* New York Belting, etc., Co., 39 Conn. 537; Mulhall *v.* Quinn, 1 Gray (Mass.) 105; 61 Am. Dec. 414; Farnsworth *v.* Jackson, 32 Me. 419. There is an exception to this rule in the case of public officers. See ASSIGNMENTS, vol. 1, p. 829; PUBLIC OFFICERS, vol. 19, p. 496.

And see generally ASSIGNMENTS, vol. 1, p. 828.

3. Brainard *v.* Burton, 5 Vt. 97; Low *v.* Pew, 108 Mass. 347; 11 Am. Rep. 357 (sale of fish to be caught); Barnard *v.* Eaton, 2 Cush. (Mass.) 295; Jones *v.* Richardson, 10 Met. (Mass.) 481; Hutchinson *v.* Ford, 9 Bush (Ky.) 318; 15 Am. Rep. 712; Lunn *v.* Thornton, 1 C. B. 379; 50 E. C. L. 385; Gale *v.* Burnell, 7 Q. B. 850; 53 E. C. L. 850; Congreve *v.* Evetts, 10 Exch. 298; Reeve *v.* Whitmore, 4 DeG. J. & S. 1; 9 Jur. N. S. 1214; Allatt *v.* Carr, 27 L. J. Exch. 385; Hope *v.* Hayley, 5 E. & B. 830; 85 E. C. L. 829; 33 L. J. Ch. 63; Reed *v.* Blades, 5 Taunt. 212.

In Brown *v.* Bateman, L. R., 2 C. P. 272, the subject-matter of the intended

is the rule to be applied in all cases where the property, whether in existence or not, is yet to be acquired by the seller,[1] and any executory agreement to sell does not effect the transfer without some new act on the part of the seller indicating an intention to effectuate the contract.[2]

An exception to this doctrine is seen in the case of rule recognized in equity that the sale of property to be after acquired, so described in the contract as to be capable of identification, vests in the buyer the beneficial interest in the property as soon as it is acquired by the seller.[3] It is sometimes said that another exception exists in favor of mortgages of after-acquired property;

sale was building materials subsequently brought upon the land of the party. See Reeves *v.* Barlow, 12 Q. B. Div. 436; Blake *v.* Izard, 16 W. R. 108.

The cases of Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439, and Frazer *v.* Hilliard, 2 Strobh. (S. Car.) 309, holding that a sale of property not belonging to the seller, if not repudiated by the purchaser, is valid after the seller's acquisition of such property, are isolated ones and cannot be considered as stating the American doctrine. The intimation by Mr. Benjamin that their holding is the American doctrine is contradicted by an overwhelming weight of authority, as may be seen from the cases in next note. See Benj. on Sales (4th Am. ed.), § 83, and note.

It was held in Bryan *v.* Lewis, R. & M. 386, that a sale of goods to be delivered at a future day, where the seller has not the goods nor any contract for them, but expects to go into the market and buy them, is not a valid contract but a mere wager on the price of the goods. But this has been overruled both in England and in the United States. Hibblewhite *v.* M'Morine, 5 M. & W. 462; Mortimer *v.* M'Callan, 6 M. & W. 58; Rumsey *v.* Berry, 65 Me. 570; Logan *v.* Musick, 81 Ill. 415; Porter *v.* Viets, 1 Biss. (U. S.) 177; Clarke *v.* Foss, 7 Biss. (U. S.) 541; Stanton *v.* Small, 3 Sandf. (N. Y.) 238; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Appleman *v.* Fisher, 34 Md. 540; Gregory *v.* Wendell, 40 Mich. 432.

1. Head *v.* Goodwin, 37 Me. 187; Shaw *v.* Gilmore, 81 Me. 396; Parker *v.* Jacobs, 14 S. Car. 112; 37 Am. Rep. 724; Williams *v.* Briggs, 11 R. I. 476; 23 Am. Rep. 518; Pierce *v.* Emery, 32 N. H. 484; Noyes *v.* Jenkins, 55 Ga. 586; McCaffrey *v.* Woodin, 65 N. Y. 459; 22 Am. Rep. 644; Brett *v.* Carter, 2 Low. (U. S.) 458; Gardiner *v.* McEwen, 19 N. Y. 123; Gittings *v.* Nelson, 86 Ill. 591; Gale *v.* Burnell, 7 Q. B. 850; 53 E. C. L. 848.

Other instances are seen in Morrill *v.* Noyes, 56 Me. 458; 96 Am. Dec. 486; 3 Am. L. Reg. N. S. 18 (mortgage of railroad property afterwards to be bought); Farmers' L. & T. Co. *v.* Long Beach Imp. Co., 27 Hun (N. Y.) 89 (mortgage of all corporate property then owned or to be acquired). See generally CHATTEL MORTGAGES, vol. 3, p. 183.

2. Head *v.* Goodwin, 37 Me. 181; Brett *v.* Carter, 2 Low. (U. S.) 458.

In Head *v.* Goodwin, 37 Me. 181, A sold to B one-half of a chaise to which he had no title whatever, but which he subsequently purchased. It was held that the transaction did not effect any transfer of the property, and could not without some new act on A's part evidencing an intent to carry the sale into effect; that the delivery of the chaise to B without any avowal that it was to effectuate the sale was not such a new act as to effect a transfer of the title.

3. **Rule in Equity.**—The application of this equitable rule is confined almost exclusively to mortgages. Holroyd *v.* Marshall, 10 H. L. Cas. 191; Belding *v.* Read, 3 H. & C. 955; 34 L. J. Exch. 212; Mitchell *v.* Winslow, 2 Story (U. S.) 638; Brett *v.* Carter, 2 Low. (U. S.) 461; Hurst *v.* Bell, 72 Ala. 336; Apperson *v.* Moore, 30 Ark. 56; 21 Am. Rep. 170. See the doctrine set forth in MORTGAGES, vol. 15, pp. 744–752; CHATTEL MORTGAGES, vol. 3, p. 183–4.

The doctrine was carried to an extreme in the case of Lazarus *v.* Andrade, 5 C. P. Div. 318; 30 Moak's Rep. 803, where it is said that "property to be after acquired, if described so as to be capable of being identified, may be, not only in equity but also in law, the subject-matter of a valid assignment for value." The use of the phrase

but such is not the correct rule, and in all cases in which such mortgages have been held binding, the property mortgaged had a potential existence, and was sustained on that ground alone.[1] Thus, mortgages of growing crops, or even of crops expected to be grown, are valid and binding,[2] while mortgages of the stock

"also in law" was probably in consequence of provisions of the judicature acts.

In Moody *v.* Wright, 13 Met. (Mass.) 17; 46 Am. Dec. 706, it was said that there is no difference between the rule at law and in equity; but it has been doubted whether this is the correct doctrine, and in Brett *v.* Carter, 2 Low. (U. S.) 458, it was intimated that it is not good law.

Property Must be Susceptible of Identification.—Where an equitable sale is made of property not existing, there must be such a description as that the property may be capable of identification from it. The same is true of executory contracts of sales of such property. Lazarus *v.* Andrade, 5 C. P. Div. 318; 30 Moak's Rep. 803; *In re* Clark, 36 Ch. Div. 348; Belding *v.* Read, 3 H. & C. 955; Clements *v.* Matthews, 11 Q. B. Div. 808; Tadman *v.* Count D'Epineuil, 20 Ch. Div. 758; Pennington *v.* Jones, 57 Iowa 37; Muir *v.* Blake, 57 Iowa 665.

This requirement exists in order to protect innocent purchasers. The description must therefore be sufficient to charge third persons with notice of the mortgage. Muir *v.* Blake, 57 Iowa 665.

In Clements *v.* Matthews, 11 Q. B. Div. 808, it appeared that B, the tenant of the farm, assigned to the plaintiff his stock in trade and effects on the farm, together with all the growing and other crops "which at any time thereafter should be in or about the same or other premises." The defendant, who was B's landlord, distrained for rent, but afterwards agreed to withdraw the distress and forego his claim if B would agree to give up possession and surrender the tenancy to him. This was accordingly done, and the defendant took possession of the farm and cultivated the crops which were growing there. Afterwards he had notice of the plaintiff's claim under the assignment to the growing crops. The amount of rent which would have become due to the defendant had the tenancy continued, and the expenses he incurred in cultivating and reaping the crops exceeded their market value when sold. It was held, in an action by the plaintiff against the defendant for the value of these crops, that the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity.

In Official Receiver *v.* Tailby, 13 App. Cas. 523, where it appeared that a bill of sale assigned all the book debts due and owing, or which might during the continuancy of the security become due and owing to the mortgagor, it was held that the assignment of such book debts, though not limited to book debts in any particular business, was sufficiently defined, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment, or in any other business. *Rev'g* 18 Q. B. Div. 25.

1. See MORTGAGES, vol. 15, pp. 749, *et seq.*; CHATTEL MORTGAGES, vol. 3, pp. 183–6.

Properly speaking, there is no difference between a mortgage and a sale in this regard. At common law, a mortgage was always operative only upon property actually or potentially in existence at the time of the execution of the mortgage. This is still the doctrine, for a review of the cases will show that in every instance the mortgage was upheld, either because the property had a potential existence, or upon the exception to the general rule which obtains in equity. Jones *v.* Webster, 48 Ala. 109; Benjamin on Sales (6th Am. ed.), § 80 and notes. See MORTGAGES, vol. 15, pp. 749, *et seq.*

In Hutchinson *v.* Ford, 9 Bush (Ky.) 318; 15 Am. Rep. 711, a lease was executed in 1867 and a mortgage given on all the crops to be raised on the land covered by the lease, which (the lease) was to take effect in 1868. It was held that the mortgage was of no effect. So in Milliman *v.* Neher, 20 Barb. (N. Y.) 38; Bank of Lansingburgh *v.* Crary, 1 Barb. (N. Y.) 542; Barnard *v.* Eaton, 2 Cush. (Mass.) 295; Jones *v.* Richardson, 10 Met. (Mass.) 481.

2. See CROPS, vol. 4, p. 902, where numerous cases are collected.

of goods in a store, including such goods as shall be afterwards brought in to replenish the stock, are invalid in so far as the transfer of title to the after-acquired property is concerned, and cannot be upheld.[1] In the application of these principles, the distinction between an actual sale and a mere executory agreement to sell is constantly to be observed.[2] It may be said, therefore, by way of summing up, that personal property, or chattels real, belonging to the seller and having an actual or potential existence, may be the subject of a valid sale,[3] and the property need not necessarily have a physical or corporeal existence such as to render it capable of manual delivery. It is enough if it has an

1. In Brett *v.* Carter, 2 Low. (U. S.) 458, there was a mortgage conveying the stock and any other goods which might from time to time during the existence of the mortgage be purchased by the grantor and put into the said store to replace any of the stock which might have been disposed of. The court by Lowell, J., said: "It is undoubtedly the law of courts of equity . . . that after-acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may lawfully be assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land, or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens* after the chattels are acquired—that is to say, either some new transfer or possession taken under the old." The same view is held in many other cases. Edgell *v.* Hart, 13 Barb. (N. Y.) 380; *aff'd* 9 N. Y. 213; 59 Am. Dec. 532; Otis *v.* Sill, 8 Barb. (N. Y.) 102; Milliman *v.* Neher, 20 Barb. (N. Y.) 37; Gardiner *v.* McEwen, 19 N. Y. 123; Davis *v.* Ransom, 18 Ill. 396; Hunt *v.* Bullock, 23 Ill. 320; Barnet *v.* Fergus, 51 Ill. 352; 99 Am. Dec. 547; Ranlett *v.* Blodgett, 17 N. H. 298; 43 Am. Dec. 603; Head *v.* Goodwin, 37 M. E. 181; Comstock *v.* Scales, 7 Wis. 159 (such mortgages "create no lien, legal or equitable"); Hunter *v.* Bosworth, 43 Wis. 583; Hamilton *v.* Rogers, 8 Md. 301; Moody *v.* Wright, 13 Met. (Mass.) 17; 46 Am. Dec. 706; Barnard *v.* Eaton, 2 Cush. (Mass.) 294; Codman *v.* Freeman, 3 Cush. (Mass.) 306; Holly *v.* Brown, 14 Conn. 255; Wright *v.* Bircher, 5 Mo. App. 322; *aff'd* 72 Mo. 179; 37 Am. Rep. 443. See CHATTEL MORTGAGES, vol. 3, p. 184. *Compare* Lazarus *v.* Andrade, 5 C. P. Div. 318; 30 Moak's Rep. 805; Rowan *v.* Sharp's Rifle Mfg. Co., 29 Conn. 282.

In some cases such mortgages are held valid as between the parties, on the ground of estoppel. American Cigar Co. *v.* Foster, 36 Mich. 368. And in this same case it was held valid as against a subsequent purchaser with actual notice. See Abbott *v.* Goodwin, 20 Me. 408.

So also such mortgages have been recognized in equity. Williams *v.* Winsor, 12 R. I. 9.

2. Chissom *v.* Hawkins, 11 Ind. 316; Whitehead *v.* Root, 2 Metc. (Ky.) 584; Benj. on Sales (6th ed.), § 308. See *infra*, this title, *Executory and Executed Contracts of Sale.*

3. In this connection, see ASSIGNMENTS, vol. 1, pp. 827, *et seq.*; CHATTEL MORTGAGES, vol. 3, p. 183; GIFTS, vol. 8, pp. 1320 *et seq.*; MORTGAGES, vol. 15, pp. 744 *et seq.*; PLEDGE AND COLLATERAL SECURITY, vol. 18, pp. 590, 593, 606.

There can be no valid sale made of a fund in court as a fund. A party can only sell his interest when it may be adjusted. McCain *v.* Portis, 42 Ark. 402.

Under the Federal Constitution, art. 4, § 3, no property belonging to the *United States* can be disposed of except by the authority of an act of Congress. U. S. *v.* Nicoll, 1 Paine (U. S.) 646.

A sale of a certain description of standing timber trees, to be taken off in a specified time, is a sale of so many only as the buyer may take off within that time. Howard *v.* Lincoln, 13 Me. 122; Pease *v.* Gibson, 6 Me. 81; Nelson *v.* Nelson, 6 Gray (Mass.) 385. The title passes when the trees are cut and removed, but not until then, since prior to that the subject of the sale was not identified or capable of exact

actual value.[1] Thus, the hope or expectation of means founded on a right in being may be the subject of a sale, since in such case there is a potential, though not an actual, existence,[2] but a mere possibility or contingency not founded upon a right or coupled with an interest can only be the subject of an executory contract of sale.[3]

ascertainment. Clough *v.* Ray, 20 N. H. 558.

1. **Sale of Property Without Physical or Corporeal Existence.**—The good-will of a partnership may be sold. Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. Rep. 312. It has been held that a newspaper subscription list is not susceptible of separate ownership, but must pass on the sale of the types, presses, etc. McFarland *v.* Stewart, 2 Watts (Pa.) 111; 26 Am. Dec. 109; Holden *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 270. An annuity may be sold. Lloyd *v.* Scott, 4 Pet. (U. S.) 205. The route of a newspaper carrier. Hathaway *v.* Bennett, 10 N. Y. 108; 61 Am. Dec. 742; Senter *v.* Davis, 38 Cal. 450. A license to sell patented articles, or to print and sell copyright productions, etc. 2 Bl. Com. (Cooley's ed.) 405; Brooks *v.* Byam, 2 Story (U. S.) 525; Story on Sales (4th ed.), § 187; Pepper *v.* Labrot, 8 Fed. Rep. 29. A ferry franchise. Montgomery *v.* Multnomah R. Co., 11 Oregon 344. Knowledge of the existence and locality of an oil-well. Reed *v.* Golden, 28 Kan. 632; 42 Am. Rep. 180. A trade-mark. Warren *v.* Warren Thread Co., 134 Mass. 247; Burton *v.* Stratton, 12 Fed. Rep. 696; Pepper *v.* Labrot, 8 Fed. Rep. 29. A seat in a stock exchange. Clute *v.* Loveland, 68 Cal. 254. State land scrip. Youley *v.* Thompson, 30 Ark. 399. The privilege of mining. Johnston *v.* Cowan, 59 Pa. St. 280.

In this connection it is said in Campbell on Sales, p. 3, that "the objects of the contract of sale are either things properly so called—*i. e.*, tangible things, more accurately defined by Austin as 'such permanent objects not being persons as are sensible or perceptible by the senses;' or they may be things intangible—the *res incorporales* of the Roman law; including the rights known to English law under the technical names 'estates and terms in land,' 'incorporeal hereditaments,' 'choses in action;' 'shares,' 'stock' (in the public funds); 'copyright,' 'patent,' 'good-will;' and, generally, all rights other than the right of property in a tangible thing. In the case of things properly so called, sale contemplates the transfer of property in the thing; in the case of things intangible, it would be more correct to say that the sale contemplates the transfer of the thing (*i. e.*, right) itself."

2. In Bacon's Abridgment, Grant (D.) 3, this example is given: "If there be a devise of a term to A for life, remainder to B, B cannot in the lifetime of A assign or grant over his interest, because he has but a bare possibility, for A may outgrow the number of years." *Citing* Dyer 116; 5 Co. 66; 10 Co. 47, 48. But this rule of policy, tending to deprive the owner of the reversion or vested remainder to the right to alien his property, is not favored in this country, and such sales are upheld, at least in equity, in all cases where it can be shown that there is no fraud or inadequate consideration. See 2 Minor's Inst. (3d ed.), p. [622] 699; Cribbins *v.* Markwood, 13 Gratt. (Va.) 507; 67 Am. Dec. 775; 1 Story's Eq., § 327.

Sale of Fish to be Caught.—The question has been sometimes raised whether one can make a valid sale of an expectancy dependent upon chance—*e. g.*, where a fisherman offers to sell the catch of his net. The civil law considered that such a sale might be valid, and this view is sustained by Mr. Story. Pothier, Contrat de Vente, No. 6; Story on Sales (4th ed.), § 185. But the doctrine is otherwise in the United States by an express decision. Low *v.* Pew, 108 Mass. 347; 11 Am. Rep. 357. It is considered by Benjamin that such a transaction is rather one for work and labor than one of sale; the case supposing that the fish before being caught were common property, being in public waters. Benj. on Sale (6th ed.), § 84. See also 4 Kent Com. (13th ed.), p. 468, *note*.

3. Wheeler *v.* Wheeler, 2 Metc. (Ky.) 474. In this case a sale by a son of all his individual interest in the slaves and personal estate of his father, was held inoperative, and not to pass any title, even though the sale was made with the father's assent. *Compare* Fitzgerald *v.* Vestal, 4 Sneed (Tenn.) 258; Skipper *v.* Stokes, 42 Ala. 255; 94

2. Under Statute of Frauds.—(See FRAUDS, STATUTE OF, Vol. 8, p. 704.)

III. EFFECT OF CONTRACT (IN PASSING PROPERTY)—1. Executory or Executed—*a.* INTENTION GOVERNS.—After the formation of a contract of sale the question of its effect arises, as to when the bargain amounts to an actual sale, or when it is a mere executory agreement. The distinction between the two contracts consists in this: that, in a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller;[1] whereas, in the executory agreement,

Am. Dec. 646; Needles *v.* Needles, 7 Ohio St. 432; 70 Am. Dec. 85; Fitch *v.* Fitch, 8 Pick. (Mass.) 480; Low *v.* Pew, 108 Mass. 347; 11 Am. Rep. 357; Boynton *v.* Hubbard, 7 Mass. 112. See Bates *v.* Smith, 83 Mich. 347; Sherwood *v.* Walker, 66 Mich. 568; 11 Am. St. Rep. 531; Grayson *v.* Sanford, 12 La. Ann. 646; Varick *v.* Edwards, Hoffm. Ch. (N. Y.) 382; Powers' Appeal, 63 Pa. St. 443; McDonald *v.* McDonald, 5 Jones Eq. (N. Car.) 211; 75 Am. Dec. 434; Masten *v.* Marlow, 65 N. Car. 695; Nimmo *v.* Davis, 7 Tex. 26; Graham *v.* Henry, 17 Tex. 164; Steele *v.* Freerson, 85 Tenn. 430; Wheeler *v.* Wheeler, 2 Metc. (Ky.) 474.

See also CATCHING BARGAIN, vol. 3, p. 37; ASSIGNMENTS, vol. 1, p. 830.

In Low *v.* Pew, 108 Mass. 350; 11 Am. Rep. 357, where a sale of the next cast of a fisherman's net was held void, it was on the ground that "there was a possibility that they (the fishermen) might catch halibut; but it was a mere possibility and expectancy, coupled with no interest."

1. Delivery Not Essential as Between Parties.—That delivery is not necessary to pass the title as between the parties to the contract, unless required by the terms of the contract, is settled by many cases. As soon as a bargain and sale of specific personal property is struck, the contract becomes absolute, without actual payment or delivery; and the property and risk of accident is in the buyer. If the seller is prevented from delivering the property by the act of God, payment must nevertheless be made. Tarling *v.* Baxter, 6 B. & C. 360; 13 E. C. L. 199; Hinde *v.* Whitehouse, 7 East 558; Tome *v.* Dubois, 6 Wall. (U. S.) 548; Barrett *v.* Goddard, 3 Mason (U. S.) 107; Arkansas, etc., Co. *v.* Mann, 130 U. S. 69; M'Coy *v.* Moss, 5 Port. (Ala.) 88; Darnell *v.* Griffen, 46 Ala. 520; McCrae *v.* Young, 43 Ala. 622; Field *v.* Simco, 7 Ark. 269; Costar *v.* Davies, 8 Ark. 213; 46 Am. Dec. 311; Danley *v.* Rector, 10 Ark. 211; 50 Am. Dec. 242; Crill *v.* Doyle, 53 Cal. 713; Visher *v.* Webster, 13 Cal. 58; May *v.* Tallman, 20 Ill. 443; Wade *v.* Moffett, 21 Ill. 110; 74 Am. Dec. 79; Sidwell *v.* Lobby, 27 Ill. 437; Webster *v.* Granger, 78 Ill. 230; Ramsey *v.* Kochenour, 8 Blackf. (Ind.) 325; Bertelson *v.* Bower, 81 Ind. 514; Sweeney *v.* Owlsley, 14 B. Mon. (Ky.) 332; Willis *v.* Willis, 6 Dana (Ky.) 48; Taylor *v.* Twenty-five Bales of Cotton, 26 La. Ann. 247; Wing *v.* Clark, 24 Me. 366; Webber *v.* Davis, 44 Me. 147; 69 Am. Dec. 87; Gough *v.* Edelen, 5 Gill (Md.) 101; Hall *v.* Richardson, 16 Md. 396; 77 Am. Dec. 303; Philbrook *v.* Eaton, 134 Mass. 398; Byles *v.* Collier, 54 Mich. 1; Whitcomb *v.* Whitney, 24 Mich. 436; Davis *v.* Ransom, 4 Mich. 238; Ingersoll *v.* Kendall, 13 Smed. & M. (Miss.) 611; Cassell *v.* Backrack, 42 Miss. 56; 96 Am. Dec. 43; 62 Am. Rep. 590; Beauchamp *v.* Comfort, 42 Miss. 94; Woodburn *v.* Cogdal, 39 Mo. 222; Robinson *v.* Uhl, 6 Neb. 328; Uhl *v.* Robinson, 8 Neb. 272; Felton *v.* Fuller, 29 N. H. 121; Bailey *v.* Smith, 43 N. H. 143; Frazier *v.* Fredericks, 24 N. J. L. 162; Gray *v.* Mayor, etc., of N. Y., 46 N. Y. Supr. Ct. 494; Dexter *v.* Norton, 55 Barb. (N. Y.) 272; Terry *v.* Wheeler, 25 N. Y. 520; Burt *v.* Dutcher, 34 N. Y. 493; Bissell *v.* Balcom, 39 N. Y. 275; Russell *v.* Carrington, 42 N. Y. 119; 1 Am. Rep. 502; Connor *v.* Williams, 2 Robt. (N. Y.) 46; Jenkins *v.* Jarrett, 70 N. Car. 255; Hooben *v.* Bidwell, 16 Ohio 509; 47 Am. Dec. 386; McCandlish *v.* Newman, 22 Pa. St. 460; Winslow *v.* Leonard, 24 Pa. St.

the goods remain the property of the seller till the contract is executed.[1]

14; 62 Am. Dec. 354; Potter *v.* Coward, Meigs (Tenn.) 26; 2 Kent's Com. (13th ed.) 491. See *infra*, this title, *Conditional Sales*.

In 2 Kent's Com. (13th ed.) p. 492, it is said: "When the terms of sale are agreed on and the bargain is struck and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer."

In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to the fact whether the goods are delivered to the buyer or remain in possession of the seller. Lester *v.* East, 49 Ind. 588.

If by the terms of the contract the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transportation is at an end, after which time the title is vested in the buyer. Bloyd *v.* Pollocks, 27 W. Va. 75; Fry *v.* Lucas, 29 Pa. St. 356; Taylor *v.* Cole, 111 Mass. 363; Odell *v.* Boston, etc., R. Co., 109 Mass. 50. See also *infra*, this title, *Conditional Sales*.

In Bloyd *v.* Pollocks, 27 W. Va. 75, goods were sold to a buyer to be delivered at the depot in a certain city or to be delivered in the cars at the depot in that city. It was held that the title and risk remained in the seller until the goods arrived at the depot in such city, but upon their arrival there, without being unloaded and without any notice of their arrival at the depot, they at once became the property of the buyer, and from thenceforth were at his risk. Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272.

A contrary rule prevailed in the civil law. Under that system of jurisprudence a sale was "not an immediate transmutation of property, but a contract of mutual and personal engagements for the transference of the thing on the one hand and the payment of the price on the other." See Bell on Contract of Sale, 9; Cunningham *v.* Ashbrook, 20 Mo. 557.

In Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227, a contract for the sale of rags was made by which delivery was to be made at a certain date. Prior to that date the sellers delivered half the number of bales for their own convenience. These bales were afterwards destroyed. It was held that though the bales had been delivered, yet the title had not passed, because the contract was an entire one, and therefore the loss must fall upon the seller.

Where the place of delivery is at the option of the seller, he must give reasonable notice to the buyer of his selection, and if he fails to do so the title and risk remain in him. Thus in Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221, the seller of certain fish delivered them at a place chosen by himself, but the buyer, being ignorant of his intention to make delivery, was not there to receive them. The fish being left there were spoiled; it was held that the seller must bear the loss. See also *infra*, this title, *Delivery*.

Bill of Sale Not Necessary. — "As a matter of law, a bill of sale is not necessary to pass the title to personal property." Gatzweiler *v.* Morgner, 51 Mo. 47.

Effect of Giving Earnest.—In Benjamin on Sales (4th Am. ed.), §§ 355–357, the question is discussed as to whether the giving of an earnest has the effect to pass the title. In some of the old authorities it seems that this effect was sometimes given, but it cannot now be regarded as the rule. Mr. Benjamin says (§ 357): "No case has been found in the books in which the giving of an earnest has been held to pass the property in the subject-matter of the sale where the completed bargain, if proof in writing or in any other sufficient manner, would not equally have altered the property." *Citing* and *reviewing* Logan *v.* Le Mesurier, 6 Moore P. C. 116; Acraman *v.* Morrice, 8 C. B. 449; 65 E. C. L. 449. See also Groat *v.* Gile, 51 N. Y. 431; Nesbitt *v.* Burry, 25 Pa. St. 208; Jennings *v.* Flannagan, 5 Dana (Ky.) 217; 30 Am. Dec. 683.

1. Benj. on Sales, § 308.

This doctrine is never denied. For leading cases in which it has been applied, see Elgee Cotton Cases, 22 Wall. (U. S.) 180; Knox *v.* Payne, 13 La. Ann. 361; Mason *v.* Thompson, 18 Pick. (Mass.) 305; Lingham *v.* Eggleston, 27 Mich. 324; Cunningham *v.* Ashbrook, 20 Mo. 553; Hurff *v.* Hires, 40 N. J. L. 581; 29 Am. Rep. 282;

This distinction is of importance in two connections: First, as between the parties to the contract, in order to determine upon whom the loss shall fall in case the property is destroyed, for it is plain that if the subject of the sale is lost or destroyed, the loss must fall upon the party who holds the title; thus if before the transfer has taken place a loss occurs, it falls upon the seller, otherwise upon the buyer;[1] and second, in order to know what rights creditors or subsequent purchasers of one party may acquire as against the other.[2]

In determining whether title has or has not passed by the contract, the primary consideration is one of intention. The agreement is what the parties intended to make it. If the intention is manifested clearly and unequivocally, it controls.[3] Thus, al-

Welsh *v.* Bell, 32 Pa. St. 17; State *v.* O'Neil, 58 Vt. 140; 56 Am. Rep. 556; Young *v.* Matthews, L. R., 2 Exch. 127; Cardinell *v.* Bennett, 52 Cal. 476; Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165; Olney *v.* Howe, 89 Ill. 556; Straus *v.* Ross, 25 Ind. 300; Lester *v.* East, 49 Ind. 592.

A mere executory agreement to sell does not transfer the risk, since that attends upon the title. Garrett *v.* Crooks, 15 La. Ann. 483.

1. Kein *v.* Tupper, 52 N. Y. 553; Dexter *v.* Norton, 55 Barb. (N. Y.) 272; 47 N. Y. 62; 7 Am. Rep. 415; Joyce *v.* Adams, 8 N. Y. 291; Terry *v.* Wheeler, 25 N. Y. 520; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Lansing *v.* Turner, 2 Johns. (N.Y.) 13; Babcock *v.* Hutchinson, 4 Lans. (N. Y.) 276; Browning *v.* Hamilton, 42 Ala. 484; Pleasants *v.* Pendleton, 6 Rand. (Va.) 473; 18 Am. Dec. 726; Hutchinson *v.* Hunter, 7 Pa. St. 140; Lingham *v.* Eggleston, 27 Mich. 324; Whitcomb *v.* Whitney, 24 Mich. 486; Bertelson *v.* Bower, 81 Ind. 512; Lovelace *v.* Stewart, 23 Mo. 384; Cunningham *v.* Ashbrook, 20 Mo. 553; Smith *v.* Dallas, 35 Ind. 255; Taylor *v.* Lapham, 13 Allen (Mass.) 26; Anderson *v.* Morice, L. R., 1 App. Cas. 713; 8 Moak's Rep. 1; L. R., 10 C. P. 609; 14 Moak's Rep. 455; Anglo-Egyptian Nav. Co. *v.* Rennie, L. R., 10 C. P. 271; 13 Moak's Rep. 345; Hanson *v.* Meyer, 6 East 614; Simmons *v.* Swift, 5 B. & C. 857; 12 E. C. L. 388; 2 Kent's Com. 496; Goodrum *v.* Smith, 3 Humph. (Tenn.) 542; Broyles *v.* Lowrey, 2 Sneed (Tenn.) 22.

The distinction between a sale and an executory agreement to sell is this: In the one case A sells to B; in the other he only promises to sell. In the one case B becomes the owner of the goods themselves, as soon as the contract is completed by mutual consent; if they are lost or destroyed he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if the goods are lost; cannot maintain trover for them; and has not, at common law, any other remedy for breach of the contract than an action for damages. Zwisler *v.* Storts, 30 Mo. App. 163; see also Barrow *v.* Window, 71 Ill. 214.

2. Ricker *v.* Cross, 5 N. H. 570; 22 Am. Dec. 480; Golder *v.* Ogden, 15 Pa. St. 528; 53 Am. Dec. 618; Hurff *v.* Hires, 40 N. J. L. 581; 29 Am. Rep. 282; Fosdick *v.* Schall, 99 U. S. 255. See also FRAUDULENT SALES, vol. 8, pp. 876 *et seq.*; and *infra*, this title, *Bona Fide Purchaser*.

3. Lester *v.* East, 49 Ind. 588; Callaghan *v.* Myers, 89 Ill. 570; First Nat. Bank *v.* Reno, 73 Iowa 145; Sewall *v.* Eaton, 6 Wis. 490; 70 Am. Dec. 471; Fletcher *v.* Ingram, 46 Wis. 201; Cook *v.* Van Horne, 76 Wis. 520; Chamberlain *v.* Dickey, 31 Wis. 68; Russell *v.* Carrington, 42 N. Y. 118; 1 Am. Rep. 498; Terry *v.* Wheeler, 25 N. Y. 525; Hurd *v.* Cook, 75 N. Y. 454; Byam *v.* Hampton (Supreme Ct.), 10 N. Y. Supp. 372; Cunningham *v.* Ashbrook, 20 Mo. 554; Morse *v.* Sherman, 106 Mass. 430; Denny *v.* Williams, 5 Allen (Mass.) 3; Weed *v.* Boston, etc., Ice Co., 12 Allen (Mass.) 377; Dugan *v.* Nichols, 125 Mass. 43; Pratt *v.* Parkman, 24 Pick. (Mass.) 42; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; 13 Am. Dec. 449; Sumner *v.* Hamlet, 12 Pick. (Mass.) 76; Macomber *v.* Parker, 13 Pick. (Mass.) 182; Winslow *v.* Leonard, 24 Pa. St. 14; 62 Am. Dec. 354;

Gonser *v.* Smith, 115 Pa. St. 452; Bethel Steam Mill Co. *v.* Brown, 57 Me. 18; 99 Am. Dec. 572; Dyer *v.* Libby, 61 Me. 45; Stone *v.* Peacock, 35 Me. 388; Levasseur *v.* Cary (Me. 1886), 5 Atl. 461; Cleaves *v.* Washburn (Me. 1888), 12 Atl. Rep. 734; Fuller *v.* Bean, 34 N. H. 290; Prescott *v.* Locke, 51 N. H. 101; 12 Am. Rep. 55; Ockington *v.* Richey, 41 N. H. 279; Kelsea *v.* Haines, 41 N. H. 246; Sherwood *v.* Walker, 66 Mich. 575; 11 Am. St. Rep. 531; Lingham *v.* Eggleston, 27 Mich. 324; Brewer *v.* Michigan Salt Assoc., 47 Mich. 526; Wilkinson *v.* Holiday, 33 Mich. 386; Bellows *v.* Wells, 36 Vt. 599; Fitch *v.* Burk, 38 Vt. 689; Chapman *v.* Shepard, 39 Conn. 413; Barrett *v.* Goddard, 3 Mason (U. S.) 113; Elgel Cotton Cases, 22 Wall. (U. S.) 187; Hatch *v.* Standard Oil Co., 100 U. S. 131; Hopkins *v.* Partridge, 71 Tex. 606; Ogg *v.* Shuter, L. R., 10 C. P. 159; 11 Moak's Rep. 316; Leggett *v.* Clary, 13 Ont. Rep. 110; Gleason *v.* Knapp, 26 U. C., C. P. 553; Ross *v.* Eby, 28 U. C., C. P. 316. See also INTENT, vol. 11, p. 368.

"If," says Parke, B., in Bryans *v.* Nix, 4 M. & W. 775, "the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are in the hands of a depositary, no matter whether that depositary be a common carrier, or shipmaster, employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected." *Quoted* with approval by Shaw, C. J., in De Wolf *v.* Gardner, 12 Cush. (Mass.) 26; 59 Am. Dec. 165.

In Ober *v.* Carson, 62 Mo. 214, the court, by Wagner, J., said: "The question of transfer to, and vesting title in, the purchaser, always involves an inquiry into the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts show an intention on the part of the seller to relinquish all further claims as owner, and on the part of the buyer to assume such control with all liabilities." Cunningham *v.* Ashbrook, 20 Mo. 553; England *v.* Moitland, 3 Mo. App. 490.

In Riddle *v.* Varnum, 20 Pick. (Mass.) 283, the court by Dewey, J., said: "Where the property to be sold is in a state ready for delivery and the payment of money or giving security therefor is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected and the interest passes immediately to the vendee, although the weight or measure of the article sold remains yet to be ascertained. Such a case presents the question of the intention of the parties to the contract. The party affirming a sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price at the rate agreed upon."

In *Wisconsin* it is laid down as the settled rule in that State that "if it clearly appears to have been the intention of the parties that the property should be deemed to be delivered and the title to have passed, and especially if their acts be inconsistent with any other view, the mere fact that something remains to be done will not govern such intention." Sewall *v.* Eaton, 6 Wis. 490; 70 Am. Dec. 471; Fletcher *v.* Ingram, 46 Wis. 191, and cases there cited.

Evidence of the business usage in such cases, and particularly that between the parties, if they have had previous dealings, is always admissible as showing the intent of the parties. Putnam *v.* Tillotson, 13 Met. (Mass.) 517; Hobart *v.* Littlefield, 13 R. I. 341.

The intention to transfer title may be either express or implied. Bonn *v.* Haire, 40 Mich. 404.

Intention of Parties Must Prevail.—Where there is a plain intention that the title to property shall not pass, no act or acts, however conclusive they might otherwise be, will effect a transfer. Thus, in Walker *v.* Clyde, 10 C. B. N. S. 381; 100 E. C. L. 380.

A agreed to build an organ for B, and to fix it in his parish church for seven hundred pounds, to be paid by certain yearly instalments. The agreement provided that in the event of a default in payment after the organ was completed, that A might recover the whole sum with interest due thereon, and that until payment A should have a lien on the said organ, and in default of payment, A might either dispose of or remove the organ as he might think proper. It was held that notwithstanding the delivery of the organ to B, the plain intent of the parties was that the property should remain in A until the instalments were paid, and that the property

though it is a presumption of law that if something remains to be done for the purpose of testing the property, or of fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, title does not pass until such act is done,[1] yet this presumption may be over-

therefore did not pass to B. See also Moakes *v.* Nicolson, 19 C. B. N. S. 290; 115 E. C. L. 290.

The intent has been allowed to determine the character of the contract, even where words of present transfer were used in the written agreement. Martin *v.* Hurlbut, 9 Minn. 142 ("the said F sells to me"); Thompson *v.* Libby, 35 Minn. 445 ("I have this day sold"); Sherwin *v.* Mudge, 127 Mass. 547 ("M sells and B buys," etc.); Ormsbee *v.* Machir, 20 Ohio St. 301 ("I have this day sold"); Winslow *v.* Leonard, 24 Pa. St. 14; 62 Am. Dec. 354; Shields *v.* Pettee, 4 N. Y. 122; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112; 20 Am. Dec. 672 ("sold" held to mean "contracted to sell"); Boyd *v.* Skiffin, 2 Camp. 326 (same); Anderson *v.* Reed, 106 N. Y. 333 (same); Blackwood *v.* Cutting Packing Co., 76 Cal. 212; 9 Am. St. Rep. 199 ("sold" held not to imply an executed contract); Eaton *v.* Richeri, 83 Cal. 185; Baldwin *v.* Morey, 41 La. Ann. 1105; Meeker *v.* Johnson, 3 Wash. 247. See also SOLD. And so though the words of the contract were "I agree to sell" title was held to pass at once where such appeared to be the intention of the parties. Bangs *v.* Friezen, 36 Minn. 423.

In Sanborn *v.* Benedict, 78 Ill. 309, there was a contract between a grain dealer and a farmer, made while the grain was growing in the field, whereby the farmer sold to the dealer a certain quantity of grain at an agreed price to be delivered when called for, the purchaser to give ten days' notice of the time at which he would call. A part of the purchase money was paid at the time of the contract. It was held to be an executed and absolute sale of grain to be delivered in future, not an executory contract for a future sale.

In Chissom *v.* Hawkins, 11 Ind. 316, W rented certain property of H, agreeing to pay a certain amount of corn, and that H should hold the crop as security for the payment of the rent. It was held that the contract was entirely executory, and that one purchasing from him without notice of H's claim would take a valid title.

Intention a Question for the Jury.—The intention of the parties is a matter of fact to be found by the jury upon the evidence under proper instructions from the court. Blodgett *v.* Hovey (Mich. 1892), 52 N. W. 149; Lobdell *v.* Horton (Mich. 1888), 40 N. W. Rep. 28; Wilkinson *v.* Holiday, 33 Mich. 386; Marble *v.* Moore, 102 Mass. 443; Stevens *v.* Boston, etc., R. Co., 8 Gray (Mass.) 262; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 296; Allen *v.* Williams, 12 Pick. (Mass.) 297; Stanton *v.* Eager, 16 Pick. (Mass.) 473; Riddle *v.* Varnum, 20 Pick. (Mass.) 280; Caywood *v.* Timmons, 31 Kan. 394; McClung *v.* Kelley, 21 Iowa 508; Kelsea *v.* Haines, 41 N. H. 253; Fuller *v.* Bean, 34 N. H. 290; DeRidder *v.* M'Knight, 13 Johns. (N. Y.) 294; Ferry *v.* Wheeler, 25 N. Y. 525; Dyer *v.* Libby, 61 Me. 45; George *v.* Stubbs, 26 Me. 250; Graff *v.* Fitch, 58 Ill. 373; 11 Am. Rep. 85; Smyth *v.* Craig, 3 W. & S. (Pa.) 14; Kent Iron, etc., Co. *v.* Norbeck, 150 Pa. St. 559; Hood *v.* Bloch, 29 W. Va. 244; Hatch *v.* Standard Oil Co., 100 W. S. 131. See also QUESTIONS OF LAW AND FACT, vol. 19, p. 657; Holly *v.* St. Louis, etc., R. Co., 34 Mo. App. 202; Glass *v.* Gelvin, 80 Mo. 297; Caldwell *v.* Smith, 4 Dev. & B. (N. Car.) 64; Godts *v.* Rose, 17 C. B. 229; 84 E. C. L. 229; Tregelles *v.* Sewell, 7 H. & M. 574.

Should the evidence be so clear one way as not to justify a finding to the contrary, the court may as in other cases direct a verdict. Merchants' Nat. Bank *v.* Bangs, 102 Mass. 296; Wigton *v.* Bowley, 130 Mass. 254; Hathaway *v.* East Tenn., etc., R. Co., 29 Fed. Rep. 489. See also INSTRUCTIONS, vol. 11, p. 243; TRIAL.

1. See *infra*, this title, *Conditional Sales*. In other words, a sale is not completed so long as anything remains to be done to the thing sold to put it in a condition for sale, or to identify it, or discriminate it from other things, or to determine its quantity if the price depends on this, unless this is to be done by the purchaser. McClung *v.* Kelley, 21 Iowa 508.

come and title will pass if such appears by the contract to have been the intention of the parties.[1]

Where, as is frequently the case, the parties fail to express their intention, or express it so imperfectly as to leave it in doubt, or where there is no definite intention, certain rules of construction are applied by the courts. In most instances these rules furnish tests which are adequate and conclusive.[2]

These rules will be considered in the succeeding divisions of this section. It must be borne in mind, however, that, as between one of the parties to the contract and the creditors or *bona fide* purchasers of the other, the law requires some evidence of this intention to transfer title, such as delivery, registry, etc.[3]

1. Marble *v.* Moore, 102 Mass. 443; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Denny *v.* Williams, 5 Allen (Mass.) 3; Weld *v.* Came, 98 Mass. 152; Morse *v.* Sherman, 106 Mass. 430; Beecher *v.* Mayall, 16 Gray (Mass.) 376; Bemis *v.* Morrill, 38 Vt. 153; Fitch *v.* Burk, 38 Vt. 683; Cushman *v.* Holyoke, 34 Me. 289; Stone *v.* Peacock, 35 Me. 388; Boynton *v.* Veszie, 24 Me. 286; Williams *v.* Adams, 3 Sneed (Tenn.) 359; Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453; Ford *v.* Chambers, 28 Cal. 13; Cummins *v.* Griggs, 2 Duv. (Ky.) 87; 87 Am. Dec. 482; Burr *v.* Williams, 23 Ark. 244; Terry *v.* Wheeler, 25 N. Y. 525; Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; Russell *v.* Carrington, 12 N. Y. 118; 1 Am. Rep. 498; Filkin *v.* Whyland, 24 N. Y. 338; Kimberley *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334; Burrows *v.* Whitaker, 71 N. Y. 291; 27 Am. Rep. 42; Fuller *v.* Bean, 34 N. H. 300; Graff *v.* Fitch, 58 Ill. 373; 11 Am. Rep. 85; Straus *v.* Minzesheimer, 78 Ill. 492; Young *v.* Matthews, L. R., 2 C. P. 127; Martineau *v.* Kitching, L. R., 7 Q. B. 436; Falk *v.* Fletcher, 18 C. B. N. S. 403; 114 E. C. L. 403; Turley *v.* Bates, 2 H. & C. 200; Alexander *v.* Gardner, 1 Bing. N. Cas. 671; 27 E. C. L. 538; Castle *v.* Playford, L. R., 7 Exch. 98; Byles *v.* Colin, 54 Mich. 1; Wilkinson *v.* Halliday, 33 Mich. 386; Sewell *v.* Eaton, 6 Wis. 490; 70 Am. Dec. 471; Morrow *v.* Delaney, 41 Wis. 149; Fletcher *v.* Ingram, 46 Wis. 191; Barker *v.* Freeland (Tenn. 1892), 18 S. W. Rep. 60; Aderholt *v.* Embry, 78 Ala. 185; Gonser *v.* Smith, 115 Pa. St. 452; Chamblee *v.* McKenzie, 31 Ark. 155.

2. Benj. on Sales (6th ed.), § 309.

3. Burge *v.* Cone, 6 Allen (Mass.) 412; Carter *v.* Willard, 19 Pick. (Mass.) 1; Phelps *v.* Cutler, 4 Gray (Mass.) 138; Harlow *v.* Hall, 132 Mass. 232; Hallgarten *v.* Oldham, 135 Mass. 8; 46 Am. Rep. 433; Ludwig *v.* Fuller, 17 Me. 162; Vining *v.* Gilbreth, 39 Me. 496; Veazie *v.* Somerby, 5 Allen (Mass.) 280; Ricker *v.* Cross, 5 N. H. 5701; 22 Am. Dec. 480; Patrick *v.* Meserve, 18 N. H. 302; Dodworth *v.* Jones, 4 Duer (N. Y.) 201; Meeker *v.* Wilson, 1 Gall. (U. S.) 419; Thorne *v.* First Nat. Bank, 37 Ohio St. 254. This subject is discussed *infra*, this title, *Bona Fide Purchasers*, and in FRAUDULENT SALES, vol. 8, pp. 876 *et seq.*

Where goods were sold to C, and shipped to his address, but before delivery he notified the seller that he had abandoned business, and the seller ordered the goods held at the railroad warehouse until he could sell them, and they were there levied on as the property of C, the seller could replevy them. Hershiser *v.* Delone, 24 Neb. 380.

No formal delivery is necessary where the buyer has already formal possession. Lake *v.* Morris, 30 Conn. 201; Nichols *v.* Patten, 18 Me. 231; 36 Am. Dec. 713; Kittredge *v.* Sumner, 11 Pick. (Mass.) 50 (sale between cotenants).

If from the nature of the circumstances delivery is impracticable—*e. g.*, the fact that the subject of the sale is at a distance—the title passes without delivery, provided the buyer uses proper diligence to take possession within a reasonable time. Samuels *v.* Gorham, 5 Cal. 226; Ricker *v.* Cross, 5 N. H. 571; 22 Am. Dec. 480; Patrick *v.* Meserve, 18 N. H. 302; Pratt *v.* Parkman, 24 Pick. (Mass.) 47; Jorda *v.* Lewis, 1 La. Ann. 59; Wright *v.* Campbell, 4 Burr. 2051; Vining *v.* Gilbreth, 39 Me. 496; Cadbury *v.* Nolen, 5 Pa. St. 320.

b. RULES DETERMINING INTENTION—(1) *Sale of Specific Chattels Unconditionally.*—When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, and that the transfer of title takes place at once, if the specific thing is agreed on, and it is ready for immediate delivery.[1] This is universally true where the price has been paid

1. Benj. on Sales, §§ 313-317; Hinde *v.* Whitehouse, 7 East 558; Tarling *v.* Baxter, 6 B. & C. 360; 13 E. C. L. 199; Martindale *v.* Smith, 1 Q. B. 389; 41 E. C. L. 592; Spartali *v.* Benecke, 10 C. B. 212; 70 E. C. L. 212; Gilmour *v.* Supple, 11 Moore P. C. 551; Calcutta Co. *v.* DeMattos, 32 L. J. Q. B. 322; Wood *v.* Bell, 6 E. & B. 355; Chinery *v.* Vial, 5 H. & N. 288; Sweeting *v.* Turner, L. R., 7 Q. B. 310; Seath *v.* Moore, 11 App. Cas. 370; Chambers *v.* Miller, 13 C. B. N. S. 125; 106 E. C. L. 124; Furley *v.* Bates, 2 H. & C. 200; Joyce *v.* Swann, 17 C. B. N. S. 84; 112 E. C. L. 83; Rice *v.* Codman, 1 Allen (Mass.) 377; McGlynn *v.* Maynz, 104 Mass. 263; Scudder *v.* Bradbury, 106 Mass. 427; Morse *v.* Sherman, 106 Mass. 430; Hoskins *v.* Warren, 115 Mass. 533; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Dugan *v.* Nichols, 125 Mass. 43; Chapman *v.* Shepard, 39 Conn. 413; Levasseur *v.* Cary (Me. 1886), 3 Atl. Rep. 461; Phillips *v.* Moor, 71 Me. 78; Miller *v.* Koger, 9 Humph. (Tenn.) 231; Bethel Steam Mill Co. *v.* Brown, 57 Me. 18; 99 Am. Dec. 572; Webber *v.* Davis, 44 Me. 147; 69 Am. Dec. 87; Chase *v.* Willard, 57 Me. 157; Merrill *v.* Parker, 24 Me. 89; Wing *v.* Clark, 24 Me. 366; Colegrove *v.* Snow, 45 Conn. 88; Hatch *v.* Standard Oil Co., 100 U. S. 124; Barrett *v.* Goddard, 3 Mason (U. S.) 107; Bass *v.* Walsh, 39 Mo. 192; Hamilton *v.* Clark, 25 Mo. App. 428; Shelton *v.* Franklin, 68 Ill. 333; Barrow *v.* Window, 71 Ill. 214; Holliday *v.* Burgess, 34 Ill. 193; Shepard *v.* Lynch, 26 Kan. 377; Bertelson *v.* Bower, 81 Ind. 512; Felton *v.* Fuller, 29 N. H. 121; Sweeney *v.* Owlsley, 14 B. Mon. (Ky.) 332; Bates *v.* Elmer Glass Mfg. Co. (N. J. 1888), 14 Atl. Rep. 273; Joyce *v.* Adams, 8 N. Y. 291; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Hayden *v.* Demets, 53 N. Y. 426; Dexter *v.* Norton, 55 Barb. (N. Y.) 262; 47 N. Y. 62; 7 Am. Rep. 475; Jenkins *v.* Jarrett, 70 N. Car. 255; Cohen *v.* Stewart, 98 N. Car. 97; Simpson *v.* Simpson, 3 Ired. (N. Car.) 233; Black *v.* Webb, 20 Ohio 304; 55 Am. Dec. 456; Frazer *v.* Hillard, 2 Strobh. (S. Car.) 304; Lucas *v.* Pittman (Ala. 1892), 10 So. Rep. 603; Hopkins *v.* Partridge, 71 Tex. 606.

In Simmons *v.* Swift, 5 B. & C. 862; 12 E. C. L. 388, Bailey, J., said: "Generally, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risk if nothing remains to be done to the goods, although he cannot take them away without paying the price." So in Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86, Park, J., said: "I take it to be clear that by the law of *England* the sale of a specific chattel passes the property in it to the vendee without delivery. . . . Where there is a sale of goods generally no property in them passes till delivery, because until then the very goods sold are not ascertained. But where, by the contract itself, the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the contract is equivalent to delivery by the vendor and the assent of the vendee to take this specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

Examples.—Upon the sale of a colt the parties agreed that it should run with its dam, which was in the possession and was the property of the seller, until it was weaned and then be delivered to the purchaser upon payment of the price. The title to the colt was held to pass at once to the purchaser and its subsequent safe keeping to be at his risk. Henline *v.* Hall, 4 Ind. 189.

Where there was a sale of an entire quantity of butter, the purchaser to take and pay for part at once, and to take and pay for the rest at a subsequent date, it was held, upon the destruction of the residue by fire before such date,

or the goods have been expressly sold on credit.[1] But where the sale is for cash, payment, it has been said, must precede the transfer of title.[2] The better doctrine, however, appears to be that the transfer of title takes place immediately upon the conclusion

that the loss was the purchaser's. Seckel *v.* Scott, 66 Ill. 106.

So where a specific lot of sheep were sold, to be delivered and paid for in the future, and before delivery and while in the possession of the seller, they are injured without his fault, he may, nevertheless, recover the price of the sheep. Barrow *v.* Window, 71 Ill. 214.

So where one purchases at a fixed price a certain number out of a flock of sheep or herd of swine, and the sheep or swine so purchased are pointed out and are distinguishable from the others, the title passes, although no other delivery is made. Webster *v.* Anderson, 42 Mich. 554; 36 Am. Rep. 452; Groat *v.* Gile, 51 N. Y. 431; Barney *v.* Brown, 2 Vt. 374; 19 Am. Dec. 720.

Plaintiff sold to defendant a horse, payment to be made at a future time, and gave him an order upon the person in charge of the horse for its delivery. Defendant presented the order and without disclosing the bargain made with plaintiff, told the person in charge that he had gotten the horse from the seller on trial. On the same day the purchaser returned the horse. It was held that there had been a full sale and delivery. Somers *v.* McLaughlin, 57 Wis. 358.

In Straus *v.* Minezesheimer, 78 Ill. 492, the sale of an entire lot of cigars was held to pass title immediately.

In Rail *v.* Little Falls Lumber Co., 47 Minn. 422, there was a sale of all the seller's logs lying at a certain point upon a river. The precise number of logs lying at that point and the mark which had been placed upon each were stated. It was held that the property passed to the purchaser.

A agreed to buy all B's spring lambs, B to pasture them until called for. It was held that a loss through no fault of B's, while the lambs were so pastured, must be borne by A. Bertelson *v.* Bower, 81 Ind. 512.

Sale of Stock.—The appellant signed and delivered to the appellee a paper in which he said: "I hold of the stock of the Washington & Hope railway company $33,250, or 1,320 shares, which is sold to Paul F. Beardsley (the appellee) and which, though standing in my name, belongs to him subject to a payment of $8,000 with interest." It was held that the ownership and equitable title passed to the appellee with a reservation of the legal title by the appellant simply as security for the purchase money. Beardsley *v.* Beardsley, 138 U. S. 262.

Retention of Possession.—The retention by the purchaser of possession of the chattel as security for the purchase money does not affect the rule of the text. Morey *v.* Medbury, 10 Hun (N. Y.) 540; Smith *v.* Lynes, 5 N. Y. 41; Terry *v.* Wheeler, 25 N. Y. 520; Morse *v.* Sherman, 106 Mass. 430.

1. In Martindale *v.* Smith, 1 Q. B. 395; 41 E. C. L. 595, Lord Denman, C. J., said: "For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by Holroyd, J., from Com. Dig., Agreement (B) 3, in Tarling *v.* Baxter, 6 B. & C. 360; 13 E. C. L. 199; and it will be found consistent with all the numerous cases referred to in the course of the argument." See also Scudder *v.* Bradbury, 106 Mass. 422.

In Upshur Guano Co. *v.* Malloy, 104 N. Car. 674, where the contract of sale provided that the buyer should take notes for the guano when sold by him and forward them to the seller to be held by the latter as collateral security for notes executed by the buyer, it was held that upon delivery the title to the guano passed.

2. Tiedeman on Sales, § 85; Powell *v.* Bradlee, 9 Gill & J. (Md.) 221; Kinnemon *v.* Miller, 2 Md. Ch. 407; Hammett *v.* Linneman, 48 N. Y. 399; Whitney *v.* Eaton, 15 Gray (Mass.) 225; Fishback *v.* Van Dusen, 33 Minn. 111. See also Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; 13 Am. Dec. 449; Ayer *v.* Bartlett, 9 Pick. (Mass.) 156; Reed *v.* Upton, 10 Pick. (Mass.) 522; 20 Am. Dec. 545; Booraem *v.* Crane, 103 Mass. 522; Turner *v.* Moore, 58 Vt. 455; Leutz *v.* Flint, etc., R. Co., 53 Mich.

of the contract, notwithstanding the fact that the transaction is for cash, the seller having a lien for the price which entitles him to retain the possession of the chattel until the price is paid.[1] And in those jurisdictions in which, when the sale is for cash, payment is held a condition precedent, it has been uniformly held that the seller waives the condition when he makes complete delivery without expressly reserving title to himself.[2] But where

444; Lang *v.* Rickmers, 70 Tex. 108; Simpson *v.* Shackelford, 49 Ark. 63. See also *infra*, this title, *Conditional Sales*.

1. Wild, C. J., in Spartali *v.* Benecke, 10 C. B. 223; 70 E. C. L. 223, says: "It is now undoubted law, that, by a sale of specific goods for an agreed price, the property passes to the buyer, and remains at his risk. Rugg *v.* Minette, 11 East 210." And in Simmons *v.* Swift, 5 B. & C. 862; 12 E. C. L. 390, Bayley, J., states the doctrine: "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed." Joyce *v.* Swann, 17 C. B. N. S. 94; 112 E. C. L. 84; see also Wilmshurst *v.* Bowker, 2 M. & G. 792; 40 E. C. L. 629.

It seems that the English cases state the better doctrine. The seller retains the property by virtue of his lien, and it would seem harsh to throw upon him the risk of loss when it is the buyer who is in default. There are several American cases which adopt the English doctrine and constitute respectable authority in its favor. Magee *v.* Billingsley, 3 Ala. 679; Bowen *v.* Burk, 13 Pa. St. 148; Mackaness *v.* Long, 85 Pa. St. 158; Harris *v.* Smith, 3 S. & R. (Pa.) 20. See also Morse *v.* Sherman, 106 Mass. 433; Phillips *v.* Moor, 71 Me. 78; Jenkins *v.* Janett, 70 N. Car. 255; Farmers Phosphate Co. *v.* Gill, 69 Md. 537; 9 Am. St. Rep. 443; Brehen *v.* O'Donnell, 43 N. J. L. 408.

The *Pennsylvania* court in Bowen *v.* Burk, 13 Pa. St. 148, cites an example from Ross on Vendors, 1: "If a man sells his horse for money, though he may keep him until he is paid for, yet the property of the horse is in the bargainer or buyer." *Compare* Bush *v.* Bender, 113 Pa. St. 94.

Express Stipulation.—It is undoubted that the parties may stipulate that payment shall be a condition precedent to the transfer of title, and where such a stipulation exists no title vests in the buyer until he has performed the condition, although complete delivery may have been made. Whitney *v.* Eaton, 15 Gray (Mass.) 226; Tiedeman on Sales, § 85; Benj. on Sales (4th Am. ed.), §§ 388–391. See *infra*, this title, *Conditional Sales*.

2. **Absolute Delivery a Waiver of Conditions.**—(See also *infra*, this title, *Conditional Sales*.) Myer *v.* Cook, 31 Me. 340; Foley *v.* Mason, 6 Md. 37; Fishback *v.* Van Dusen, 33 Minn. 111 (whether delivery is absolute or conditional, a question for the jury); Smith *v.* Dennie, 6 Pick. (Mass.) 262; 17 Am. Dec. 368; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Freeman *v.* Nichols, 116 Mass. 309; Pierson *v.* Hoag, 47 Barb. (N. Y.) 243; Bowen *v.* Burk, 13 Pa. St. 146; Welsh *v.* Bell, 32 Pa. St. 17; Pitts *v.* Owen, 9 Wis. 152; Spartali *v.* Benecke, 10 C. B. 223; 70 E. C. L. 223.

In Smith *v.* Lynes, 5 N. Y. 41, *reversing* 2 Sandf. (N. Y.) 733, it is said that delivery in such cases without demand or receipt of payment creates a presumption of waiver of prepayment which may be rebutted by evidence of the intent and conduct of the parties. And this is the view taken in Farlow *v.* Ellis, 15 Gray (Mass.) 229 (Shaw, C. J.); Parker *v.* Baxter, 86 N. Y. 586.

A purchaser from the buyer in such cases acquires a valid title, provided he purchases *bona fide*. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

Evidence of a usage or custom may be admitted to rebut the presumption of waiver. Farlow *v.* Ellis, 15 Gray (Mass.) 229; Scudder *v.* Bradbury, 106 Mass. 427; USAGES AND CUSTOMS.

But a usage of trade cannot be allowed to control the express intention of the parties, nor the interpretation and effect which result from an absolute rule of law applicable to the situation. And a usage that no title

immediate payment is required by the contract, and the buyer upon obtaining possession of the goods refuses to pay, the seller may regain the possession and rescind the contract.[1]

The parties may insert their own conditions in the contract, such as a condition precedent, the performance of which must precede the vesting of the title, or a condition subsequent, a failure to perform which will divest the title.[2] A common condition is that the seller shall put the property into a deliverable state, or that the buyer shall prepay the price.[3] But even where the conditions are express it may remain a question of intention whether the title passes, and an implied waiver of the conditions may be inferred from the acts and conduct of the parties.[4]

(2) *Sale of Specific Chattels Conditionally.*—See *infra*, this title, *Conditional Sales.*

(3) *Sale of Chattels Not Specific*—(a) **General Rule.**—When the agreement of sale is for a thing not specified, as of an article to be manufactured or of a certain quantity of goods in general, without

passes upon an ordinary sale and delivery without an actual payment of the price within a certain time is unreasonable and invalid. Haskins *v.* Warren, 115 Mass. 514; Foley *v.* Mason, 6 Md. 49; Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

An Exception.—The rule of the text is not absolute, but may vary in particular cases. Thus, in a cash sale of merchandise in a city, the seller does not waive the condition precedent of payment where the goods are delivered too late on Saturday to send in a bill, and payment is called for on Monday, when the purchaser has absconded. The seller, in such case, may reclaim the goods from a judgment creditor of the purchaser. Acker *v.* Campbell, 23 Wend. (N. Y.) 372. So where the buyer was bound to pay for each wagon load of goods as delivered, the seller does not waive his right to payment on delivery of subsequent loads by delivering several wagon loads without requiring payment for each. Gardner *v.* Clark, 21 N. Y. 399.

1. D'Wolf *v.* Babbett, 4 Mason (U. S.) 289; Goldsmith *v.* Bryant, 26 Wis. 35; Hodgson *v.* Barrett, 33 Ohio St. 63; 31 Am. Rep. 527; Young *v.* Bradley, 69 Ill. 553; Toledo, etc., R. Co. *v.* Gilvin, 81 Ill. 511; Kinsey *v.* Leggett, 71 N. Y. 387; Henderson *v.* Lauck, 21 Pa. St. 359.

In Wilmshurst *v.* Bowker, 2 M. & G. 792; 40 E. C. L. 629, the agreement stipulated for "payment by banker's draft on London at two months' date, to be remitted on receipt of invoice and bill of lading." The buyers, upon receipt of the invoice and bill of lading, instead of a banker's draft on London, sent their own acceptance for the invoice price. The sellers immediately returned it, saying that such acceptance was not called for by the agreement, and that they had arranged otherwise for the disposal of the goods, which they had obtained back from the captain of the vessel and resold. It was held that although the property in the wheat had passed to the buyers under the contract, the right to the possession was not to vest until they had remitted the banker's draft on London in payment, and having failed to do so the sellers were justified in preventing a delivery.

2. See *infra*, this title, *Conditional Sales.*

3. See *infra*, this title, *Conditional Sales.*

4. Thus, where weighing, measuring, counting, etc., remains to be done, but the goods are actually delivered, it may be shown that the intention of the parties was to complete the sale by delivery, and the weighing, etc., will not be regarded as a part of the contract of sale, but will be considered as referring to the adjustment on final settlement. Ober *v.* Carson, 62 Mo. 210; Southwestern Freight, etc., Co. *v.* Stannard, 44 Mo. 71; Scott *v.* Wells, 6 W. & S. (Pa.) 357; 40 Am. Dec. 568; Dennis *v.* Alexander, 3 Pa. St. 51; Bell *v.* Farrar, 41 Ill. 400; Magee *v.* Billingsley, 3 Ala. 679; Kaufman *v.* Stone, 25 Ark. 337; Upson *v.* Holmes, 51 Conn. 500; Cham-

specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is executory and the property does not pass.[1] Where the contract is for the

blee *v.* McKenzie, 31 Ark. 155; Riddle *v.* Varnum, 20 Pick. (Mass.) 280; Adams Min. Co. *v.* Senter, 26 Mich. 73; Bradley *v.* Wheeler, 44 N. Y. 495; Sahlman *v.* Mills, 3 Strobh. (S. Car.) 385; 51 Am. Dec. 630.

Thus, where in a sale of a certain number of bricks the seller delivered to the buyer the possession of the whole kiln in order for him to take out his purchase, the title passed although the quantity was still unascertained. Crofoot *v.* Bennett, 2 N. Y. 258.

1. Browning *v.* Hamilton, 42 Ala. 484; Screws *v.* Roach, 22 Ala. 675; Block *v.* Maas, 65 Ala. 211; Mobile Sav. Bank *v.* Fry, 69 Ala. 350; Fry *v.* Mobile Sav. Bank, 75 Ala. 473; Upham *v.* Dodd, 24 Ark. 545; Beller *v.* Block, 19 Ark. 566; McLaughlin *v.* Piatti, 27 Cal. 451; Caruthers *v.* McGarvey, 41 Cal. 16; Ruston *v.* Knapp, 85 Cal. 559; Huntington *v.* Chisholm, 61 Ga. 270; Central R., etc., Co. *v.* Bun, 51 Ga. 553; Lewis *v.* Lofley, 60 Ga. 559; Dunlap *v.* Beny, 5 Ill. 327; 39 Am. Dec. 413; Cook *v.* Logan, 7 Iowa 142; Rosenthal *v.* Risley, 11 Iowa 541; Courtright *v.* Leonard, 11 Iowa 32; Smyth *v.* Ward, 46 Iowa 339; Commercial Nat. Bank *v.* Gillette, 90 Ind. 268; 46 Am. Rep. 222; Murphy *v.* State, 1 Ind. 366; Indianapolis, etc., R. Co. *v.* Maguire, 62 Ind. 140; Howell *v.* Pugh, 27 Kan. 702; Bailey *v.* Long, 24 Kan. 90; Haug *v.* Gillett, 14 Kan. 140; Williams *v.* Feiniman, 14 Kan. 288; Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555; 29 Am. Rep. 418; Warren *v.* Kirk, 24 La. Ann. 150; Stone *v.* Peacock, 35 Me. 385; Ober *v.* Carson, 62 Mo. 213; Morrison *v.* Dingley, 63 Me. 553; Reeder *v.* Machen, 57 Md. 56; Young *v.* Austin, 6 Pick. (Mass.) 279; Merrill *v.* Hunnewell, 13 Pick. 213; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Ropes *v.* Lane, 9 Allen (Mass.) 510; Abberger *v.* Marvin, 102 Mass. 70; Foster *v.* Ropes, 111 Mass. 10; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Hahn *v.* Fredericks, 30 Mich. 223; 18 Am. St. Rep. 119; Thomas *v.* State, 37 Miss. 353; Baldwin *v.* McKay, 41 Miss. 358; Cunningham *v.* Ashbrook, 20 Mo. 553; Davis *v.* Hill, 3 N. H. 382; Warren *v.* Buckminster, 24 N. H. 336; Fuller *v.* Bean, 34 N. H. 290; Ockington *v.* Richey, 41 N. H. 275; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Jenness *v.* Wendell, 51 N. H. 63; 12 Am. Rep. 48; Prescott *v.* Locke, 51 N. H. 94; 12 Am. Rep. 55; Messer *v.* Woodman, 22 N. H. 172; Foot *v.* Marsh, 51 N. Y. 288; Joyce *v.* Adams, 8 N. Y. 291; Field *v.* Moore, Hill & D. Supp. (N. Y.) 418; Stevens *v.* Ens, 10 Barb. (N. Y.) 95; Gardiner *v.* Suydam, 7 N. Y. 359; Roder *v.* Wade, 47 Barb. (N. Y.) 53; Waldo *v.* Belcher, 11 Ired. (N. Car.) 609; Woods *v.* McGee, 7 Ohio 127; 30 Am. Dec. 220; Ormsbee *v.* Machir, 20 Ohio St. 306; Hutchinson *v.* Hunter, 7 Pa. St. 140; Haldeman *v.* Duncan, 51 Pa. St. 66; Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15; Cleveland *v.* Williams, 29 Tex. 205; 94 Am. Dec. 274; Grey *v.* U. S., 25 Ct. of Cl. 61; Wallace *v.* Breeds, 13 East 522; Gabaron *v.* Kreft, L. R., 10 Exch. 274; 14 Moak's Rep. 562; Busk *v.* Davis, 2 M. & S. 397; White *v.* Wilkes, 5 Taunt. 176; Gillett *v.* Hill, 2 C. & M. 531; Shepley *v.* Davis, 5 Taunt. 617; Austin *v.* Craven, 4 Taunt. 643; Campbell *v.* Mersey Dock Co., 14 C. B. N. S. 412; 108 E. C. L. 410; Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86; Mirabita *v.* Imperial Ottoman Bank, 3 Exch. Div. 157; 31 Moak's Rep. 200; Stock *v.* Inglis, 9 Q. B. Div. 708.

"When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A buys from B ten sheep to be delivered hereafter, or ten sheep out of a flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the mere contract, that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B, and to have become the property of A." Benj. on Sales, § 310.

"As to the general rule upon this subject there is no controversy. In Cook *v.* Logan, 7 Iowa 142, it was stated thus: 'Where some act remains to be done in relation to the articles which are the subject of the sale, as weighing or measuring; or, as in this case, that of separating and setting them apart

sale of goods generally described and not referred to as forming part of a specified lot, there is no dispute that title does not pass until the goods have been separated or otherwise identified.[1]

from the bulk, so that they may be distinguished and identified, the performance of such act is a pre-requisite, and until it is performed, the property does not pass to the vendee.' (Citing Davis *v.* Hill, 3 N. H. 382; Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Brewer *v.* Smith, 3 Me. 44; 14 Am. Dec. 213; Downer *v.* Thompson, 2 Hill (N. Y.) 137; Story on Cont., § 800; 1 Pars. on Cont. 441.) The same general rule is stated thus by Chancellor Kent (2 Com. 496): 'When the goods sold are mingled with others, they must be ascertained, designated and separated from the mass, before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by numbers, weight or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified.' 'And the reason is,' says Strong, J., in Crofoot *v.* Bennett, 2 N. Y. 258 (a case much like the one before us), 'that the sale cannot apply to any article until it is clearly designated and its indentity thus ascertained.'" Courtright *v.* Leonard, 11 Iowa 34.

Examples.—The rule of the text has been held to apply and a separation or appropriation to be necessary to a transfer of title in the following cases: Where the sale was of a certain number of barrels of pork not identified or distinguished from a larger quantity which the seller had on hand. Scudder *v.* Worster, 11 Cush. (Mass.) 573. Sale of a whole lot, when a reservation was to be made by the seller. Block *v.* Maas, 65 Ala. 211. Sale of ungathered vegetables or fruit. Bailey *v.* Long, 24 Kan. 90. Sale of a certain number of telegraph poles to be selected from a larger number. Bailey *v.* Smith, 43 N. H. 141; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487. Sales of ores to be hereafter delivered from a mine or heap. Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184; Reeder *v.* Machen, 57 Md. 56.

Therefore, a contract for the sale of certain specified quantities of different kinds of liquors at agreed prices is merely executory, and no title passes until the liquors are separated and set apart; but the separation and setting apart completes the sale and the title passes when that takes place. Banchor *v.* Warren, 33 N. H. 183.

Warehouse Receipts.—This rule has been held to apply notwithstanding the fact that the buyer had received a warehouse-storage receipt, which by usage of trade usually constituted a delivery. Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555; 29 Am. Rep. 418; Ropes *v.* Lane, 9 Allen (Mass.) 502; Keeler *v.* Goodwin, 111 Mass. 490; Gardiner *v.* Suydam, 7 N. Y. 359; Joyce *v.* Adams, 8 N. Y. 291 (in this case the buyer paid some of the purchase money and agreed to pay storage —the title, however, did not pass).

But in *Massachusetts*, a statute provides that the warehouseman's receipt for any portion of grain or other property stored in a public warehouse in such a manner that different lots or parcels are mixed together so that the identity of the same cannot be preserved, shall be deemed a valid title to so much thereof as is designated in said receipt, without regard to any separation or identification. *Massachusetts* Pub. Sts., ch. 72, § 7. And see upon this subject, WAREHOUSE.

1. Banker *v.* Warren, 33 N. H. 183; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184; Winslow *v.* Leonard, 24 Pa. St. 14; 62 Am. Dec. 354; McCandlish *v.* Newman, 22 Pa. St. 460; Eagle *v.* Eichelberger, 6 Watts (Pa.) 29; 31 Am. Dec. 449; Marsh *v.* Meshew, 8 Bush (Ky.) 187; May *v.* Hoaglan, 9 Bush (Ky.) 171; Lewis *v.* Lofley, 60 Ga. 559; Anderson *v.* Read, 106 N. Y. 333; Brady *v.* Cassidy, 104 N. Y. 147; Black *v.* Webb, 20 Ohio 304; 55 Am. Dec. 456; Ormsbee *v.* Machir, 20 Ohio St. 295; Pugh *v.* Lawrence, 27 U. C., C. P. 402; Abberger *v.* Marvin, 102 Mass. 70; Herron *v.* State, 51 Ark. 133; Hubler *v.* Gaston, 9 Oregon 66; First Nat. Bank *v.* Crowley, 24 Mich. 492; Scotten *v.* Sutter, 37 Mich. 526; State *v.* Basserman, 54 Conn. 88; Hubbard *v.* Gaston, 9 Oregon 66; Warren *v.* Kirk, 24 La. Ann. 150.

The plaintiff, a manufacturer of iron, contracted to sell the defendants 900 tons of iron. It was held that notwithstanding the fact of payment that the contract remained executory until an

This is equally true when the sale is of an article to be manufactured.[1]

(b) **Part of a Uniform Mass.**—Where, however, the sale is of a certain quantity of goods which constitute a portion of a designated and uniform mass, it has been held by some authorities that no separation or appropriation is necessary in order to pass title.[2]

appropriation of specific iron to the contract. Copley Iron Co. *v.* Pope, 108 N. Y. 232.

Where defendant bought from plaintiff twenty barrels of a certain sugar, and there was at the time of making the purchase no selecting or setting apart of any specific barrels, it was held that the contract was executory. Doane *v.* Dunham, 65 Ill. 513.

1. See *infra*, this title, *Sale of Goods to be Manufactured or Procured.*

2. Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334; Crofoot *v.* Bennett, 2 N. Y. 258; Hoyt *v.* Hartford F. Ins. Co., 26 Hun (N. Y.) 416; Lobdell *v.* Stowell, 51 N. Y. 75; Russell *v.* Carrington, 42 N. Y. 118; 1 Am. Rep. 498; Pleasants *v.* Pendleton, 6 Rand. (Va.) 475; 18 Am. Dec. 726; Hurff *v.* Hires, 40 N. J. L. 581; 29 Am. Rep. 282; Kingham *v.* Holmquist, 36 Kan. 735; Howell *v.* Pugh, 27 Kan. 702; Sewell *v.* Eaton, 6 Wis. 490; 70 Am. Dec. 471; Young *v.* Miles, 23 Wis. 643; Chapman *v.* Shepard, 39 Conn. 413. In that case, however, separation was prevented by party alleging that the title had not passed. Watts *v.* Hendry, 13 Fla. 523; Nash *v.* Brewster, 39 Minn. 530; MacKellar *v.* Pillsburg (Minn.), 1892; 51 N. W. Rep. 222; Coffey *v.* Quebec Bank, 20 U. C. C. P. 110.

Whitehouse *v.* Frost.—In the leading case of Whitehouse *v.* Frost, 12 East 614, the sellers owned forty tons of oil in a cistern, of which they sold ten tons, which was never measured or delivered from the larger mass. The purchaser sold his ten tons to another person and gave an order on the original sellers, which, on being presented, they accepted. It was held that the title had passed without separation, stress being laid upon the acceptance of the order by the sellers, which, it was said, placed them in the relation of bailees to the quantity sold. This case was followed in Jackson *v.* Anderson, 4 Taunt. 54.

Virginia.—In Pleasants *v.* Pendleton, 6 Rand. (Va.) 473; 18 Am. Dec. 726, the defendant bought 119 barrels of flour out of 123, all of similar kind and marks, and in the same warehouse, and gave his check for the amount, taking a receipted bill and order on the warehouseman for their delivery. No separation or designation of any kind had been made, nor had the order on the bailee been presented, but on the next day the whole were destroyed by fire. Plaintiff recovered the price of the 119 barrels upon proof of a custom so to sell flour in store. The subject was elaborately examined in this leading case, and Jackson *v.* Anderson, 4 Taunt. 24, was much relied on.

Florida.—A sold to B one hundred cattle of named age and part of a particular stock then running upon the range. B paid the price agreed upon, and A gave to him a delivery order upon his (A's) agent. C, with a knowledge of these facts, subsequently purchased of A the balance of the particular stock. C took possession of the entire stock, admitting B's right of property in one hundred of the cattle. It was held, citing with approval Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334, and Pleasants *v.* Pendleton, 6 Rand. (Va.) 473; 18 Am. Dec. 726, that title passed without any separation or identification. Watts *v.* Hendry, 13 Fla. 523. But *compare* Stafford *v.* Anders, 8 Fla. 34.

New York.—In Kimberly *v.* Patchin, 19 N. Y. 330; 35 Am. Dec. 334, the leading American case on the subject, there was a sale of a small quantity of grain mingled with a larger mass. The court, after a long review of the authorities, held that the title might pass without the actual separation of the quantity sold from the mass with which it was mixed if the acts and declarations of the parties fairly evinced an intention to make an immediate transfer. But see Gardiner *v.* Suydam, 7 N. Y. 359, where it was held that the receipt of a warehouseman for a quantity of flour in store does not pass title to the flour unless the flour is actually separated from the mass by delivery, or is identified by some special mark or designation which would amount to a constructive delivery. See also Field *v.* Moore, Hill & D. Supp. (N.

But this view is supported neither by principle nor the weight of authority. The general rule governs this class of cases as well as the others, and an appropriation is necessary to cast the title upon the purchaser.[1]

Y.) 418; Stevens *v.* Ens, 10 Barb. (N. Y.) 95.

Michigan. — In Merchants', etc., Bank *v.* Hibbard, 48 Mich. 118; 42 Am. Rep. 465, the court by Cooley, J., after citing and reviewing a number of cases, said: "To the elaborate argument made for the defense to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of Anderson *v.* Brenneman, 44 Mich. 198." This language was quoted with approval in Commercial Nat. Bank *v.* Gillette, 90 Ind. 269; 46 Am. Rep. 222, where the court goes on to say that the civil law rule is the same as that of the common law, and that our great American jurists have given it unhesitating approval. *Citing* 2 Kent's Com. (13th ed.) 639; Story on Sales (4th ed.), § 296. See also Pfistner *v.* Bird, 43 Mich. 14 (sale of all the trees on certain land that buyer may choose to cut); Hahn *v.* Fredericks, 30 Mich. 223; 18 Am. St. Rep. 119. But see Carpenter *v.* Graham, 42 Mich. 191. And in Wagar *v.* Detroit, etc., R. Co., 79 Mich. 648, the court, citing Carpenter *v.* Graham, 42 Mich. 191 with approval, distinctly holds that no separation from a uniform mass is necessary to pass title.

Kansas.—In Kingman *v.* Holmquist, 36 Kan. 735; 59 Am. Rep. 604, it was held that where a certain number of articles are sold from an ascertained lot which are identical in kind and value, a selection is unnecessary and a separation is not essential to transfer title to the purchaser. *Compare* Bailey *v.* Long, 24 Kan. 90, where it was held that the sale of 500 bushels of corn to be gathered from a field of 60 acres, did not pass the title to the corn until there had been a separation. Williams *v.* Feiniman, 14 Kan. 288.

The Mass Must Be Uniform.—The courts hold, in those jurisdictions where the doctrine of the text prevails, that the subject of the sale must be of uniform quality and value with the mass of which it is a part before the rule applies. In Chapin *v.* Shepard, 39 Conn. 421, it is said: "If the articles differ from each other in quantity or quality, or value, the necessity of a selection is clearly implied. In all such cases the subject-matter of the contract cannot be identified until severance, and the severance is necessary in order that the subject-matter of the contract may be made certain and definite. But where the subject-matter of the sale is part of an ascertained mass of uniform quality and value, no selection is required, and in this class of cases it is affirmed by authorities of the highest character that severance is not, as a matter of law, necessary in order to vest the legal title in the vendee to the part sold."

In Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334, it is said: "It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. . . . But property can be acquired and held in many things which are incapable of such an identification. Articles of this kind are sold, not by a description, which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains and the flour manufactured from them." See also Galloway *v.* Week, 54 Wis. 604; Hoffman *v.* King, 58 Wis. 314; Newhall *v.* Langdon, 39 Ohio St. 87; 48 Am. Rep. 426; Kingham *v.* Holmquist, 36 Kan. 735.

1. Browning *v.* Hamilton, 42 Ala. 484; Mobile Sav. Bank *v.* Fry, 69 Ala. 350; Warten *v.* Strane, 82 Ala. 311; Fry *v.* Mobile Sav. Bank, 75 Ala. 473; Block *v.* Maas, 65 Ala. 211; Commercial Nat. Bank *v.* Gillette, 90 Ala. 268; 46 Am. Rep. 222; Upham *v.* Dodd, 24

Ark. 545; Beller *v.* Block, 19 Ark. 567; McLaughlin *v.* Piatt, 27 Cal. 463; Caruthers *v.* McGarve, 41 Cal. 15; Huntington *v.* Chisholm, 61 Ga. 270; Love *v.* State, 78 Ga. 66; 6 Am. St. Rep. 234; Central R., etc., Co. *v.* Burr, 51 Ga. 553; Dunlap *v.* Berry, 5 Ill. 327; 39 Am. Dec. 413; Morrison *v.* Woodley, 84 Ill. 192; Bricker *v.* Hughes, 4 Ind. 146; Murphy *v.* State, 1 Ind. 366; Lester *v.* East, 49 Ind. 594; Cook *v.* Logan, 7 Iowa 142; Courtwright *v.* Leonard, 11 Iowa 32; Rosenthal *v.* Risley, 11 Iowa 541; Harwick *v.* Weddington, 73 Iowa 300; Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555; 29 Am. Rep. 418; May *v.* Hoaglan, 9 Bush (Ky.) 171; Brewer *v.* Smith, 3 Me. 44; 14 Am. Dec. 213; Morrison *v.* Dingley, 63 Me. 553; Reeder *v.* Machen, 57 Md. 56; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Young *v.* Austin, 6 Pick. (Mass.) 280; Merrill *v.* Hunnewell, 13 Pick. (Mass.) 213; Keeler *v.* Goodwin, 111 Mass. 490; England *v.* Mortland, 3 Mo. App. 490; Ober *v.* Carson, 62 Mo. 213; Thomas *v.* State, 37 Miss. 353; Baldwin *v.* McKay, 41 Miss. 358; Ockington *v.* Richey, 41 N. H. 275; Fuller *v.* Bean, 34 N. H. 290; Warren *v.* Buckminster, 24 N. H. 337; Bailey *v.* Smith, 43 N. H. 141; Jeraulds *v.* Brown, 64 N. H. 606; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Waldo *v.* Belcher, 11 Ired. (N. Car.) 609; Blakeley *v.* Patrick, 67 N. Car. 40; 12 Am. Rep. 600; Austin *v.* Dawson, 75 N. Car. 523; Dunkart *v.* Rinehart, 89 N. Car. 357; Woods *v.* McGee, 7 Ohio 127; 30 Am. Dec. 220; Hutchinson *v.* Hunter, 7 Pa. St. 140; Golder *v.* Ogden, 15 Pa. St. 528; 53 Am. Dec. 618; Winslow *v.* Leonard, 24 Pa. St. 14; 62 Am. Dec. 354; Haldeman *v.* Duncan, 51 Pa. St. 66; Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521; Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15; Cleveland *v.* Williams, 29 Tex. 204; 94 Am. Dec. 274; Stock *v.* Inglis, 9 Q. B. Div. 708; Aldridge *v.* Johnson, 7 E. & B. 885; 90 E. C. L. 885; Campbell *v.* Mersey Docks, 14 C. B. N. S. 412; 108 E. C. L. 410.

In Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555; 29 Am. Rep. 418; warehouse receipts were delivered for thirty-six hundred hams, weighing a certain amount, and another for eighty-two hundred and fifty hams, without stating the weight, all marked with a special brand. These hams were part of a great quantity all marked in the same way, but they were not separated or distinguished in any way from the rest. It was held that such receipts conveyed no title. The court quotes the language of Bailey, J., in Gillett *v.* Hill, 2 C. & M. 530: "If I agree to deliver a certain quantity of oil, as ten tons out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided." And also quotes Mr. Benjamin, as saying of the case of Whitehouse *v.* Frost, 12 East 614 (cited above), that "notwithstanding the explanation of judges in subsequent cases, it is scarcely ever mentioned without suggestion of doubt or disapproval." It refers to the case of Pleasants *v.* Pendleton, 6 Rand. (Va.) 475; 18 Am. Dec. 726, asserting that it does not maintain the doctrine claimed by the *New York* court, in that the barrels sold were of a different brand from the others, and were therefore sufficiently designated and separated. Of this same case (Pleasants *v.* Pendleton, 6 Rand. (Va.) 475), the court by Grimke, J., in Woods *v.* McGee, 7 Ohio 127; 30 Am. Dec. 203, says: "It is impossible to divest one's self of the impression that the small difference between the aggregate mass and the quantity sold, the former being one hundred and twenty-three barrels and the latter one hundred and nineteen, may have gone a great way to influence the decision. It was a hard case, and hard cases make shipwreck of principles." *Compare* Newhall *v.* Langdon, 39 Ohio St. 87; 48 Am. Rep. 426. This language is *quoted* and *approved* in Scudder *v.* Worster, 11 Cush. (Mass.) 573. In Hutchinson *v.* Hunter, 7 Pa. St. 140, the *Virginia* case is again disapproved, and it is held that where one hundred barrels of molasses were sold, the same being a parcel of one hundred and twenty-five barrels of the same kind, and the whole was destroyed by fire before separation or designation of the particular barrels, the loss must fall upon the seller because title had not passed. In Blackburn on Sales, p. 20, it is said: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description, and, since the vendor will fulfill his part of the contract by furnishing any parcel of goods answering that description, it is clear that there can be no intention to transfer the

property in any particular lot of goods more than another until each has ascertained which are the very goods sold." Other cases sustaining the same view are Golder *v.* Ogden, 15 Pa. St. 528 (one thousand rolls of paper mingled with other paper of the same kind); Murphy *v.* State, 1 Ind. 366; Commercial Nat. Bank *v.* Gillette, 90 Ind. 268; 46 Am. Rep. 222 (sale of five hundred car wheels mingled in a larger lot); Waldo *v.* Belcher, 11 Ired. (N. Car.) 609 (sale of two thousand eight hundred bushels of corn mingled with a larger amount).

In Bailey *v.* Smith, 43 N. H. 141, there was an agreement for the sale of two thousand telegraph poles. The seller had on hand two thousand one hundred and thirty such poles, and notified the buyer that he was ready to deliver. The buyer replied admitting the facts, and saying that he would settle soon. Before anything further was done the poles were carried away by a freshet. It was held that the seller must sustain the whole loss, since no title had passed to the buyer, a separation not having been made. A similar case is Cooke *v.* Millard, 65 N. Y. 352; 22 Am. Rep. 619; *aff'g* 5 Lans. (N. Y.) 243.

Instances.—Thus a sale of a portion of the bricks in a kiln by the thousand cannot be complete so as to transfer the title until the exact quantity has been separated in some mode from the common mass. Dunlap *v.* Berry, 5 Ill. 327; 39 Am. Dec. 413; Courtright *v.* Leonard, 11 Iowa 32. *Compare* here Damon *v.* Osborne, 1 Pick. (Mass.) 476; 11 Am. Dec. 229.

In Cleveland *v.* Williams, 29 Tex. 204; 94 Am. Dec. 274, A sold to B a certain number of bushels of corn out of a large quantity then in his crib and appointed an agent to measure and deliver the quantity bought by B to him. This the agent did, but after the death of A, unknown to the agent or B. It was held that the title did not pass, and that A's administrator might recover the corn of B. *Quoting* Story on Sales (4th ed.), § 296.

In Hutchinson *v.* Hunter, 7 Pa. St. 140, there was a sale of one hundred barrels of molasses in a cellar containing one hundred and twenty-five barrels. The barrels bought were not separated or marked, nor were any particular barrels agreed on. It was held to be an incomplete sale. Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 527.

Massachusetts. — In Scudder *v.* Worster, 11 Cush. (Mass.) 573, A sold to B two hundred and fifty barrels of pork, part of a larger lot, all of the same quality, having the same mark, and all stored in the cellar of A, but no separation was made. B sold and delivered to C one hundred barrels of the same pork, and afterwards sold to D the remaining one hundred and fifty barrels, giving him an order on A therefor, which, being presented to A, he assented to hold the same for D, but nothing was done to distinguish or separate the one hundred and fifty barrels from other pork of the same brand in A's cellar. B became insolvent, and A then refused to deliver the one hundred and fifty barrels to D on the order. It was held that the one hundred and fifty barrels were not so specified and separated from the whole mass that D could maintain replevin therefor. Ropes *v.* Lane, 9 Allen (Mass.) 502.

The only *Massachusetts* case which appears to be in conflict with the doctrine set out in Scudder *v.* Worster, 11 Cush. (Mass.) 573, and the other cases cited *supra* this note, is that of Damon *v.* Osborn, 1 Pick. (Mass.) 476; 11 Am. Dec. 229. In that case plaintiff sold defendant 12,000 bricks out of more than 40,000 which he had in his yard. Defendant took away 800, but there was no separation or identification of the remainder. The transaction was held to be a complete bargain and sale of the 12,000 bricks. In Young *v.* Austin, 6 Pick. (Mass.) 284, this case is cited, and it was there intimated that the partial delivery (*i. e.*, the delivery of the 800 bricks) took the case out of the rule requiring an appropriation to complete the sale. But it would seem that in Scudder *v.* Worster, 11 Cush. (Mass.) 573, there was also a partial delivery.

California.—Notwithstanding two early cases (Ghirardelli *v.* McDermott, 22 Cal. 539; Horr *v.* Barker, 11 Cal. 403), which seem to lean towards the contrary doctrine, the rule of the text is now established in *California;* viz., that the sale is "not completed so long as anything remains to be done to the thing sold to identify or discriminate it from other things" of the same kind with which it is mixed. McLaughlin *v.* Piatti, 27 Cal. 451; Caruthers *v.* McGarvey, 41 Cal. 15; Callender *v.* McLeod, 74 Cal. 376; Blackford *v.* Cutting Packing Co., 76 Cal. 212. See also Greenbaum *v.* Martinez, 86 Cal. 459.

A seeming exception to this rule exists in cases where the grain of various parties is mixed together in a public warehouse. Here the parties are tenants in common of the whole mass, and each one may transfer his right and title to his portion without separating it from the common mass, as by merely giving a delivery order.[1]

Missouri.—In *Missouri* the rule, it seems, is that of the text, although the point does not appear to have been expressly settled. See Ober *v.* Carson, 62 Mo. 209; Cunningham *v.* Ashbrook, 20 Mo. 553; England *v.* Cortland, 9 Mo. App. 578. The contrary rule is approved *obiter* in Hamilton *v.* Clark, 25 Mo. App. 428.

Maine.—In Morrison *v.* Dingley, 63 Me. 553, W had a cargo of 250 tons of coal lying on a wharf. He sold 125 tons to plaintiff. Plaintiff carried away a portion of the 125 tons, but the rest was not separated from the general mass. It was held that no title passed as to this residue. See also Brewer *v.* Smith, 3 Me. 44; 14 Am. Dec. 213. These cases do not seem reconcilable with Waldron *v.* Chase, 37 Me. 415; 59 Am. Dec. 56.

1. **Elevators.**—Broadwell *v.* Howard, 77 Ill. 305; Warren *v.* Milliken, 57 Me. 97. The development of the business of public warehouses and of grain elevators and the enormous amount of traffic handled by them, all of which has arisen since the decision of many of the earlier cases, has necessitated this departure from the old doctrine, if it can be called a departure at all. It has grown up and is established as a well known usage of trade rendered necessary by the exigencies of the case. The doctrine is set forth in Cushing *v.* Breed, 14 Allen (Mass.) 380; 92 Am. Dec. 777, where the court by Chapman, J., said: "The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property, by the method above stated, or by any other method equivalent to it. Actual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same whether the proprietors are numerous, or the vendor and vendee are owners of the whole. . . . This is not like the class of sales where the vendor retains the possession, because there is something further for him to do, such as measuring or weighing or marking, as in Scudder *v.* Worster, 11 Cush. (Mass.) 573; nor like the case of Weld *v.* Cutler, 2 Gray (Mass.) 195, where the whole of a pile of coal was delivered to the vendee in order that he might make the separation." See also Farnum *v.* Pitcher, 151 Mass. 475; Russell *v.* Carrington, 42 N. Y. 118; 1 Am. Rep. 498.

Pipe Lines.—A similar case to that of grain in an elevator is that of oil in the pipes or tanks of a pipe-line. Here, as in the case of the elevator, the property of different persons is mixed in a common reservoir, and they hold as tenants in common of the whole mass. It seems that no separation of the particular oil which is the subject of sale from the mass is necessary in order to pass title. In Hutchinson *v.* Com., 82 Pa. St. 472, it was said: "The oil was in the pipes of the pipe-line company. For the sake of convenience it was poured in and mixed with the oil of other pro-

The reason of the rule lies in this, that the whole matter is a question of the intention of the parties. There is always a strong presumption in ordinary contracts of sale that the parties intended to pass a title in severalty to the goods, and not a title in common with others to the greater mass; so that where the presumption is not rebutted, the courts hold that the intent of the parties is to pass a title in severalty, and this can never be done without separation and segregation. Where, however, there is a usage of trade, as in case of grain elevators, of which the parties are cognizant, a presumption may be created that the intent of the parties was to pass merely a title in common, so that separation is not necessary.[1]

Where the portion of the mass or lot which is the subject of the contract, is designated in such a manner as to make it easily distinguishable from that with which it is mixed, no other separation or appropriation is necessary to render the contract one of bargain and sale.[2]

ducers, and by the usage of trade each one was entitled to draw out, not the identical oil put in, but oil which was its precise equivalent. In the consideration of the questions involved in this case we cannot close our eyes to the total revolution in the manner of doing business which has been brought about by the discovery of petroleum in this State. . . It was distinctly proved upon the trial that the delivery of the certificates was a delivery of the oil. It was the usage of trade known to all these parties. . . . For all the purposes of trade and commerce the delivery of the accepted orders was a delivery of the oil. It is a matter of fact established by the evidence and admitted by the demurrer. Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts the property passes, that the orders draw to them the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. None of the reasons which require a separation of the oil in the cases cited exists here."

1. The Rule Explained.—This is the explanation presented by Mr. Tiedeman (§ 88), and it is believed to be the only one by which the apparently conflicting authorities may be reconciled and a uniform rule established. See also Chapman *v.* Shepard, 39 Conn. 413; Hurff *v.* Hires, 40 N. J. L. 581; 29 Am. Rep. 282; Aderholt *v.* Embry, 78 Ala. 185; Phillips *v.* Ocmulgee Mills, 55 Ga. 634.

2. Sanger *v.* Waterbury, 116 N. Y. 371; Hamilton *v.* Clark, 25 Mo. App. 428; Colwell *v.* Keystone Co., 36 Mich. 51; Robertson *v.* Hunt, 77 Tex. 321; Commercial Nat. Bank *v.* Davidson, 18 Oregon 57; Webster *v.* Anderson, 42 Mich. 554; 36 Am. Rep. 452; Groat *v.* Gile, 51 N. Y. 431; Barney *v.* Brown, 2 Vt. 374; 19 Am. Dec. 720.

Thus in Newcomb *v.* Cabell, 10 Bush (Ky.) 460, where a distiller sold whiskey stored in his warehouse in barrels branded with numbers, and delivered to the purchaser a certificate signed by himself as proprietor of the warehouse, in which the barrels were designated by numbers, it was held that the whiskey was sufficiently identified.

The doctrine is well put in the case of Ropes *v.* Lane, 9 Allen (Mass.) 510, where it is said:

"These principles are fully discussed in Scudder *v.* Worster, 11 Cush. (Mass.) 573. If the owner of a large quantity of merchandise of this character sells a part of it, the property in that part does not pass to the vendee unless the part which is sold is separated from the part unsold. A designation by some visible mark is a sufficient separation. It is not necessary that an artificial mark should be made for this sole purpose. If the barrels have been inspected and marked as of different qualities, *e. g.*, No. 1, No. 2, No. 3, and the whole of that which is marked No. 1 is sold, a bill of sale given and a formal delivery made, the property will pass without any further separation or designation, and the delivery will have been perfected, though the

The delivery of the whole to the purchaser, for the purpose of enabling him to separate the part sold, has been held to pass title to that part before such separation has been made.[1]

(c) **Subsequent Appropriation.**—After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time, but is none the less one contract; viz., a bargain and sale of goods. The selection of the goods by the one party and the adoption of that act by the other, converts that which was before a mere agreement to sell into an actual sale, and the property thereby passes.[2] This doctrine presents no difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfill an agreement which in itself does not designate the goods. The effect is then the same as if the parties had, from the first, agreed upon a sale of those specific goods.[3] But the express or implied assent of both parties to the

barrels marked No. 1 are left intermingled with the other barrels which have different marks. So if there are one hundred barrels marked No. 1 and the owner makes a contract to sell one hundred and fifty barrels of that mark, and makes his bill of sale and formal delivery affirming that there are that number of barrels in the lot, the property in the one hundred barrels will pass to the vendee. But if there are one hundred and fifty barrels in the lot, which have that mark, and the owner sells but one hundred barrels, it will then be necessary to separate the one hundred barrels from the rest, and, if they are not taken away, to designate them by some mark that shall distinguish them from the fifty unsold barrels. If there is no mark of designation and no actual separation, a storage receipt will not supply the defect, for there will have been no delivery of the specific property sold. The vendee cannot identify any one of the barrels as his own, so as to authorize him to take it away or replevy it. The property in all the barrels will still remain in the vendor, notwithstanding his bill of sale and his storage receipt."

1. Where the Whole Mass Is Delivered to the Purchaser.—In the case of the sale of a part of an entire mass of goods, such as coal, brick, flour and grain, if the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to that part passes to the purchaser and he may retain the whole until he has had sufficient time and opportunity to separate and take the part belonging to him. Weld *v.* Cutler, 2 Gray (Mass.) 195; Lamprey *v.* Sargeant, 58 N. H. 241; Page *v.* Carpenter, 10 N. H. 77; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86. See also Crofoot *v.* Bennett, 2 N. Y. 258; Brewer *v.* Salisbury, 9 Barb. (N. Y.) 511.

2. Benj. on Sales (6th ed.), § 358; Rhode *v.* Thwaites, 6 B. & C. 388; 13 E. C. L. 206; Fishback *v.* Van Dusen, 33 Minn. 122; Hyde *v.* Lathrop, 2 Abb. App. Dec. N. Y. 436; Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Rice *v.* Codman, 1 Allen (Mass.) 377; Thompson *v.* Conover, 32 N. J. L. 466.

Meaning of "Appropriation." — Various meanings have been assigned to the word "appropriation," its more legitimate scope being limited to the selecting, separating, setting apart, and so identifying, specific goods to the sale contract, while in legal discussion the word is often extended through the labyrinth of conditions and special stipulations so as to comprehend a complete shifting of a title to unspecified chattels from the seller to the buyer." 2 Schouler's Pers. Prop. (2d ed.), § 265. See also Rhode *v.* Thwaites, 6 B. & C. 388; 13 E. C. L. 206; Wait *v.* Baker, 2 Exch. 1.

3. Blackb. on Sales (Text-book Series), p. 129; Rhode *v.* Thwaites, 6 B. & C.

subsequent appropriation is essential.[1] The only difficulty that can arise on this question is in cases where the seller only, under the implied or express authority of the purchaser, has made the subsequent appropriation. When, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and when once he has done that act the election has been irrevocably determined, but till then he may change his mind.[2] It follows from this that where from the terms of an executory agreement to sell unspecified goods, the seller is to dispatch the goods or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made finally and conclusively by the authority

388; 13 E. C. L. 206; Alexander *v.* Gardner, 1 Bing. N. Cas. 671; 27 E. C. L. 538; Wilkins *v.* Bromhead, 6 M. & G. 963; 46 E. C. L. 962; Thayer *v.* Davis, 75 Wis. 205; Dowell *v.* Taylor, 2 Mo. App. 329; Wooster *v.* Sherwood, 25 N. Y. 278; Johnson *v.* Hays, 5 Ohio St. 102.

In Sparkes *v.* Marshall, 2 Bing. N. Cas. 761; 29 E. C. L. 480, B, a corn merchant, sold to plaintiff "five hundred to seven hundred barrels of prepared black oats at 11s. 9d. per barrel to be shipped by Thomas Johns & Sons of Youghal." The oats were to be delivered at Portsmouth. Some days afterwards B informed plaintiffs that Messrs. Johns & Sons had engaged "room in the schooner Gibralter, of Dartsmouth, to take about six hundred barrels of black oats on your account." Plaintiff next day ordered insurance "four hundred pounds on oats per the Gibralter packet of Dartsmouth," etc. In this action against the underwriters it was contended by them that the property had not passed, but the court held the contrary. Tindal, C. J., said that "B's letter to the plaintiff was an unequivocal appropriation of the oats on board the Gibralter packet," and "this appropriation is assented to and adopted by the plaintiff, who on the following day gives instructions to his agent in London to effect the policy on oats per Gibralter packet."

1. Hague *v.* Porter, 3 Hill (N. Y.) 141; Atkinson *v.* Bell, 83 B. & C. 277; 15 E. C. L. 216; Aldridge *v.* Johnson, 7 E. & B. 885; 90 E. C. L. 885; Jenner *v.* Smith, L. R., 4 C. P. 270; Bryans *v.* Nix, 4 M. & W. 775; Rider *v.* Kelly, 32 Vt. 268; 76 Am. Dec. 176; Gowans *v.* Consolidated Bank, 43 U. C., Q. B. 318; Moody *v.* Brown, 34 Me. 107; 56 Am. Rep. 640.

In Campbell *v.* Mersey Docks, 14 C. B. N. S. 414; 108 E. C. L. 413, Earle, C. J., said: "It has been established by a long series of cases, of which it will be enough to refer to Hansom *v.* Meyer, 6 East 614; Rugg *v.* Minett, 11 East 210; and Rhode *v.* Thwaites, 6 B. & C. 388; 13 E. C. L. 206, that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and appropriation assented to by both vendor and vendee. Nothing passes until there is an assent express or implied on the part of the vendee. The warehouseman may, in some cases, be the agent of the vendee for the purpose of such assent; but nothing passes until there has been a separation and appropriation assented to."

But as will be seen from the succeeding paragraph of the text, a *subsequent* assent by the buyer to an appropriation made by the seller is not necessary. This assent is implied where by the terms of the contract the seller is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do until an appropriation was made. Benj. on Sales (6th ed.), § 371.

2. Benj. on Sales (6th ed.), § 359; Blackburn on Sales (Text-book Series), p. 130; Haywood's Case, 2 Coke Rep. 36; Comyn's Dig., tit. *Election*. Martz

conferred in the agreement.[1] Thus, where a seller delivers goods to a carrier by order of the purchaser, the appropriation is deter-

v. Putnam, 117 Ind. 392; Osborne *v.* Van Atten, 3 Wash. Ter. 53.

1. Benj. on Sales (6th ed.), § 359; Blackburn on Sales (Text-book Series), p. 130; Schouler's P. P., § 265; Haywood's Case, 2 Coke Rep. 36; Comyn's Dig., tit. *Election;* Langton *v.* Higgins, 4 H. & N. 402; Fragano *v.* Long, 4 B. & C. 219; 10 E. C. L. 313; Bryans *v.* Nix, 4 M. & W. 775; Calcutta *v.* De Mattos, 32 L. J., Q. B. 322; 33 L. J., Q. B. 214; Browne *v.* Hare, 3 H. & N. 484; Tregelles *v.* Sewell, 7 H. & N. 574; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Wigton *v.* Bowley, 130 Mass. 352; Fisher *v.* Tifft, 127 Mass. 313; Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436; Martz *v.* Putnam, 117 Ind. 400; Osborne *v.* Van Atten, 3 Wash. Ter. 53; Brewer *v.* Michigan Salt Asso., 47 Mich. 526.

Examples of Appropriations.—In Aldridge *v.* Johnson, 7 E. & B. 885; 90 E. C. L. 885; the plaintiff agreed to take from one K one hundred quarters of barley out of the bulk in K's granary. The plaintiff was to send his own sacks, which K was to fill to take to the railway for conveyance to the plaintiff and to place upon trucks free of charge. Each quarter of barley would fill two sacks and the plaintiff sent 200 sacks to be filled, some of them with his name marked on. K filled 155 of the sacks, leaving in the bulk more than enough to fill the other 45 sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. Plaintiff afterwards complained to K of the delay and was assured that the barley would be put on the rail that day. This was not done, and K, finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again so as to make it undistinguishable. The action was detinue and trover against the assignees of K for the barley and the sacks. It was held that the property in the barley in the 155 sacks had passed, but not in the barley which had not been filled into the other 45 sacks. Campbell, C. J., said: "As soon as each sack was filled with barley *eo instante* the property in the barley in the sacks vested in the plaintiff. I conceive there was here an *a priori* assent; not only was there a sale of barley but it was a sale of part of a specific bulk which the plaintiff had seen, and he sends the sack to be filled out of that bulk and out of that only could the vendee's sacks be filled. No subsequent assent was necessary if the sacks were properly filled." His lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee."

Earl, J., said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the election rested with Knight alone. He had to fill the sacks, which were to be sent to him for that purpose by the vendee, and as soon as he had done an outward act indicating his election, viz., by filling the sacks and directing them to be sent to the railway, the property passed.

But see Sneathen *v.* Grubbs, 88 Pa. St. 147. There the seller agreed to deliver to the purchasers at their landing in P two barges of coal, terms cash when delivered in P free of all charges. The purchasers furnished the barges and the coal was placed therein by seller, but owing to low water in the river they could not be taken to P. While thus lying at the works, the coal was levied upon by the creditors of the seller. It was held that as the delivery of the coal had not taken place and the terms of the contract of sale had not been performed, no title to the coal passed. It is probable, however, that the court would have held that title had passed as between buyer and seller. See also Bryans *v.* Nix, 4 M. & W. 775; Benj. on Sales (6th ed.), § 367; Rochester, etc., Oil Co. *v.* Hughey, 56 Pa. St. 322.

In Lynch *v.* O'Donnell, 127 Mass. 311, where the agreement was that the sale was to be at the seller's shop and the goods were to be delivered by the seller at the depot, it was held that upon the seller's putting up the goods, marking them with the purchaser's name, labelling them, placing them to one side with the bill of lading attached with intent to pass title, and delivering them to a teamster to take to the depot, the sale was complete and executed.

Where the contract was for the purchase of all the lumber of certain specified qualities, which the seller should make at a certain place during the season, it was held that as fast as

mined. The delivery to the carrier is a delivery to the purchaser and the property vests immediately.[1] So also the effect of any

the different qualities were ascertained and set apart, they were identified as the lumber agreed to be sold and that title to them passed. Whitcomb *v.* Whitney, 24 Mich. 486; Hart *v.* Sumners, 38 Mich. 399.

1. Delivery to Carrier—*Alabama.*—Hill *v.* Gayle, 1 Ala. 275; Bradford *v.* Marbury, 12 Ala. 520; 46 Am. Dec. 264; Robinson *v.* Pogue, 86 Ala. 261.

Arkansas.—Burton *v.* Baird, 44 Ark. 556; State *v.* Carl, 43 Ark. 353; 51 Am. Rep. 565; Hope Lumber Co. *v.* Foster, 53 Ark. 196.

California.—Gates *v.* Carquinez Packing Co., 78 Cal. 439.

Colorado.—Hanauer *v.* Bartels, 2 Colo. 514.

Connecticut.—Whiting *v.* Farrand, 1 Conn. 60; Hall *v.* Gaylor, 37 Conn. 550.

Georgia.—Dunn *v.* State, 82 Ga. 27.

Illinois.—Stafford *v.* Walter, 67 Ill. 83; Bliss *v.* Geer, 7 Ill. App. 612; Diversy *v.* Kellogg, 44 Ill. 114; 92 Am. Dec. 154; Ellis *v.* Roche, 73 Ill. 280.

Indiana.—Rechtin *v.* McGary, 117 Ind. 132.

Maine.—Torrey *v.* Corliss, 33 Me. 333; Barry *v.* Palmer, 19 Me. 303; Wing *v.* Clark, 24 Me. 366.

Maryland.—Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Campbell *v.* Ehlen (Md. 1892), 24 Atl. Rep. 420.

Massachusetts.—Putnam *v.* Tillotson, 13 Met. (Mass.) 517; Hunter *v.* Wright, 12 Allen (Mass.) 548; Stanton *v.* Eager, 16 Pick. (Mass.) 467; Odell *v.* Boston, etc., R. Co., 109 Mass. 50; Wigton *v.* Bowley, 130 Mass. 252; Kline *v.* Baker, 99 Mass. 253; Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Foster *v.* Rockwell, 104 Mass. 167.

Missouri.—Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; Hening *v.* Powell, 33 Mo. 468.

New Hampshire.—Arnold *v.* Prout, 51 N. H. 587; Smith *v.* Smith, 27 N. H. 252; Woolsey *v.* Bailey, 27 N. H. 217; Garland *v.* Lane, 46 N. H. 248.

New York.—Downer *v.* Thompson, 2 Hill (N. Y.) 137; 6 Hill (N. Y.) 378; Krulder *v.* Ellison, 47 N. Y. 37; 7 Am. Rep. 402; Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Gutwillig *v.* Zuberbier, 2 N. Y. St. Rep. 605; Waldron *v.* Romanie, 22 N. Y. 368; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Mee *v.* McNider, 109 N. Y. 500; Smith *v.* Edwards, 29 Hun (N. Y.) 493.

North Carolina.—Ober *v.* Smith, 78 N. Car. 313.

Ohio.—Straws *v.* Wessel, 30 Ohio St. 211.

Pennsylvania.—Schmertz *v.* Dwyer, 53 Pa. St. 335; Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264; Summeril *v.* Elder, 1 Binn. (Pa.) 106; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429; 9 Am. Dec. 444; Garbracht *v.* Com., 96 Pa. St. 449; 42 Am. Rep. 550; Bacharach *v.* Chester Freight Line, 133 Pa. St. 414.

Rhode Island.—Hobart *v.* Littlefield, 13 R. I. 341.

Vermont.—Birge *v.* Edgerton, 28 Vt. 291; Strong *v.* Dodds, 47 Vt. 348.

West Virginia.—Bloyd *v.* Pollocks, 27 Va. 129; State *v.* Hughes, 22 W. Va. 743.

Wisconsin.—Ranney *v.* Higby, 5 Wis. 62 (manner of shipment chosen by the vendee); Congar *v.* Galena, etc., R. Co., 17 Wis. 477; Sarbecker *v.* State, 65 Wis. 171; 56 Am. Rep. 624; Swanke *v.* McCarty, 81 Wis. 109.

English.—Fragano *v.* Long, 4 B. & C. 219; 10 E. C. L. 313; Meredith *v.* Meigh, 2 E. & B. 364; 75 E. C. L. 363; Dutton *v.* Solomonson, 3 B. & P. 582; King *v.* Meredith, 2 Camp. 639 (even though carrier is paid by seller); Cork Distilleries Co. *v.* Great Southern, etc., R. Co., L. R., 7 H. L. 269; 10 Moak's Rep. 25; Wise *v.* McMahon, Longf. & T. (Irish) 192; Waite *v.* Baker, 2 Exch. 1; Dawes *v.* Peck, 8 T. R. 330; London, etc., R. Co. *v.* Bartlett, 7 H. & M. 400; Johnson *v.* Lancashire, etc., R. Co., 3 C. P. Div. 499.

See also *infra*, this title, *Place Where Transfer of Title Occurs. Compare* Perkins *v.* Eckert, 55 Cal. 405; Coates *v.* Chaplin, 2 G. & D. 552; 6 Jur. 1123; Taplin *v.* Packard, 8 Barb. (N. Y.) 220; Loyd *v.* Wight, 20 Ga. 574; 65 Am. Dec. 636.

In Allen *v.* Agee, 15 Oregon 551; 3 Am. St. Rep. 206, plaintiff purchased wheat stored in a warehouse from the agent of the seller, the agent giving an order on the warehouseman. Plaintiff ordered the railroad company to send out cars for the wheat, taking shipping receipts for the amount, and on the arrival of the cars the warehouseman loaded the wheat and locked the cars.

It was held that this was sufficient to transfer the title to the plaintiffs.

It will be borne in mind that the buyer's title, however, does not become absolute until his receipt of the goods. During the course of transportation, the title is so far his as to impose upon him all risk, and is valid as against all except the seller himself, who still retains the right of stoppage *in transitu*. See Lentz *v.* Flint, etc., R. Co., 53 Mich. 444; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; see also STOPPAGE IN TRANSITU.

Thus in the case of Bull *v.* Robinson, 10 Exch. 342, A agreed to sell B a certain hook iron to be manufactured in S, and to be delivered at L. The iron was forwarded in canal-boats and at a period of the year at which it necessarily suffered some deterioration by being rusted. The iron, which was clean and bright when put on board, arrived at L in a rusty state, and B refused to accept. It was held that the full measure of duty had been performed by A when he delivered the iron in a proper state to the carrier, and that the loss by subsequent deterioration must fall upon B.

The carrier, being the buyer's agent, the buyer alone can bring an action for loss of the goods. Dutton *v.* Solomonson, 3 B. & P. 582; Dawes *v.* Peck, 8 T. R. 330; Brewer *v.* Hodgson, 2 Camp. 36; Krulder *v.* Ellison, 47 N. Y. 38; 7 Am. Rep. 402; Keiwert *v.* Mayer, 62 Ind. 587; 30 Am. Rep. 206. See also CARRIERS OF GOODS, vol. 2, pp. 902–3.

Therefore, where, in pursuance of orders from W, a quantity of merchandise was shipped by M for the account of W on board a general freighting vessel designated by W for the purpose, and the bill of lading was obtained by M, by the terms of which the merchandise was deliverable to W, there was a sale and constructive delivery of merchandise, and M could not, by withholding the bill of lading and subsequently sending it to his agent with directions to deliver it to W only upon payment, convert such absolute delivery into a conditional one or divest W of his property in the merchandise. Stanton *v.* Eager, 16 Pick. (Mass.) 467.

Due Care to be Used in Marking and Directing Goods.—If goods are insufficiently marked, and the buyer's residence is not given in the bills of lading, by the neglect of the seller, and they are thereby detained in the transit, and so destroyed, the loss falls upon the seller. In shipping the goods he is bound to use due care in marking and directing them; and the fact that the purchaser, after knowledge of their imperfect direction, claims the goods and endeavors to have them forwarded will not establish a waiver of the seller's failure to ship them properly, unless such was the intention. Finn *v.* Clark, 12 Allen (Mass.) 522. See also Woodruff *v.* Noyes, 15 Conn. 335; Garretson *v.* Selby, 37 Iowa 529; 18 Am. Dec. 14.

What Constitutes Delivery to a Carrier.—To constitute a delivery to a common carrier in this connection, the carrier must have accepted the goods in his character as such, and assumed exclusive custody and control over them, and the consignor must at the same time have parted with and entirely surrendered his possession and control over them. Reed *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

Therefore, merely placing goods in such a position that a person (in this case, the receiving-clerk in the carrier's office) can take them but without calling his attention to them, is not a delivery. O'Bannon *v.* Southern Express Co., 51 Ala. 481. Nor is merely landing the property on a wharf at the end of a voyage a good delivery by the carrier unless notice is given to the consignee. Ostrander *v.* Brown, 15 Johns. (N. Y.) 39; 8 Am. Dec. 211; Price *v.* Powell, 3 N. Y. 322; Abb. L. Dict., Delivery.

The evidence of a complete delivery to a carrier should be distinct and clear to divest one man of his property without payment of the price, in favor of one whose insolvency is not discovered until the very moment of fulfillment. Wenger *v.* Barnhart, 55 Pa. St. 900.

By Order of the Purchaser.—The delivery to the carrier must be by the express or implied order of the purchaser. Cobb *v.* Arundell, 26 Wis. 553; Everett *v.* Parks, 62 Barb. (N. Y.) 9; Hague *v.* Porter, 3 Hill (N. Y.) 141; Loyd *v.* Wight, 20 Ga. 574; 63 Am. Dec. 636; Hanauer *v.* Bartels, 2 Colo. 514. See also *infra*, this title, *Delivery*.

Delivery in the Ordinary Course of Business.—But where the purchaser has not designated a special carrier, the delivery to a common carrier in the usual and ordinary course of business

consignment is generally to vest the title in the consignee and impose the risk upon him;[1] though this is true only when the consignment is made in execution of a contract previously entered into between the parties.[2] The same rule applies where delivery is made to a warehouseman with the express or implied agree-

transfers the property to the purchaser. Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Dutton *v.* Solomonson, 3 B. & P. 582; Krulder *v.* Ellison, 47 N. Y. 36; Watkins *v.* Paine, 57 Ga. 50.

Where the Seller Sends Goods Not Ordered, in the Hope of Inducing a Sale.—"But it would be different where the seller sends goods not ordered, in the hope of inducing a sale; for that delivery to a carrier which charges a purchaser, as delivery to him from the seller, must have been under some express or implied authority from the purchaser." Schouler's Pers. Prop., § 272; Cobb *v.* Arundell, 26 Wis. 553; Ruhl *v.* Corner, 63 Md. 185. Manifestly in such a case an essential element of a valid sale, mutual assent, is lacking. See *supra*, this title, *Mutual Assent*.

The Fact that the Goods Are to be Paid for in Cash Upon Arrival Does Not Prevent the Title from Passing.—Where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract a specific quantity by delivering them to a vessel designated by the buyer, or, in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash *on arrival* does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. In such case the goods become the property of the purchaser and are at his risk from the time they are put on board the vessel. Farmers' Phosphate Co. *v.* Gill, 69 Md. 545; 9 Am. St. Rep. 443. See also Mee *v.* McNider, 109 N. Y. 500; Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Appleman *v.* Michael, 43 Md. 281; Dutton *v.* Solomonson, 3 B. & P. 584; Fragano *v.* Long, 4 B. & C. 219; 10 E. C. L. 313; Alexander *v.* Gardner, 1 Bing. N. Cas. 671; 27 E. C. L. 538.

1. **Effect of Consignment.**—Jones *v.* Sinn, 6 Port. (Ala.) 138; Stanton *v.* Eager, 16 Pick. (Mass.) 467; Grosvenor *v.* Phillips, 2 Hill (N. Y.) 147; Grove *v.* Brien, 8 How. (U. S.) 429; Lawrence *v.* Minturn, 17 How. (U. S.) 100; The Mary and Susan, 1 Wheat. (U. S.) 25; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; Blum *v.* Caddo, 1 Woods (U. S.) 64; Nesmeth *v.* The Dyeing, etc., Co., 1 Curt. (U. S.) 130; Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Dawes *v.* Peck, 8 T. R. 330; Fragano *v.* Long, 4 B. & C. 219; 10 E. C. L. 313. See also CARRIER OF GOODS, vol. 2, p. 811. *Compare* Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

See also Prince *v.* Boston, etc., R. Corp., 101 Mass. 542, where bill of lading was signed by one who was only a pretended master of the vessel in which the goods were shipped. Newhall *v.* Langdon, 39 Ohio St. 87; 48 Am. Rep. 426.

In Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341, the plaintiffs agreed to buy a quantity of oil, not precisely determined, but within certain limits, to be delivered in B. The seller sent a quantity by railroad to B, consigned to themselves. They notified the plaintiffs, and gave an order for its delivery to one of them, and the plaintiffs paid for the oil. These facts were held sufficient to transfer the property in the oil to the plaintiffs.

2. The Frances, 2 Gall. (U. S.) 391 (shipment made without orders); The St. Joze Indiano, 1 Wheat. (U. S.) 208; Hague *v.* Porter, 3 Hill (N. Y.) 141; Hanauer *v.* Bartels, 2 Colo. 514.

The delivery to the carrier must therefore be in conformity to the terms of the contract, and the title does not vest in the consignee so as to throw upon him the risk when the goods shipped do not correspond in quantity or quality with those agreed upon. Barton *v.* Kane, 17 Wis. 37; 84 Am. Dec. 728; Lloyd *v.* Wright, 25 Ga. 215; Gardner *v.* Lane, 9 Allen (Mass.) 492; 12 Allen (Mass.) 39; 85 Am. Dec. 779.

In The Frances, 8 Cranch (U. S.) 359, it is said that although an intention of the consignor of goods to vest the right of property in the consignee is clearly proved, still, until the goods are received by the consignee or some evidence is given of his agreement to take them on his own account, the goods are

ment that he shall hold as bailee for the buyer.[1] These rules, however, may be varied by express provision of the contract or by the relation of the parties.[2] But however clearly the seller may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act of dispatch or other act is actually commenced the appropriation is not final, for it is not made by the authority of the other party nor binding on him.[3] The appropriation may be conditional, and the property will not pass until the condition has been performed.[4]

The property does not pass even when the seller has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods, nor a smaller, nor goods of a different quality, than those ordered, and throw the selection on the purchaser.[5] But an appropriation and tender of

at the risk of the shipper. See also Ezell *v.* English, 6 Port. (Ala.) 311.

The title does not pass where the consignor so negligently ships the goods that they are lost in transit, as where he fails to mark or direct them properly, etc. Woodruff *v.* Noyes, 15 Conn. 335; Finn *v.* Clark, 10 Allen (Mass.) 479; Garretson *v.* Selby, 37 Iowa 529; 18 Am. Rep. 14.

1. Delivery to Warehouseman.—Gibson *v.* Stevens, 8 How. (U. S.) 384; Bradford *v.* Marbury, 12 Ala. 420; 46 Am. Dec. 264; Hunter *v.* Wright, 12 Allen (Mass.) 548 (not necessary to inform warehouseman of buyer's title); Gibson *v.* Chillicothe Bank, 11 Ohio St. 311; Rice *v.* Cutler, 17 Wis. 251; 84 Am. Dec. 747.

2. Thus where the consignee is entitled to the proceeds only of goods to be sold by him, the title remains in the consignor. Bonner *v.* Marsh, 10 Smed. & M. (Miss.) 376; 48 Am. Dec. 754; Warring *v.* Cox, 1 Camp. 369.

Or where delivery is ordered to a mere agent of the consignor. Warring *v.* Cox, 1 Camp. 369; Cox *v.* Hardin, 4 East 211. See also CARRIERS OF GOODS, vol. 2, p. 810.

As to reservation of title by express terms of the bill of lading, see *infra*, this title, *Delivery with Reservation of Title.*

3. Blackburn on Sales (Text-book Series), p. 130; Benj. on Sales (6th ed.), § 360; Aldrich *v.* Johnson, 7 E. & B. 885; 90 E. C. L. 885; Campbell *v.* Mersey Docks, 14 C. B. N. S. 412; 108 E. C. L. 410; Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 216; Andrews *v.* Cheney, 62 N. H. 404; Gunn *v.* Knoop, 73 Ga. 510.

In Jenner *v.* Smith, L. R., 4 C. P. 270, where the sale was made by sample and was of two pockets of hops out of three that were lying at a specified warehouse, the seller instructed the warehouseman to set apart two out of the three pockets for the purchaser. And the warehouseman thereupon placed on two of them a "wait-order card," that is, a card on which was written "to wait orders" and the name of the purchaser, but no alteration was made on the warehouseman's books, and the seller remained liable for the storage. The seller then sent an invoice with the numbers and weights to the buyer of those two pockets with a note at the foot, "The two pockets are lying to your order." It was held that the property had not passed, because the buyer had not made the seller his agent for appropriating the goods to the contract, nor abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

In Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. Rep. 552, the seller had contracted to sell a full boat load of coal, slack, and had undertaken to fill the boat. It was held that the title did not pass until the boat was completely filled.

4. Benjamin on Sales (6th ed.) 369; Godts *v.* Rose, 17 C. B. 229; 2 Schouler's Pers. Prop., § 263.

5. Cunliffe *v.* Harrison, 6 Exch. 903; Levy *v.* Green, 1 E. & E. 969; 27 L. J. Q. B. 111; 102 E. C. L. 968; Gath *v.*

goods not in accordance with the contract, and for that reason rejected by the purchaser, does not prevent the seller from afterwards, within the time limited for so doing, appropriating and

Lees, 3 H. & C. 558; Hart *v.* Mills, 15 M. & W. 85; Dixon *v.* Fletcher, 3 M. & W. 145; Croninger *v.* Crocker, 62 N. Y. 151; Rommel *v.* Wingate, 103 Mass. 327; Westfield *v.* Mayo, 122 Mass. 100; Marland *v.* Stanwood, 101 Mass. 470; Clark *v.* Baker, 11 Met. (Mass.) 186; 45 Am. Dec. 199; Brewer *v.* Housatonic R. Co., 104 Mass. 593; Gardner *v.* Lane, 9 Allen (Mass.) 492; 12 Allen (Mass.) 39; 85 Am. Dec. 779; Barton *v.* Kane, 17 Wis. 37; 84 Am. Dec. 728; Lloyd *v.* Wright, 25 Ga. 215; Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296; Downs *v.* Marsh, 29 Conn. 409; Stevenson *v.* Burgin, 49 Pa. St. 44. *Compare* Iron Cliffs Co. *v.* Buhl, 42 Mich. 86; Lockhart *v.* Bonsall, 77 Pa. St. 53; Brownfield *v.* Johnson, 128 Pa. St. 254; The Frances, 2 Gall. (U. S.) 391; The Julia, 8 Cranch (U. S.) 183.

Thus, in Cunliffe *v.* Harrison, 6 Exch. 903, it was held that where an order was given for ten hogsheads of claret, and the seller sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract and thus no property had passed.

The defendant agreed to pay the plaintiff ten cents a pound for perfect rosewood cut into pieces of a certain shape; the plaintiff sent the defendant 333 pounds so cut, of which amount 176 pounds only were perfect, and these pieces the defendant weighed and set apart. It was held that the plaintiff could recover the price agreed upon for the 176 pounds without showing an acceptance of those pieces by the defendant. Rodman *v.* Guilford, 112 Mass. 405. *Compare* the *Massachusetts* cases cited *supra*, this note. See *infra*, this title, *Delivery*.

But in Downer *v.* Thompson, 6 Hill (N. Y.) 608, the plaintiff having received an order from the defendant to forward 250 barrels of cement, sent by a carrier 260 barrels, which the defendant refused to receive, saying, among other things, that there was more than he had ordered, and that the quality was not good; whereupon the carrier took the cement away and stored it. Afterwards a letter was written to the plaintiff by the defendant, in which he placed his refusal to receive the cement on the sole ground that the quality was not good, but admitted that the order had been complied with as to the number of barrels. The plaintiff then brought an action for the value of the 250 barrels of cement, declaring as for goods bargained and sold, and for goods sold and delivered; but he was nonsuited at the trial because the number of barrels ordered had been delivered to the carrier as part of a larger number, without being counted out or separated, and that therefore no sale had taken place. It was held that the nonsuit was erroneously granted, and that the case should have been submitted to the jury; for if the entire quantity of cement delivered to the carrier was intended as a mere compliance with the order, and was not sent for the purpose of charging the defendant with the excess, he was liable. This decision appears to rest entirely upon the ground that it did not appear that plaintiff intended to charge the defendant for the extra ten barrels; but upon the contrary it seemed that they were merely thrown in "as good measure." This is the view which was taken of the case in Barton *v.* Kane, 17 Wis. 37; 84 Am. Dec. 728; where it is said: "To constitute a delivery to the carrier a delivery to the consignee, so as to pass the title and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality, with those named in the order. Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; and Downer *v.* Thompson, 2 Hill (N. Y.) 137, are clear upon this question; and though the latter was reversed in the court of errors (6 Hill, N. Y. 208), the main point of reversal cannot arise here. There can be no pretense that the 625 extra cigars were sent out of an abundance of caution, and to insure a *scriptural* compliance with the order. They were sent to fill up the case, and the defendant was charged with their price. To entitle him to recover under the circumstances, the plaintiff should have shown that the defendant actually received and accepted the cigars sent, upon the terms indicated in the plaintiff's letter notifying him of the consignment."

tendering other goods which are in accordance with the contract.[1]

When there is an executory contract for the sale of a certain quantity of unspecified goods, and the seller, in part performance thereof, sets aside, separates and appropriates a smaller quantity of goods, which appropriation the buyer accepts, the property in the goods so appropriated passes to the purchaser, and it makes no difference as to the operation of this rule whether the executory contract was an entirety or not.[2]

(d) **Goods to be Manufactured or Procured.**—Where the agreement is for the sale of goods to be manufactured, the same rule applies as in the case of the sale of unspecified chattels; the contract is executory, and the title does not pass until the manufacture is completed and goods selected, separated, and made ready for delivery.[3]

1. Borrowman *v.* Free, 4 Q. B. Div. 500; see also Gath *v.* Lees, 3 H. & C. 558.

2. Thompson *v.* Conover, 32 N. J. L. 469; Birge *v.* Edgerton, 28 Vt. 291; Albemarle Lumber Co. *v.* Wilcox, 105 N. Car. 34; Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436; see also Totten *v.* Cooke, 2 Metc. (Ky.) 275.

Thus in Birge *v.* Edgerton, 28 Vt. 291, the contract was for three hundred cords of logs. The seller delivered fifty cords at a time. It was held that the property passed in the fifty cords delivered upon each delivery.

3. Shaw *v.* Smith, 48 Conn. 306; 40 Am. Rep. 170; Schneider *v.* Westerman, 25 Ill. 424; Wollensak *v.* Briggs, 119 Ill. 453; Fordice *v.* Gibson, 129 Ind. 7; Moline Scale Co. *v.* Bead, 52 Iowa 309; 35 Am. Rep. 272; Moody *v.* Brown, 34 Me. 107; 56 Am. Rep. 640 (acceptance by buyer is necessary); Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Mixer *v.* Howarth, 21 Pick. (Mass.) 205; 32 Am. Dec. 256; Briggs *v.* Light Boat, 7 Allen (Mass.) 287; Goddard *v.* Binney, 115 Mass. 450; 15 Am. Rep. 112; First Nat. Bank *v.* Crowley, 24 Mich. 492; Hosmer *v.* Wilson, 7 Mich. 293; 74 Am. Dec. 716; West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Andrews *v.* Durant, 11 N. Y. 35; 62 Am. Dec. 551; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495; 75 Am. Dec. 420; Sutton *v.* Campbell, 2 Thomp. & C. (N. Y.) 595; Higgins *v.* Murray, 4 Hun (N. Y.) 565; 73 N. Y. 252; Smith *v.* Edwards, 29 Hun (N. Y.) 493; Dunnigan *v.* Crummey, 44 Barb. (N. Y.) 528 (part delivered and accepted); Halterline *v.* Rice, 62 Barb. (N. Y.) 593 (buyer's acceptance said to be necessary); Comfort *v.* Kiersted, 26 Barb. (N. Y.) 472; Frankenfield *v.* Freyman, 13 Pa. St. 56 (machine taken back to be repaired); Galloway *v.* Week, Wis. 604; Gowans *v.* Consolidated Bank, 43 U. C., Q. B. 318; Anglo-Egyptian Nav. Co. *v.* Rennie, L. R., 10 C. P. 271; 12 Moak's Rep. 345; Mucklow *v.* Mangles, 1 Taunt. 218; Maberley *v.* Sheppard, 10 Bing. 99; 25 E. C. L. 43; Bishop *v.* Crawshay, 3 B. & C. 415; 10 E. C. L. 136; Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 216; Chitty on Contracts, p. 378. *Compare* Brewer *v.* Salisbury, 9 Barb. (N. Y.) 511.

In McConihe *v.* New York, etc., R. Co., 20 N. Y. 495; 75 Am. Dec. 420, one M had agreed with the defendant to furnish materials and build certain cars for him, for which the defendant was to furnish the iron boxes. M set up some of the cars and had the work ready to set up the others, and those set up were completed as far as it was possible to do so without the boxes which the company neglected to furnish. He expended over $2,000 in the work and materials, and was prevented from completing the contract solely by the failure of the defendant to furnish the boxes as he had agreed, though M frequently urged him to furnish them. While matters were in this condition, all the cars and material were consumed by fire. It was held that the title had not passed and that M should bear the loss. *Citing* and *approving* Andrews *v.* Durant, 11 N. Y. 35; 62 Am. Dec. 55. See also Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 307; 19 Am. Rep. 717.

In Bellamy *v.* Davey (1891), 3 Ch. 544, plaintiff entered into a contract with the defendant company to build

This rule, however, is still one of presumption. And, if it can clearly be shown that such was the intention of the parties, a sale may be made of an unfinished chattel as such, or of a chattel progressing towards completion, so as to transfer the property to the thing in its existing state;[1] or, though the contract was executory in the first place, the purchaser may elect to take the article in an unfinished state, and, if delivery is tendered and accepted, a new contract is created and title passes by virtue of it.[2]

The rule is not altered by the fact that the contract provides for the payment of the price by instalments at various stages of the work. The title still remains in the seller or manufacturer until completion and appropriation, unless there is a plain and express understanding to the contrary between the parties.[3]

and deliver on completion two tanks. As the tanks were very heavy, it was agreed that they should be erected on the premises of the person who was to use them. The plaintiff commenced to erect the two tanks, and one was nearly completed when defendant company became insolvent. It was held that the property in the tanks so far as erected had not passed from plaintiff.

In Comfort *v.* Kiersted, 26 Barb. (N. Y.) 472, a manufacturer agreed to make a quantity of shingles for K to "be the property of K as fast as they were made." It was held that in spite of this stipulation, no property in the shingles passed to K until there had been an appropriation.

A accepted an order to build a boat for B, and proceeded to build one, which he repeatedly declared he was building for B on the order, but, after it was finished, refused to deliver it. It was held that B could not maintain replevin to recover the boat, his remedy being by an action on the contract. Pettengill *v.* Merrill, 47 Me. 109.

1. Clarkson *v.* Stevens, 106 U. S. 505; Shaw *v.* Smith, 48 Conn. 306; 40 Am. Rep. 170; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495; 75 Am. Dec. 420; Wright *v.* O'Brien, 5 Daly (N. Y.) 54; Woods *v.* Russell, 5 B. & Ald. 942; 7 E. C. L. 310; Young *v.* Matthews, L. R., 2 C. P. 127; Brown *v.* Bateman, L. R., 2 C. P. 272; Paine *v.* Young, 56 Md. 316; see also Beaumont *v.* Crane, 14 Mass. 400.

In Thorndike *v.* Bath, 114 Mass. 116; 19 Am. Rep. 318, a person offered to purchase an unfinished piano in the maker's shop if he would finish it. The offer was accepted then and there, a bill of sale made, and subsequently the price was paid. It was held that there was a sufficient delivery as against a subsequent purchaser.

It is competent for parties to make a special agreement as to when title shall pass, and this will control as between them, and also as to third parties, if proper evidence of the contract is given. Wright *v.* O'Brien, 5 Daly (N. Y.) 54.

A debtor sold his creditor an unfinished carriage for $180, the amount of, and in payment of, the debt, but retained the same to add to it an apron, tongue and seat-back, for which he was to receive $10 extra. It was held that the title passed at the time of the contract of the sale. Cowgill *v.* Ford, 2 Houst. (Del.) 164.

2. Clemens *v.* Davis, 7 Pa. St. 263. See also Thorndike *v.* Bath, 114 Mass. 116; 19 Am. Rep. 318.

3. Wollensak *v.* Briggs, 119 Ill. 453.

In Woods *v.* Russell, 5 B. & Ald. 942; 7 E. C. L. 310, A, a ship builder, contracted with B to build a ship and to complete it in April. B was to pay for it by four instalments; the first, when the keel was laid; the second, when at the light plank; and the third and fourth when the ship was launched. Soon after the third instalment was paid, A went into bankruptcy. The court held that upon the payment of each instalment the title to so much of the ship as was then constructed passed to the buyer. And the English courts, following this case, have uniformly held that, in the absence of express understanding otherwise, the intention of the parties is that the title shall pass upon the payment of each instalment. Clarke *v.* Spence, 4 A. & E. 448; 31 E. C. L. 107; Wood *v.* Bell, 5 E. & B. 772; 85 E. C. L. 771,

Nor is the rule altered by the fact of prepayment of the entire price,[1] nor by the fact that the purchaser exercised a superintendence and control over the work.[2]

Upon an appropriation of the finished article to the contract, the executory contract of sale becomes executed, as in the case of an appropriation of specific chattels, and title passes to the purchaser.[3]

and cases *cited;* Laidler *v.* Burlinson, 2 M. & W. 602.

In Clarke *v.* Spence, 4 A. & E. 448; 31 E. C. L. 107, the court, while acknowledging and following the doctrine laid down in Woods *v.* Russell, 5 B. & Ald. 942; 7 E. C. L. 310, seriously questions its correctness. The doctrine of the *English* case is followed in *Indiana.* Sandford *v.* Wiggins Ferry Co., 27 Ind. 522.

But in most of the States a different view is taken, and it is considered that the old rule must apply; so that no title passes until the manufacture of the ship is completed and it has been delivered. Clarkson *v.* Stevens, 106 U. S. 505 (where the old doctrine is reviewed); Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370; Briggs *v.* Light Boat, 7 Allen (Mass.) 292; Williams *v.* Jackman, 16 Gray (Mass.) 514; Wright *v.* Tetlow, 99 Mass. 397; Andrews *v.* Durant, 11 N. Y. 35; 62 Am. Dec. 55; Merritt *v.* Johnson, 7 Johns. (N. Y.) 473; 5 Am. Dec. 289; Derbyshire's Estate, 81 Pa. St. 18; Scull *v.* Shakespear, 75 Pa. St. 303. *Compare* Beaumont *v.* Crane, 14 Mass. 400.

In Elliott *v.* Edwards, 35 N. J. L. 265; *affirmed* 36 N. J. L. 449, the doctrine of these latter cases was approved, though in that case there was a specific provision that the property should pass at a certain stage of the work.

In Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370, the general rule was recognized, but it was held that it did not prevail where the vessel was constructed under the superintendence of the party for whom it was built or his agent, and payments for it, based upon the progress of the work, were made by instalments as the work was done. Bank of Upper Canada *v.* Killaly, 21 U. C., Q. B. 9.

In Green *v.* Hall, 1 Houst. (Del.) 506, a builder contracted to build a ship, receiving payment in three equal instalments as the work progressed. After the ship was two-thirds finished and two-thirds paid for, it was attached by the creditors of the builder, but the buyer, having received possession, refused to give it up and trover was brought against him. It was held that the question was one of intent, and that since the ship was to be delivered in Philadelphia and pass inspection there, it was not reasonable to suppose that the property was intended to be passed until completion.

1. Bennett *v.* Platt, 9 Pick. (Mass.) 558; West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Halterline *v.* Rice, 62 Barb. (N. Y.) 593.

In Shaw *v.* Smith, 48 Conn. 306; 40 Am. Rep. 170, a person, with whom an agreement had been made to manufacture certain chattels, fraudulently represented to the buyer that they were substantially completed and ready for delivery, and the buyer, trusting this representation, paid the balance of the contract price. Soon after the seller made an assignment in insolvency. In an action of replevin by the buyer against the trustee in insolvency, it was held that the title had not passed and that the buyer could not therefore recover the chattels.

2. Williams *v.* Jackman, 16 Gray (Mass.) 514; Andrews *v.* Durant, 11 N. Y. 35; 62 Am. Dec. 55. *Compare,* however, Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370; *reversed* in 2 Black (U. S.) 372, but not on the point here involved.

3. See *supra,* this title, *Subsequent Appropriation.* 2 Schouler's Pers. Prop., § 267; McIntyre *v.* Kline, 30 Miss. 361; 64 Am. Dec. 163; Gordon *v.* Norris, 49 N. H. 376; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Shawhan *v.* Van Nest, 25 Ohio St. 490; 18 Am. Rep. 313; Ballentine *v.* Robinson, 46 Pa. St. 177; Spicers *v.* Harvey, 9 R. I. 582; Mount Hope Iron Co. *v.* Buffington, 103 Mass. 62; Higgins *v.* Murray, 4 Hun (N. Y.) 565; 73 N. Y. 252; Hubbard *v.* O'Brien, 8 Hun (N. Y.) 244.

What Constitutes a Sufficient Appropriation.—A ship builder had undertaken to construct a barge to order.

It is laid down by some of the authorities that where the appropriation is made by the seller there must be a subsequent acceptance of the manufactured article by the purchaser before the title passes, and that until such acceptance the contract remains executory and the seller's remedy is an action for the refusal to accept, not for goods sold and delivered.[1] But this doctrine is

The barge had been completed to the painting of the purchaser's name on the stern, but was still under the builder's control. It was held that no property had passed. Mucklow *v.* Mangles, 1 Taunt. 218.

A boiler made for a person was, by his direction, placed by the maker on a lot of land belonging to him in the rear of his shop and was paid for. It was held that as between the maker and the purchaser, title had passed to the latter. Pratt *v.* Maynard, 116 Mass. 388.

In Atkinson *v.* Bell, 8 B. & C. 277; 13 E. C. L. 216, a purchaser had ordered the machines; they had been made and packed under his agent's superintendence; the boxes made ready to be sent; and the seller had written to ask the purchaser by what conveyance they were to be sent, but had received no answer when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods bargained and sold, this form of action not being maintainable where the property has not passed. It was held that the form of action was misconceived; it should have been for not accepting the goods. The property had not passed; for although the seller intended them for the purchaser, his right to revoke that intention still existed and he might have sold the goods to another at any time before the buyer assented to the appropriation. Of this case it is said by an eminent authority: "This is, perhaps, the strongest case in the books on this subject; for the conduct of the vendor was as near an approximation to a determination of election, without actually becoming so, as one can well conceive. . . . Many attempts have been made to reconcile Atkinson *v.* Bell with the principles recognized in the other cases on the subject, but it is very difficult to avoid that a conflict really exists, and that if correctly reported, the case would not on this particular point be now decided as it was in 1828." Benj. on Sales (6th ed.), § 379.

What is a sufficient appropriation and acceptance is usually a question of fact to be determined by the circumstances of each case. In Wilkins *v.* Brownhead, 6 M. & G. 693; 46 E. C. L. 962, B was employed to build a greenhouse for A. He completed it, sent notice to A, and asked for payment. A remitted the price and requested B to retain the house until he should send for it. B deposited it with C (unknown to A), telling him it was A's property. It was held that there was a sufficient appropriation and acceptance by A.

The defendant, a corporation, made a contract with manufacturers of salt, whereby it was to take all the salt manufactured by them; the salt to become the property of the association as soon as inspected and branded, but the manufacturer to furnish storage for it and be responsible for it until delivery. A certain quantity belonging to a manufacturer, after being inspected and branded, and while it remained on his premises, was accidentally destroyed by fire. It was held that the defendant had become owner, and was liable to pay for the salt as it would have been on a sale. Brewer *v.* Michigan Salt Assoc., 47 Mich. 526.

In Weld *v.* Came, 98 Mass. 152, defendant contracted to make a billiard table for plaintiffs and to deliver it upon their wharf. He notified them when the table was finished, and proposed to dispose of it otherwise. Plaintiffs objected to this, paid for the table, and said they would give defendant notice when they had a ship ready to receive it. While still in the custody of the defendant it was accidentally burnt, and plaintiffs brought suit for the price which they had paid. The trial court directed a verdict for the plaintiffs. This was held error upon the ground that the evidence would have authorized a jury in finding that the property had passed to the plaintiffs.

1. Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 216; Gowans *v.* Consolidated Bank, 43 U. C., Q. B. 318; Halterline *v.* Rice, 62 Barb. (N. Y.) 593;

not undisputed, some cases holding that the appropriation of the article, when completed, to the contract, passes the title without the subsequent assent of the purchaser, and the weight of authority sustains the latter view.[1]

The title to materials furnished by the seller and designed for the article under construction, does not pass, notwithstanding a constructive delivery of the article, until such materials have been so affixed to the manufactured article as to become a part of it.[2]

Moody *v.* Brown, 24 Me. 107; 56 Am. Dec. 640. See also Rider *v.* Kelley, 32 Vt. 268; 76 Am. Dec. 176.

In Gammage *v.* Alexander, 14 Tex. 414, it is said that an actual acceptance is necessary to the transfer of title, but the point does not seem to have been involved.

In McIntyre *v.* Kline, 30 Miss. 361; 64 Am. Dec. 163, it was held that the property had passed. It was there said that an acceptance was necessary, but that it might be implied from the facts that notice of the completion of the work had been given to the purchaser and that he had made no objections.

An Exception.—There is an admitted exception to the rule of the text where the work is done under the direction and superintendence of the buyer or his agent. Moody *v.* Brown, 34 Me. 107; 56 Am. Dec. 640.

Measure of Damages.—In such cases the measure of damages for a refusal to accept is the contract price. The article having been manufactured expressly for the buyer and according to his directions a larger measure of damages is allowed than in cases where the thing sold is an ordinary article of merchandise. Gordon *v.* Norris, 49 N. H. 376. See also DAMAGES, vol. 5, p. 29, 30; *infra*, this title, *Vendor's Remedies*.

1. Spicers *v.* Harvey, 9 R. I. 58; Ballentine *v.* Robinson, 46 Pa. St. 177; Bookwalter *v.* Clark, 11 Biss. (U. S.) 126; Smith *v.* Edwards (Mass. 1892), 30 N. E. Rep. 1017. See also Goddard *v.* Binney, 115 Mass. 450; 15 Am. Rep. 112; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Higgins *v.* Murray, 4 Hun (N. Y.) 565; 73 N. Y. 253; Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436; Shawhan *v.* Van Nest, 25 Ohio St. 490; 8 Am. Rep. 313; Hadly *v.* Pugh, Wright (Ohio) 554; Rattary *v.* Cook, 50 Ala. 352; Osborne *v.* Van Atten, 3 Wash. Ter. 53. And see Gordon *v.* Norris, 49 N. H. 376; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Bates *v.* Conkling, 10 Wend. (N. Y.) 389.

A agreed to build a buggy for B, and to deliver it at a time certain. B gave directions as to the style and finish of the buggy, and it was built in compliance with his directions, and marked with his monogram. Before the buggy was finished B called to see it, and in response to an inquiry of A, asking if he might sell the buggy, replied that he would keep it; when the buggy was finished, A notified B and sent him a bill for it. B retained the bill and promised "to see" A "about it." The buggy was afterwards destroyed by fire while in A's possession. It was held in a suit by A for the price that the property in the buggy had passed to B, and he was liable. Goddard *v.* Binney, 115 Mass. 450; 15 Am. Rep. 112. In this case, the court by Ames, J., said: "In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession."

2. Title to Materials Used in Construction.—The question arises where the

(4) *Reservation of Jus Disponendi.*—The foregoing rules for determining whether the property in goods sold has passed from seller to buyer are rules of construction adopted for the purpose of ascertaining the intention of the parties. It follows necessarily that such general rules are not applicable where exceptional circumstances repel the presumptions or inferences upon which the rules rest. If, notwithstanding the appropriation of the goods, the seller's acts show clearly his purpose to retain the ownership, the property does not pass.[1] It is to be borne in mind, however, that this doctrine applies as between the parties to the sale, and not to the prejudice of the rights of third parties, such as creditors or *bona fide* purchasers, who, under the circumstances, may be entitled to insist that as to them a reservation should be treated as inoperative.[2]

Where the seller delivers goods to a common carrier for delivery to the buyer, this is equivalent to a delivery to the buyer, whose agent the carrier is deemed to be.[3] If a bill of lading is taken, the carrier is bailee for the person indicated by the bill of lading.[4]

manufactured article is attached by the buyer's creditors and the seller claims that part of the materials in the manufactured articles are not covered by the attachment. See Wood *v.* Bell, 5 E. & B. 772; 85 E. C. L. 771 (engines and boilers designated for a steamer), Anglo-Egyptian Nav. Co. *v.* Rennie, L. R., 10 C. P. 271; 12 Moak's Rep. 345; Tripp *v.* Armitage, 4 M. & W. 687; Johnson *v.* Hunt, 11 Wend. (N. Y.) 135; 2 Schouler on Pers. Prop. (2d ed.), § 268; Newmark on Sales, § 122.

1. "The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A, in New York, orders goods from B, in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival. B may take the bill of landing, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods; or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to A. These are the most simple forms in which the question is generally presented; but we shall see that in this class of cases, as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*." Benj. on Sales, § 381.

2. See *infra*, this title, *Conditional Sales*. See also FRAUDULENT SALES, vol. 8, pp. 877 *et seq.*

3. See *supra*, this title, *Subsequent Appropriation*.

4. Wait *v.* Baker, 2 Exch. 1; Moakes *v.* Nicholson, 19 C. B. N. S. 290; 115 E. C. L. 29; Key *v.* Cotesworth, 7 Exch. 595; Gaborron *v.* Kreeft, L. R., 10 Exch. 281; 14 Moak's Rep. 562; Brandt *v.* Bowley, 2 B. & Ad. 932; 22 E. C. L.

If, as is frequently the case, the seller has the bill of lading so drawn that the goods are deliverable to his order, this, in the absence of evidence to the contrary, is almost decisive in showing his intention to reserve the *jus disponendi*, and to prevent the passing of title to the buyer.[1]

This *prima facie* conclusion that the seller reserves the *jus disponendi* when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the purchaser and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was.[2] So, when the seller ships goods to a third person who is his agent for delivery to the purchaser, he equally manifests the intention to reserve the *jus disponendi* and to prevent the property from passing to the purchaser until such delivery has been made.[3]

Where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, attached to the bill of lading, which is to pass when the former is accepted or paid, the buyer cannot retain

214; Mirabila *v.* Imperial Ottomon Bank, 3 Ex. Div. 164; 31 Moak's Rep. 200; Shepherd *v.* Harrison, L. R., 4 Q. B. 196; L. R., 5 H. L. 116; Reynolds *v.* Scott (Cal. 1884), 4 Pac. Rep. 346; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429; 9 Am. Dec. 444; Blanchard *v.* Page, 8 Gray (Mass.) 281; Marine Bank *v.* Wright, 48 N. Y. 1; Ward *v.* Taylor, 56 Ill. 494; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560.

1. Wait *v.* Baker, 2 Exch. 1; Wilmshurst *v.* Bowker, 2 M. & G. 792; 40 E. C. L. 629; Ellershaw *v.* Magniac, 6 Exch. 570; Van Casteel *v.* Booker, 2 Exch. 691; Jenkyns *v.* Brown, 14 Q. B. 496; 68 E. C. L. 495; 19 L. J., Q. B. 286; Shepherd *v.* Harrison, L. R., 4 Q. B. 196; L. R., 5 H. L. 116; Gaborron *v.* Kreeft, L. R., 10 Exch. 274; 14 Moak's Rep. 562; Ogg *v.* Shuter, 1 C. P. Div. 47; 15 Moak's Rep. 231; *Ex parte* Banner, 2 Ch. Div. 278; 16 Moak's Rep. 704; Reynolds *v.* Scott (Cal. 1884), 4 Pac. Rep. 346; Berger *v.* State, 50 Ark. 20; St. Joze Indiano, 1 Wheat. (U. S.) 208; The John H. Shaw, 32 Fed. Rep. 491; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 560; Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77; McCormick *v.* Anderson, 77 Ala. 236; Doyle *v.* Roth Mfg. Co., 76 Wis. 48.

By such a bill of lading the seller does not reserve merely a lien, but the absolute right of disposal of the goods. Ogg *v.* Shuter, 1 C. P. Div. 47; 15 Moak's Rep. 231; Gabarron *v.* Kreeft, L. R., 10 Exch. 274; 14 Moak's Rep. 562; Dows *v.* National Exch. Bank, 91 U. S. 618. And his assignee acquires the same rights, so that the carrier is bound to deliver to his order. Emery *v.* Irving Nat. Bank, 25 Ohio St. 360; 18 Am. Rep. 299; Bank of Rochester *v.* Jones, 4 N. Y. 497; 55 Am. Dec. 290; First Nat. Bank *v.* Dearborn, 115 Mass. 219; 15 Am. Rep. 92; First Nat. Bank *v.* Bayley, 115 Mass. 230; First Nat. Bank *v.* Crocker, 111 Mass. 163; Shumacher *v.* Eby, 24 Pa. St. 521; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. Rep. 434. See also First Nat. Bank *v.* Kelly, 57 N. Y. 34. The consignee in such cases becomes the mere agent or factor of the consignor or his assignee. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; and must therefore deliver to his order even though the consignor be indebted to him (the consignee) for advances. Marine Bank *v.* Wright, 48 N. Y. 1.

As to the negotiability of a bill of lading, its general character, etc., see Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155; 33 Am. Rep. 745; BILL OF LADING, vol. 2, p. 241.

2. Van Casteel *v.* Booker, 2 Exch. 691; Hare *v.* Browne, 4 H. & N. 822; 29 L. J. Exch. 6; Joyce *v.* Swann, 17 C. B. N. S. 84; 12 E. C. L. 83; Moakes *v.* Nicholson, 19 C. B. N. S. 290; 115 E. C. L. 290; Hobart *v.* Littlefield, 13 R. I. 341.

3. Berger *v.* State, 50 Ark. 20; Redd *v.* Williams, 58 Ga. 574. *Compare* Sarbecker *v.* State, 65 Wis. 171; 56 Am. Rep. 624.

the bill of lading unless he accepts the bill of exchange, and if he refuses acceptance he acquires no right to the bill of lading or the goods of which it is a symbol.[1] This is true though the consignment is made expressly "at the risk of the buyer."[2] If the bill of exchange is payable at sight or on demand, there must be both acceptance and payment before the purchaser can claim the bill of lading.[3] Upon payment or acceptance of the bill by the purchaser and delivery of the bill of lading to him, the contract or

1. Shepherd *v.* Harrison, L. R., 4 Q. B. 196; 5 H. L. 116; Ogg *v.* Shuter, 1 C. P. Div. 47; 15 Moak's Rep. 231; Roue *v.* Payne, 53 L. T. 932; Brandt *v.* Bowlby, 2 B. & Ad. 932; 22 E. C. L. 214; Jenkyns *v.* Brown, 14 Q. B. 496; 68 E. C. L. 495; Barrow *v.* Coles, 3 Camp. 92; National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; Forty Sacks of Wool, 14 Fed. Rep. 643; Seeligson *v.* Philbrick, 30 Fed. Rep. 601; Alabama G. S. R. Co. *v.* Mt. Vernon Co., 84 Ala. 173; Lanfear *v.* Blossman, 1 La. Ann. 148; 45 Am. Dec. 76; First Nat. Bank *v.* Crocker, 111 Mass. 163; Alderman *v.* Eastern R. Co., 115 Mass. 233; Security Bank *v.* Luttgen, 29 Minn. 363; Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77; Cayuga Nat. Bank *v.* Daniels, 47 N. Y. 631; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568; Marine Bank *v.* Wright, 48 N. Y. 1; Erwin *v.* Harris, 87 Ga. 333; Taylor *v.* Turner, 87 Ill. 296; Bank of Rochester *v.* Jones, 4 N. Y. 497; 55 Am. Dec. 290; Alabama G. S. R. Co. *v.* Mount Vernon Co., 84 Ala. 173. See also BILL OF LADING, vol. 2, p. 243.

Where goods were ordered to be paid for by a draft due in forty-five days, and the draft was sent to the consignee with the bill of lading, it was held that the acceptance and return of the draft were necessary before the title passed. Mathewson *v.* Belmont Flouring Mills Co., 76 Ga. 357.

When a draft has been drawn against the consignment to order, and has been forwarded to an agent for collection with a bill of lading attached, the agent should deliver over the bill of lading to the drawee on acceptance of the draft. It is not his duty after acceptance to hold the bill of lading for the payment of the draft. National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92.

Schouler says: "It is not always easy, however, to reconcile such cases with those following the ordinary rule, unless it be explained by the manifest reluctance of the courts to make a seller's precautionary measures, taken simply for securing his rights, redound to the advantage of the other party, so as to exempt him from the ordinary risks of transit. Chief Justice Cockburn has observed upon this discrepancy, that there is much reason for holding in some of the cases that while the property had vested in the buyer the seller retained possession, with a lien for the purchase money." The remark of Lord Cockburn referred to above is to be found in Shepherd *v.* Harrison, L. R., 4 Q. B. 196.

Consignor Agent of Consignee. — A bought goods on B's order; sent a bill of parcels of them to B, describing himself as a produce commission merchant, stating that they were bought on B's account, and charging a commission; annexed a bill of lading of them, made to his own order and indorsed in blank, to a draft on B for their price; and sent the draft through a bank for presentment to B. B accepted the draft, and the bill of lading was given up to him. It was held that the relation between B and A was that of principal and agent, not of buyer and seller; that the general property in the goods vested in B on their purchase; and that a delivery of them to a third person by A, although before the acceptance of the draft by B, passed no title. Whitney *v.* Beckford, 105 Mass. 267.

2. Shepherd *v.* Harrison, L. R., 4 Q. B. 196; L. R., 5 H. L. 116.

3. Alderman *v.* Eastern R. Co., 115 Mass. 233; Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155; 33 Am. Rep. 745 (bill indorsed "Not to be delivered until paid"); Dows *v.* National Exch. Bank, 91 U. S. 618; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360; 18 Am. Rep. 299; Jenkyns *v.* Brown, 14 Q. B. 496; 68 E. C. L. 495. See also Farmers', etc., Bank *v.* Logan, 74 N. Y. 569; Security Bank *v.* Luttgen, 29 Minn.

bargain and sale is completed and the property of the goods is in the purchaser although they are yet *in transitu*.[1] If the seller sends the bill of lading to the buyer without attaching to it the bill of exchange, the acceptance of the bill of exchange need not precede the vesting of the title in the purchaser. The title passes though he refuses to honor the bill.[2] These rules are not altered by the fact that the consignor is indebted to the consignee for advances, even though they may be beyond the value of the consignment.[3]

Although, as a general rule, the delivery of goods by the seller on board the purchaser's own ship is a delivery to the purchaser and passes the property,[4] yet the seller may by special terms restrain the effect of such delivery and reserve the *jus disponendi* even in cases where the bills of lading show that the goods are free of freight because owner's property.[5]

If the carrier delivers goods to the purchaser notwithstanding the bill of lading provides otherwise, the purchaser acquires no title and the seller may maintain an action to recover the goods

363; Treadwell *v.* Anglo-American Packing Co., 13 Fed. Rep. 22.

1. Thus, where a seller delivered goods to a carrier for transportation, and took a bill of lading to himself, which he indorsed in blank, and attached to a sight draft on the buyers, and then deposited the bill of lading with the draft in the bank, and got credit on his bank account for the amount of the draft, and, the draft and bill of lading being forwarded, the buyers paid the draft and accepted the indorsed bill of lading while the goods were yet *in transitu*, it was held that the goods were not delivered, and that the title did not pass, until the bill of lading had been delivered to the buyers; but that, after that time, in the absence of a contract to the contrary, the risk of damage to the goods by the elements was assumed by the buyers. Forcheimer *v.* Stewart, 65 Iowa 593; 54 Am. Rep. 30.

"If the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does, on payment or tender of the price, pass to the purchaser." Mirabita *v.* Imperial Ottoman Bank, L. R., 3 Exch. Div. 173; 31 Moak's Rep. 200.

But in Cobb *v.* Illinois Cent. R. Co., 88 Ill. 396, where the drafts were upon general account and not drawn upon a specific shipment of corn, it was held that property in a specific shipment did not pass.

2. *Ex parte* Banner, 2 Ch. Div. 278; 16 Moak's Rep. 704; *reviewing* and *distinguishing* Shepherd *v.* Harrison, L. R., 4 Q. B. 196; L. R., 5 H. L. 116 and *Ex parte* Waring, 19 Ves. 345.

3. Bank of Rochester *v.* Jones, 4 N. Y. 497; 55 Am. Dec. 290; Marine Bank *v.* Wright, 48 N. Y. 1; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360; 18 Am. Rep. 299; First Nat. Bank *v.* Crocker, 111 Mass. 163; Mitchel *v.* Ede, 11 Exch. 888; 39 E. C. L. 261.

4. Mirabita *v.* Imperial Ottoman Bank, L. R., 3 Exch. Div. 172; Moak's Rep. 200. See also Campbell *v.* Ehlen (Md. 1892), 24 Atl. Rep. 420; Gill *v.* Benjamin, 64 Wis. 364; 54 Am. Rep. 619; Albemarle Lumber Co. *v.* Wilcox, 105 N. Car. 34.

5. Turner *v.* Liverpool Dock Trustees, 6 Exch. 543; Ellershaw *v.* Magniac, 6 Exch. 570; Brandt *v.* Bowlby, 2 B. & Ad. 932; Van Casteel *v.* Booker, 2 Exch. 691; Moakes *v.* Nicholson, 19 C. B. N. S. 290; 115 E. C. L. 290; Falk *v.* Fletcher, 18 C. B. N. S. 463; 114 E. C. L. 403; Shotsman *v.* Lancashire, etc., R. Co., 2 Ch. 332; Gumm *v.* Tyrie, 33 L. J., Q. B. 97; 34 L. J., Q. B. 124.

from any one in possession, even though he may be a *bona fide* purchaser for value.[1]

2. Place Where Transfer of Title Takes Place.—The question sometimes arises as to the exact place in which a sale can be said to have taken place. Thus, under a statute prohibiting the sale of liquor within a certain locality, it has been made a question whether the statute was violated where the liquor was sent C. O. D. to be delivered within the limits of the prescribed locality. In some cases it is held that the sale is consummated at the time of delivery by the express agent to the consignee, and that the sale is, therefore, in violation of the statute.[2] But this is not the correct rule, and is opposed by principle and the decided weight of authority. The sale takes place at the place of shipment and not at the place of delivery to the consignee.[3] This general

1. Hieskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155; 33 Am. Rep. 745; Stollenwerck *v.* Thacher, 115 Mass. 224; Dows *v.* National Exch. Bank, 91 U. S. 618; Shepherd *v.* Harrison, L. R., 5 H. L. 116; Brandt *v.* Bowlby, 2 B. & Ad. 932; 22 E. C. L. 214. *Compare* as to *bona fide* purchasers, Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

In some cases the carrier is held liable for delivery in contradiction of the bill of lading. Thus, in Alderman *v.* Eastern R. Co., 115 Mass. 233, a second carrier received the consignment from the first carrier, and, ignorant of the terms of the bill of lading, though with knowledge of on whose account it was carried, delivered the goods to a purchaser from the consignee. In an action against the carrier, it was held liable to the holder of the bill of lading. Newcomb *v.* Boston, etc., R. Co., 115 Mass. 230; Brandt *v.* Bowlby, 2 B. &. Ad. 932; 22 E. C. L. 214.

2. State *v.* O'Neil, 58 Vt. 160; Baker *v.* Bourcicault, 1 Daly (N. Y.) 23; 56 Am. Rep. 556; People *v.* Shriver (U. S. Dist. Ct.), 31 Alb. L. J. 163. In this latter case, the court, by Treat, J., said: "In the case of liquor shipped by the defendant to F by express C. O. D., the liquor is received by the express company at S as the agent of the seller and not as the agent of the buyer, and on its reaching F, it is there held by the company, as agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and, generally, the right of property remains in the seller till payment of the price. An order from a person in F to the defendant at S for liquor to be shipped C. O. D. is a mere offer by the person sending such order to purchase liquor from the defendant and pay him for it when he delivers it to him at F."

The case of State *v.* O'Neil, 58 Vt. 140; 56 Am. Rep. 556, was taken to the United States supreme court on a writ of error. It was there held that the ruling of the *Vermont* court as to the place of sale was not a federal question and could not properly be reviewed by the supreme court. And the three dissenting justices maintained that the holding of the *Vermont* court as to the place of sale was wrong; that the completed sale took place in *New York*, where the liquors were separated and shipped to the dealer. O'Neil *v.* Vermont, 144 U. S. 323.

3. As has already been seen, the sale is complete so as to transfer the title and right of property to the buyer when the buyer and seller agree upon the terms of the contract, and nothing remains to be done on the part of the seller as to separation and specification; and while the seller may retain possession until payment by virtue of his lien, still the right of property is vested in the buyer. Therefore, wherever an order for liquors is sent to a certain place, and they are to be sent from there C. O. D. to the purchaser, the title vests in the purchaser from the time of delivery by the seller to the carrier, and the sale takes place, not where they are delivered by the express company, or other carrier, but where they are delivered by the seller to such

rule is subject to variation under the provisions of particular contracts.[1]

IV. Sales Distinguished from Other Contracts—1. In General.—Possession is commonly the best evidence of ownership. Transfers of the possession of property under circumstances which may or may not amount to a sale give rise in law to nice and important distinctions. If the transaction is a sale, the buyer has not only the right of possession but all the rights and risks of ownership as well; any loss occurring must fall on him, and the property is liable to be taken in satisfaction of debts or other claims against him.[2] On the other hand, if no sale is effected, the prop-

carrier. Pilgreen *v.* State, 71 Ala. 369; State *v.* Carl, 43 Ark. 350; 51 Am. Rep. 565; Garbracht *v.* Com., 96 Pa. St. 449; 42 Am. Rep. 550; Com. *v.* Fleming, 130 Pa. St. 138; 17 Am. St. Rep. 765; Woolsey *v.* Bailey, 27 N. H. 217; Boothy *v.* Plaisted, 51 N. H. 436; 12 Am. Rep. 140 (although buyer reserved right to reject if not according to sample); Garland *v.* Lane, 46 N. H. 245; Orcutt *v.* Nelson, 1 Gray (Mass.) 537; Sarbecker *v.* State, 65 Wis. 71; 56 Am. Rep. 624; Banchor *v.* Cilley, 38 Me. 553; State *v.* Intoxicating Liquors, 73 Me. 278; Pearson *v.* State, 66 Miss. 510; State *v.* Hughes, 22 W. Va. 757; Norfolk Southern R. Co. *v.* Barnes, 104 N. Car. 25; Higgins *v.* Murray, 73 N. Y. 252.

In the case of Tegler *v.* Shipman, 33 Iowa 194; 11 Am. Rep. 118, a salesman for an *Illinois* house, while in *Iowa*, took an order for liquors, which his house filled by shipping the liquor to the purchaser in *Iowa*, he to pay the charges and take risks. It was held that this was an *Illinois* contract. The court by Cole, J., said: "It is very plain upon principle that the contract is made where it is accepted, and not where the offer was made; for it is there that the two minds meet upon the same thing, and the contract is consummated. This has been so adjudicated." *Citing* M'Intyre *v.* Parks, 3 Met. (Mass.) 207; Whiston *v.* Stodder, 8 Martin (La.) 95; 13 Am. Dec. 281. The same view is held in Frank *v.* Hoey, 128 Mass. 263; Merchant *v.* Chapman, 4 Allen (Mass.) 362. See also C. O. D., vol. 3, p. 290, and cases there cited. Intoxicating Liquors, vol. 11, pp. 741, 745.

The case of Suit *v.* Woodhall, 113 Mass. 391, does not oppose the conclusion of the text. In that case the agent of the foreign seller made the contract within the prescribed locality, the order to be forwarded to the principal, subject to his (the principal's) approval; the goods were forwarded, the seller paying the freight. It was held that the execution of the contract took place where the buyer received the goods, they having remained the property of the seller during the course of transportation.

Delivery to Carrier.—The principle that delivery to a carrier is delivery to the buyer and also effects a transfer of the title to him applies here also, to make the sale take place at the point where the shipment was made. State *v.* Carl, 43 Ark. 354; 51 Am. Rep. 565, and numerous cases cited; Tegler *v.* Shipman, 33 Iowa 194; 11 Am. Rep. 118; Garland *v.* Lane, 46 N. H. 245; Hill *v.* Spear, 50 N. H. 253; 9 Am. Rep. 205; Garbracht *v.* Com., 96 Pa. St. 449; 42 Am. Rep. 550; Sarbecker *v.* State, 65 Wis. 171; 56 Am. Rep. 624; Shuenfieldt *v.* Junkermann, 20 Fed. Rep. 357; *supra*, this title, *Subsequent Appropriation;* Intoxicating Liquors, vol. 11, pp. 743, 744.

1. Thus in Wilson *v.* Stratton, 47 Me. 120, the contract stipulated that after the goods were delivered to the buyer, he need not accept them nor pay for them unless they suited him. It was held that the sale was not complete until after he had had opportunity to examine and to make his election; therefore the sale took place at the point where buyer received the goods.

2. The definition and requisites of a valid sale, as already set forth, ought to furnish sufficient *criteria* for most of the cases which arise. Sometimes, however, the distinction is difficult to make, and the only solution is by a resort to the intention of the parties as shown by the facts and circumstances. See *supra*, this title, *Definition; Effect of Contract.*

erty in the goods does not pass, but remains in the original owner, whose agent or bailee the transferee becomes.[1]

Whether on particular facts, or in particular circumstances, a contract is one of sale may be largely matter of intention;[2] business usages prevalent at the time and place of the contract may bear upon the question of intention.[3]

1. See in this connection, BAILMENT, vol. 2, p. 40; COMMISSION MERCHANTS, vol. 3, p. 317; *infra*, this title, *Conditional Sales*, *Warehousemen*.

2. Thus in Reissmer *v.* Oxley, 80 Ind. 584, the court by Woods, J., said: "The rights of parties to put an interpretation upon their own contracts, even to the extent of doing away, practically, with the ordinary and plain meaning of terms, cannot well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful. And the cases are numerous and consistent, which permit a resort to proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and, when this is done, the question must be left to the decision of the jury substantially as was done in this instance." Bates *v.* Dehaven, 10 Ind. 319; Lyon *v.* Lenon, 106 Ind. 567; Gould *v.* Warne, 27 Ill. App. 651; Wilcoxen *v.* Bowles, 1 La. Ann. 230; Williamson *v.* McClure, 37 Pa. St. 402. See also the cases cited under particular sections. Slutz *v.* Desenberg, 28 Ohio St. 371; INTERPRETATION, vol. 11, p. 511; INTENT, vol. 11, p. 368.

3. Lonergan *v.* Stewart, 55 Ill. 44; Bailey *v.* Bensley, 87 Ill. 556; Lyon *v.* Lenon, 106 Ind. 567; Morningstar *v.* Cunningham, 110 Ind. 328; 59 Am. Rep. 211; Ledyard *v.* Hibbard, 48 Mich. 421; 42 Am. Rep. 474. See also USAGES AND CUSTOMS.

And a person dealing in a certain market is presumed to deal according to the known and uniform usage existing there. If he employs one to act for him, the presumption still exists, even though he had no knowledge of the custom or usage. Bailey *v.* Bensley, 87 Ill. 556; Oldershaw *v.* Knoles, 4 Ill. App. 63; Lyon *v.* Culbertson, 83 Ill. 33; 25 Am. Rep. 349; Rahilly *v.* Wilson, 3 Dill. (U. S.) 420; Ledyard *v.* Hibbard, 48 Mich. 421; 42 Am. Rep. 474.

Miscellaneous Instances.—Thus in Ochs *v.* Price, 6 Heisk. (Tenn.) 483, there was a promise by a debtor to several of his creditors that if they would abstain from suing, he would, within a few days, send a specified stock of merchandise to a certain auctioneer, to be sold by him, the proceeds to be applied to the payment of their claims. This promise was not a sale to the creditors and no title passed to them by virtue of it.

A brewer sold a quantity of ale, in barrels bearing his brand, to a retailer, on an agreement that the barrels should be returned, and if not they should be paid for at $2 per barrel. This was merely a liquidation of damages if they were not returned, not a sale of the barrels. Westcott *v.* Thompson, 18 N. Y. 363.

A planter agreed to sell his growing crop to his creditor for a certain sum of money, which, together with whatever else should be realized from the crop, should be placed to the credit of the planter's account. Although the parties called the transaction a sale, it was not one, but rather a contract of security, and the ownership of the crop was not transferred by it. Herold *v.* Stockwell, 32 La. Ann. 949. The essence of the contract is to be regarded rather than its form, or the name by which the contracting parties choose to designate it. See also Hutchings *v.* Field, 10 La. 237; Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

A gave to B a memorandum setting forth that A had received $175 as an advance to buy barley for B, A agreeing to deliver at a certain place and within a certain time, and for a certain price, one thousand bushels of merchantable barley. This was a contract of sale, not of agency, but the contract being executory the property in the barley remained in A until delivery by him to B. Black *v.* Webb, 20 Ohio 304; 55 Am. Dec. 456.

A raised tobacco on B's farm on shares; the whole crop was stored in B's sheds, and by a written agreement

2. From Bailments.—A sale is a transfer of the possession and ownership, while a bailment is a transfer of the possession only.[1] Where the possession is transferred, under an understanding that the article will be returned, though in an altered form, the transaction is a bailment, and the property remains continuously in the original owner.[2] Where grain is sent to a mill and mingled with other grain, the owner to receive in return an equivalent quantity of flour, the transaction is not a bailment, but a sale, and any loss occurring must be borne by the miller.[3]

A "agrees to sell and does sell (to B) all his tobacco on the farm (of B), being the undivided half of all the tobacco," etc., "at fourteen cents per pound, the said tobacco being herein and hereby now delivered to B, who hereby agrees to sell the said tobacco for the best price he can obtain," whatever remaining—after payment of expenses—over fourteen cents a pound to be paid over to A. The whole crop was destroyed by a flood. It was contended, and the lower court so held, that the contract was one of trust or agency on B's part, and that the loss of the whole must fall equally on A and B. But, on appeal, it was held that there was an absolute sale to B, and that B must, therefore, bear the whole loss. Ruthrauff *v.* Hagenbuch, 58 Pa. St. 103.

For various other cases, see Gray *v.* Millay, 61 Me. 327; Johnson *v.* Ensign (Pa. 1886), 4 Atl. Rep. 37; Horne *v.* Walton, 117 Ill. 130 (distinction between a sale and a loan on security).

A sold B a steer running at large, if in existence,—a fact of which neither was certain,—and it was held that the property passed. Nance *v.* Metcalf, 19 Mo. App. 183.

1. See BAILMENT, vol. 2, p. 40.

2. The rule is thus stated: When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to restore the specific article and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return and the title to the property is changed,—it is a sale. Lonergan *v.* Stewart, 55 Ill. 44; Grier *v.* Stout, 2 Ill. App. 602; First Nat. Bank *v.* Schween, 127 Ill. 578; 11 Am. Rep. 174; Bastress *v.* Chickering, 18 Ill. App. 198; Foster *v.* Pettibone, 7 N. Y. 433; 57 Am. Dec. 530; Pierce *v.* Schenck, 3 Hill (N. Y.) 28; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92; Mallory *v.* Willis, 4 N. Y. 76; Marsh *v.* Titus, 3 Hun (N. Y.) 550; Lyon *v.* Lenon, 106 Ind. 567; Chase *v.* Washburn, 1 Ohio St. 244; 59 Am. Dec. 623; Barker *v.* Roberts, 8 Me. 101; Schenck *v.* Saunders, 13 Gray (Mass.) 37; Mansfield *v.* Converse, 8 Allen (Mass.) 182; Bulkley *v.* Andrews, 39 Conn. 70; Rahilly *v.* Wilson, 3 Dill. (U. S.) 427; Laflin, etc., Powder Co. *v.* Burkhardt, 97 U. S. 110; Buffum *v.* Merry, 3 Mason (U. S.) 478; McCabe *v.* McKinstry, 5 Dill. (U. S.) 509; Tilt *v.* Silverthorn, 11 U. C., Q. B. 619; Stephenson *v.* Ranney, 2 U. C., C. P. 196; Isaac *v.* Andrews, 28 U. C., C. P. 40; Benedict *v.* Ker, 29 U. C., C. P. 410; Rankin *v.* Mitchell, 1 Hannay (N. Bruns.) 495.

The mere fact that an agreement had been made that the bailee shall pay a certain sum if the goods are not returned does not of itself change the transaction into a sale. Westcott *v.* Thompson, 18 N. Y. 363; Brown *v.* Hitchcock, 28 Vt. 452.

Other instances in which the distinction has been made between a bailment and a sale may be seen in Moses *v.* Taylor, 6 Mackey (D. C.) 255 (municipal bonds); Coquard *v.* Wernse, 100 Mo. 137 (transfers of shares); Puffer, etc., Mfg. Co. *v.* Baker, 104 N. Car. 148; Dick *v.* Lindsay, 2 Grant's Cas. (Pa.) 431.

3. Carlisle *v.* Wallace, 12 Ind. 252; 74 Am. Dec. 207; Ewing *v.* French, 1 Blackf. (Ind.) 354; Woodward *v.* Semans, 125 Ind. 331; 21 Am. St. Rep. 225; Wilson *v.* Cooper, 10 Iowa 565; Smith *v.* Clark, 21 Wend. (N. Y.) 83; 34 Am. Dec. 213; Foster *v.* Pettibone, 7 N. Y. 433; 57 Am. Dec. 530; Baker *v.* Woodruff, 2 Barb. (N. Y.) 520, *aff'd* Norton *v.* Woodruff, 2 N. Y. 153; Andrews *v.* Richmond, 34 Hun (N. Y.) 20; Reherd *v.* Clem, 86 Va. 374; Wilson *v.* Cooper, 10 Iowa 565.

Contra.—In Slaughter *v.* Greene, 1 Rand. (Va.) 3; 10 Am. Dec. 488, it was held that where wheat was delivered to a miller upon an agreement that he

should return a given quantity of flour for so many bushels of wheat, the miller was liable as a bailee, and not as purchaser, and this, notwithstanding he was not bound to return flour made from the identical wheat, but merely flour of a certain quality. The case of Seymour *v.* Brown, 19 Johns (N. Y.) 44, holds a similar view, but it may be safely stated that these cases are no longer of authority. The latter has been expressly overruled in Smith *v.* Clark, 21 Wend. (N. Y.) 83; 34 Am. Dec. 213; Hurd *v.* West, 7 Cow. (N. Y.) 752. And of the former it has been said: "It is much like Seymour *v.* Brown, 19 Johns (N. Y.) 44. They were both hard cases and have made bad precedents." Smith *v.* Clark, 21 Wend.(N.Y.) 83; 34 Am. Dec. 213.

Inglebright *v.* Hammond, 19 Ohio 337; 53 Am. Dec. 430, is sometimes cited as opposing the rule of the text, but in that case the agreement was that the flour was to be made out of the wheat delivered, and it cannot be relied on as upholding a contrary view. See Chase *v.* Washburn, 1 Ohio St. 244; 59 Am. Dec. 623, 630, note.

Where the flour is to be manufactured out of the identical grain delivered the transaction is of course a bailment, and not a sale. Such cases are clearly distinguishable from the foregoing. Ashby *v.* West, 3 Ind. 170; Broom *v.* Hitchcock, 28 Vt. 452.

Other Instances.—In Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, a manufacturing company agreed to furnish one Dittmar with the materials and money for manufacturing powder, the manufactured product to be returned to the company for sale, the net profits arising from such sales to be divided equally between the parties. It was held that the materials were sold to Dittmar and that he was under no obligation to return the exact materials furnished in the manufactured state, but might substitute others.

So where A agreed to receive hides from B at current prices, to tan them and return the leather to B, and after deducting the price of the hides, commission, interest, and current expenses, all that the leather would command was to be accredited to A, this was a sale to A and not a bailment. Prichett *v.* Cook, 62 Pa. St. 193; Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121; 28 Am. Dec. 691.

In Butterfield *v.* Lathrop, 71 Pa. St. 226, A and other farmers delivered milk to a cheese factory; each was credited with the amount of his milk and all the milk was manufactured together; the company sold all the cheese; each farmer was charged with the expenses and received his share of the proceeds in proportion to the milk furnished. Such a transaction was a sale of milk to be paid for in a certain time and manner, and not a bailment. But in First Nat. Bank *v.* Schween, 127 Ill. 573; 11 Am. Rep. 174, under a similar state of facts, it was held that the transaction was not a sale but a bailment, the cheese manufacturer being no more than the factor or agent of the farmers supplying the milk.

In Fosdick *v.* Greene, 27 Ohio St. 484; 22 Am. Rep. 328, G transferred certain railroad stock to F, who gave him this written obligation: "Borrowed of W. G. one hundred and nine shares of M. & C. railroad stock, drawing interest at 8 per cent., to be returned on demand." This transaction was in the nature of a *mutuum* and not a bailment, and payment in discharge of the loan might be made by return of an equal number of shares of stock of the same railroad company without regard to its market value; and this notwithstanding the fact that all the property, rights and franchises of the company had been subsequently conveyed to a new corporation and the old corporation ceased to exist in fact and its stock to be of value.

See also Silsbury *v.* McCoon, 3 N. Y. 379; 53 Am. Dec. 307, *reversing* 6 Hill (N. Y.) 425; 41 Am. Dec. 753 (the conversion of corn into whiskey); Buffum *v.* Merry, 3 Mason (U. S.) 478 (delivery of cotton yarn to be manufactured into plaids); Austin *v.* Seligman, 21 Blatchf. (U. S.) 506 (agreement for refining jewelers' sweepings); Weir Plow Co. *v.* Porter, 82 Mo. 23; Barker *v.* Roberts, 8 Me. 101 (agreement for the manufacture of certain logs into lumber); Wood *v.* Orser, 25 N. Y. 348; Moore *v.* Holland, 39 Me. 307 (transfer of hay to be converted into manure); Schenck *v.* Saunders, 13 Gray (Mass.) 37 (leather sent to be manufactured into boots); Good *v.* Winslow, 4 Allen (N. Bruns.) 241 (in which the lessee of cattle agreed to return them in two years, or others in their stead).

The delivery of wheat to a miller to be paid for on delivery or at any subsequent time when payment shall be demanded, and with an understanding

that the miller may use it in his milling business, is a sale absolute if no right is reserved to recall or return it. Jones *v.* Kemp, 49 Mich. 9. And see Ives *v.* Hartley, 51 Ill. 520.

In some cases it may be a question for the jury whether the transaction is a sale or a bailment. Crosby *v.* Delaware, etc., Canal Co., 119 N. Y. 334.

Grain in Warehouse or Elevator.—Where grain is stored in a warehouse or elevator, with knowledge that it will be mingled with the grain of others, and must be returned from the general mass, there is a conflict of decision whether the contract is one of bailment or of sale. According to the weight of the later cases the better doctrine seems to be that if the depositor under his contract is entitled to have grain delivered to him, the contract is one of bailment and the depositors are tenants in common of the whole mass. Schindler *v.* Westover, 99 Ind. 403; Rice *v.* Nixon, 97 Ind. 97; 49 Am. Rep. 430; Lyon *v.* Lenon, 106 Ind. 567; Bottenberg *v.* Nixon, 97 Ind. 106; Pribble *v.* Kent, 10 Ind. 325; 71 Am. Dec. 327; Ledyard *v.* Hibbard, 48 Mich. 421; 42 Am. Rep. 474; Nelson *v.* Brown, 44 Iowa 455; 53 Iowa 555; Sexton *v.* Graham, 53 Iowa 181; Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648; Cushing *v.* Breed, 14 Allen (Mass.) 376; 92 Am. Dec. 777; Young *v.* Miles, 20 Wis. 615; 23 Wis. 643; Hall *v.* Pillsbury, 43 Minn. 33; 19 Am. Rep. 209; German Nat. Bank *v.* Meadowcroft, 4 Ill. App. 630; Broadwell *v.* Howard, 77 Ill. 305; Barker *v.* Bushnell, 75 Ill. 220; Dole *v.* Olmstead, 36 Ill. 150; 83 Am. Dec. 397; Dows *v.* Ekstrone, 1 McCrary (U. S.) 434; Greenleaf *v.* Dows, 3 McCrary (U. S.) 27; see 2 Kent Com. (12th ed.) 365; Story on Bailments, § 40; Law of Produce Exch., § 152; Schouler's Pers. Prop., § 46; 2 Bl. Com. (Cooley's ed.) 404, n. And see article on the subject in 6 Am. Law Rev. 450.

Mr. Tiedeman in criticising this rule says: "But this is a very severe strain on the principle, where it is carried to the length of holding that the depositor of grain in an elevator is a tenant in common, not only with the other depositors who at that time have grain in the elevator or as long as some of his grain is still there, but with every other person who might deposit grain in the elevator even after his grain had been taken away in filling some order. In this latter case, there never had been any confusion of goods, because the subsequent deposits were made when none of the grain of the depositor in question was left in the elevator. The only object of these later decisions seems to be to shield elevator proprietors from responsibility in case of destruction or injury of the grain deposited." Tiedeman on Sales, § 7.

The reasoning of Dillon, J., in Rahilly *v.* Wilson, 3 Dill. (U. S.) 426, is clear. He says: "Is the depositor a bailor simply, and the warehouseman a bailee; or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence that the grain at any time on hand belongs to the depositors to the extent of their receipts or tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defense to any demand on the part of the ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases." See also Andrews *v.* Richmond, 34 Hun (N. Y.) 20.

And see Bailey *v.* Bensley, 87 Ill. 556; South Australia Ins. Co. *v.* Randell, L. R., 3 C. P. 101. In this last case the depositor had no right to compel a redelivery of grain, but could only claim the market price of the same quantity and quality of grain on the day on which he claimed payment,

3. From Contracts of Sale or Return.—Where one to whom an article is delivered has the option of returning it if it proves unsuitable, or of paying its value in money or other property, title passes after the lapse of a reasonable time,[1] during which the

and therefore it was undoubtedly a sale; but the court seems to have gone farther and held that it would have been a sale even though the depositors could have compelled a redelivery of grain.

Some decisions make a distinction between cases where the proprietor of the elevator has the right to use or sell all the grain received, provided he keeps enough on hand to restore to the depositors on demand, and where he has no such right but retains the common mass of grain actually deposited, holding in the former case that there is a sale and in the latter that it is a bailment. Bretz *v.* Diehl, 117 Pa. St. 603; 2 Am. St. Rep. 706; Chase *v.* Washburn, 1 Ohio St. 244; 59 Am. Dec. 623. And this appears to have been Judge Dillon's idea in Rahilly *v.* Wilson, 3 Dill. (U. S.) 428, where he said: "I regard the case at bar distinguishable from Young *v.* Miles, 20 Wis. 615; 23 Wis. 643, and Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334, and like cases, where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations." And in a note to this case the learned judge says further: "And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it *may* be different from such a case, but it is doubtful whether it is so."

A contract acknowledging the receipt of grain for storage "lost by fire and the elements at the owner's risk," with the option of the party receiving it to return grain of equal test and value, constitutes a contract of bailment. Nelson *v.* Brown, 44 Iowa 455; 53 Iowa 555; Ledyard *v.* Hibbard, 48 Mich. 421; 42 Am. Rep. 474. And more especially where the grain was stored in a separate bin, and on the warehouseman offering to purchase it the owner refused. Irons *v.* Kentner, 51 Iowa 88; 33 Am. Rep. 119.

See also James *v.* Plank (Ohio, 1891), 26 N. E. Rep. 1107.

Evidence of the local business usage is always admissible as showing the intent of the parties. Though it cannot change the written stipulations of the parties, it may furnish explanations or add incidents. Ledyard *v.* Hibbard, 48 Mich. 427; James *v.* Plank (Ohio, 1891), 26 N. E. Rep. 1107; Eager *v.* Atlas Ins. Co., 14 Pick. (Mass.) 141; 25 Am. Dec. 363; Pavey *v.* Burch, 3 Mo. 447; 26 Am. Dec. 682. See generally USAGES AND CUSTOMS.

Where the warehouseman may at his option return grain or pay money, the contract is one of sale. Johnson *v.* Browne, 37 Iowa 200; Barnes *v.* McCrea, 75 Iowa 267; 9 Am. St. Rep. 473; Woodward *v.* Boone, 126 Ind. 122; Lyon *v.* Lenon, 106 Ind. 567; Richardson *v.* Olmstead, 74 Ill. 213; Lonergan *v.* Stewart, 55 Ill. 44; Grier *v.* Stout, 2 Ill. App. 602. And see Reherd *v.* Clem, 86 Va. 374.

Where a farmer delivers grain to a grain dealer with the agreement that he may, at some future day, select a market price at which it shall be settled for, the transaction is a sale. Handwerk *v.* Oswood, 23 Ill. App. 282; Reherd *v.* Clem, 86 Va. 374. In such case the former is bound to select a price within a reasonable time, and if he does not, he is properly credited with the net proceeds received for the corn by the dealer, with the addition of the loss occasioned by the latter's want of reasonable care and diligence. Handwerk *v.* Oswood, 23 Ill. App. 282.

See generally DEPOSIT, vol. 5, p. 570; WAREHOUSE AND WAREHOUSEMAN.

1. Reasonable Time.—For what is a *reasonable time*, and when it is a question of law or of fact, see *Reasonable Time*, vol. 19, p. 1089; *Questions of Law and Fact*, vol. 19, p. 640; *Demand*, vol. 5, p. 528[z59]. See also *infra*, this title, *Conditional Sales*.

Where an article is sold on trial, under an agreement fixing the time within which the trial is to be made, the buyer, in order to relieve himself from liability, must show that he gave notice of disapproval within the time fixed. Butler *v.* School Dist. of Lehighton (Pa. 1892), 24 Atl. Rep. 308; Gentilli *v.* Starace, 59 N. Y. Super. Ct. 449; Spickler *v.* Marsh, 36 Md. 222;

option to return has not been exercised. Until the expiration of such time he holds as a bailee and not as owner.[1] But this rule does not apply where the privilege of purchase or return is not dependent on the suitableness of the property sold but solely

Childs *v.* O'Donnell, 84 Mich. 533. After giving notice, he is entitled to a reasonable time, after the expiration of such time, in which to return the goods. Newberger *v.* Hoyt, 86 Ga. 508; but there need be no return, or offer of return, even then, unless it be so agreed. Esterly *v.* Campbell, 44 Mo. App. 621, distinguishing Quinn *v.* Stout, 31 Mo. 160. And see Colles *v.* Sevensburg (Mich. 1892), 51 N. W. Rep. 275.

1. Thus in Hunt *v.* Wyman, 100 Mass. 198, A having a horse for sale, B proposed to take the horse and try it, and if he did not like it he would return it in as good condition as he got it. The horse was delivered to B; but before he had an opportunity to try it, and without any negligence on his part, the horse was injured. B was, therefore, unable to try the horse, and he did not return it within the time agreed nor afterwards. It was held that the transaction was a bailment, and not a sale, and that the loss of the horse must fall upon A. See also as sustaining the doctrine of the text, Kahn *v.* Klabunde, 50 Wis. 238; Bayley *v.* Anderson, 71 Wis. 417; Mowbray *v.* Cady, 40 Iowa 604; Fairfield *v.* Madison Mfg. Co., 38 Wis. 346; Glasscock *v.* Hazell, 109 N. Car. 145; Chamberlain *v.* Smith, 44 Pa. St. 431; Rose *v.* Story, 1 Pa. St. 190; 44 Am. Dec. 21; Enlow *v.* Klein, 79 Pa. St. 488; Becker *v.* Smith, 59 Pa. St. 469; Clark *v.* Jack, 7 Watts (Pa.) 375; Rowe *v.* Sharp, 51 Pa. St. 26; Wilson *v.* Stratton, 47 Me. 120; Washington *v.* Johnson, 7 Humph. (Tenn.) 468 (what is a reasonable time, question for jury); Quinn *v.* Stout, 31 Mo. 160; Johnson *v.* McLane, 7 Blackf. (Ind.) 501; 43 Am. Dec. 102; Colton *v.* Wise, 7 Ill. App. 395; Wartman *v.* Breed, 117 Mass. 18; Gurney *v.* Collins, 64 Mich. 458; Moore *v.* Piercy, 1 Jones (N. Car.) 131; Childs *v.* O'Donnell, 84 Mich. 533; Humphries *v.* Cavalho, 16 East 45; Ellis *v.* Mortimer, 1 N. R. 257; Elphick *v.* Barnes, 5 C. P. Div. 321; 30 Moak's Rep. 810; Head *v.* Tattersall, L. R., 7 Exch. 7; 1 Moak's Rep. 140; Moss *v.* Sweet, 16 Q. B. 495; 71 E. C. L. 495; Beverley *v.* Lincoln Gaslight, etc., Co., 6 A. & E. 829; 33 E. C. L. 222.

See also Fuller *v.* Buswell, 34 Vt. 108; Person *v.* Civer, 28 How. Pr. (N. Y.) 139; Schlesinger *v.* Stratton, 9 R. I. 578.

If before the expiration of the time limited the purchaser so misuse the property as to materially impair its value, the sale becomes absolute, the privilege of return being forfeited. Ray *v.* Thompson, 12 Cush. (Mass.) 281; 59 Am. Dec. 187.

But where A took a mare from B, her owner, to use and to buy if she drove to suit him, no time being specified, and, after driving her twenty miles, stabled her, and the next morning, finding that she was sick, notified B, who directed him to bring her to his (B's) house, where he would do what he could for her; it was held, on the mare dying at B's house, that the title was in B. Carter *v.* Wallace, 35 Hun (N. Y.) 189.

Where the parties agree to a present transfer of the absolute title, with the privilege of returning the thing sold if not satisfactory, it is a contract of sale and return, and the title passes immediately. McKinney *v.* Bradlee, 117 Mass. 321; Dearborn *v.* Turner, 16 Me. 17; 33 Am. Dec. 630; Person *v.* Civer, 28 How. Pr. (N. Y.) 139; Stevens *v.* Cunningham, 3 Allen (Mass.) 491.

In McKinney *v.* Bradlee, 117 Mass. 321, the owner of a horse sold and delivered it to another, receiving from him a certain sum in part payment, the buyer promising to pay the remainder on a day specified or return the horse. It was held that the title passed unconditionally to the purchaser upon delivery.

The case of Holbrook *v.* Armstrong, 10 Me. 31, is to be distinguished in this connection. There B delivered to A six cows, which were to be returned to him at the end of two years or their value in money, unless A should be dissatisfied with a certain exchange of farms then made between them; in which case they were to remain the property of A forever. At the end of two years A expressed himself as satisfied with the trade, but refused to redeliver the cows or to pay their value. It was held that the transaction was not a bailment, but amounted to a sale. The passage from Jones on Bailments was cited with approval, that "there

on the option of the purchaser. This latter class of contracts are known as "contracts of sale or return," and the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time.[1]

is a distinction between an obligation to restore the specific things and a power or necessity of returning others equal in value. In the first case, it is a regular bailment; in the second, it becomes a debt." Story on Bailments, § 439. The court by Parris, J., said: "If the agreement had been to return the same cows if at the end of two years the defendant should not be satisfied with the trade concerning farms, the property might not have passed, but it might have fallen within the first class of cases mentioned in the authority just cited. But the additional clause giving the defendant the election to return the cows or pay for them the value in money, divests the plaintiff of his interest in the specified thing, and leaves him to his remedy on the contract for the value. Such would seem to be the legal operation of this contract, even before the election was expressly or impliedly made by the defendant." See also Buswell *v.* Bicknell, 17 Me. 344; 35 Am. Dec. 262; Dearborn *v.* Turner, 16 Me. 17; 33 Am. Dec. 630; Perkins *v.* Douglass, 20 Me. 317; Hurd *v.* West, 7 Cow. (N. Y.) 752.

Hiring or Leasing with Privilege of Purchase.—The principle announced in the text applies also in cases where there is a lease or hiring of property with the privilege to the lessee to purchase at the expiration of the lease. Thus, in Chamberlain *v.* Smith, 44 Pa. St. 431, the contract ran thus: "Received of J B one pair of stags to keep and work in a reasonable and farmer-like manner for the term of one year, said cattle to be returned in one year, but the said McW has the privilege, by paying $40 and legal interest, at the expiration of the year to keep the said cattle." The contract was held one of bailment and not a sale, "a bailment with a refusal of the cattle for a specified time."

Loan with Privilege of Purchase.—A loan, with a continuous offer of sale at a certain price, may be accepted as a sale at any time before the withdrawal of the offer. Windsor *v.* Cruise, 79 Ga. 635.

Right of Buyer to Sell.—It will be observed that although the buyer holds as bailee until he has exercised his option, he has the right at any time to make a valid sale of the property; such sale being an implied acceptance of the article sold and a waiver of his right, therefore, to return. Dearborn *v.* Turner, 16 Me. 17; 33 Am. Dec. 630.

1. Walker *v.* Blake, 37 Me. 373; Holbrook *v.* Armstrong, 10 Me. 31; Dearborn *v.* Turner, 16 Me. 17; 33 Am. Dec. 630; Perkins *v.* Douglass, 20 Me. 317; Southwick *v.* Smith, 29 Me. 228; Buswell *v.* Bicknell, 17 Me. 344; 35 Am. Dec. 262; Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 118; Schlesinger *v.* Stratton, 9 R. I. 578; McKinney *v.* Bradlee, 117 Mass. 321; Martin *v.* Adams, 104 Mass. 262; Hurd *v.* West, 7 Cow. (N. Y.) 752; Fuller *v.* Buswell, 34 Vt. 107; Œlbermann *v.* Jarman, 58 Hun (N. Y.) 609; Wooster *v.* Sage, 6 Hun (N. Y.) 285; Neate *v.* Ball, 2 East 117.

Story defines a contract "on sale or return" to be an "agreement by which goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate, if sold again by the latter; and if not sold, to be returned." Story on Sales, § 249. And see Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Marsh *v.* Wickham, 14 Johns. (N. Y.) 167; Hotchkiss *v.* Higgins, 52 Conn. 205; 52 Am. Rep. 582; Moss *v.* Sweet, 3 Eng. Law & Eq. Rep. 311; 16 Q. B. 493; 71 E. C. L. 495; Meldrum *v.* Snow, 9 Pick. (Mass.) 440; 20 Am. Dec. 489.

Where goods are purchased with an agreement that those unsold at a certain time may be returned, and none are returned at or before that time, the seller can recover as upon an absolute sale of the goods. Griffin *v.* Keith, 1 Hilt. (N. Y.) 58. *Compare* Marsh *v.* Wickham, 14 Johns. (N. Y.) 167.

Delivery to Factors or Agents.—Where goods are consigned to a factor to be sold, any portion remaining unsold to be returned to the consignor, the transaction is a bailment and no title passes to the factor. Blood *v.* Palmer, 11 Me. 414; 26 Am. Dec. 547; First Nat. Bank *v.* Schween, 127 Ill. 573; 11 Am. Rep. 174; Middleton *v.* Stone, 111 Pa. St. 589; Eldridge *v.* Benson, 7 Cush (Mass.) 483.

4. From a Pledge or Mortgage.—(See CHATTEL MORTGAGES, vol. 3, p. 175; PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 593.)

5. From Leases.—(See *infra*, this title, *Conditional Sales.*)

6. From Assignments.—The term "assignments" is generic, and indicates a transfer of property, and, broadly speaking, embraces the contract of sale.[1]

7. From Consignments.—In the case of goods consigned to be sold for the consignor, who is to regulate the price and terms of sale, the factor is an agent and the contract one of bailment;[2] and this is so though the consignment is made on a *del credere* com-

Infra, this title, *From Consignments to Factors*. Nor does it apply to any other one who receiving possession of property acknowledges the title to be in someone else. Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 118; Morss *v.* Stone, 5 Barb. (N. Y.) 516.

Sale of an Option.—A, in consideration of $100, delivered to B certain options, with the agreement that if B. should pay A a named sum within twenty days all A's rights in the property should accrue to B, and B bound himself to pay A this sum or return the options, which had been duly indorsed to him, within thirty days. It was held that this was not a contract of sale and return so as to give A an absolute right to the purchase money on B's failure to pay it within the twenty days or to return the options within thirty days. Wailes *v.* Howison (Ala. 1891), 9 So. Rep. 594.

1. See ASSIGNMENTS, vol. 1, p. 826; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 845. See also Ball *v.* Chadwick, 46 Ill. 31; Bump *v.* Van Orsdale, 11 Barb. (N. Y.) 634; Potter *v.* Holland, 4 Blatchf. (U. S.) 210. In Burrill on Assignments (3d ed.), § 4, the distinction is thus put: "Sales are transfers in the ordinary course of business; assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid or agreed to be paid, and created or passing simultaneously. An assignment is in most cases for a consideration already executed, as for a preceding or subsisting debt. An important distinction between the two modes of transfer arises out of the character of a trust which belongs to an assignment. A sale is, on delivery of the thing sold and receipt of the consideration, a complete transaction, passing absolutely and irrevocably all the seller's interest in the subject of it without reversion or return under any circumstances. An assignment is likewise an absolute conveyance, by which both the legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds . . . Sales are often subject to covenants on the part of the buyer and seller, from which assignments are free. The assignee is not liable to the payment of incumbrances to the same extent as a purchaser." See also Blank *v.* German, 5 W. & S. (Pa.) 36; *In re* Potter, 54 Pa. St. 465; Johnson *v.* McGrew, 11 Iowa 151; Cowles *v.* Rickets, 1 Iowa 582; 77 Am. Dec. 137; Keiler *v.* Tutt, 31 Mo. 306; Hight *v.* Sackett, 34 N. Y. 451.

A debtor transferred his stock of goods, his accounts, etc., to a creditor by an absolute bill of sale without any reservations or words of trust whatever. The creditor accepted the property in satisfaction of the debt, which was less than the value of the property, but he assumed to pay for the debtor certain other claims, the whole amount exceeding the value of the property. The transfer was held to be a sale—not an assignment for the benefit of the creditor. Powell *v.* Kelly, 82 Ga. 1.

2. Walker *v.* Butterick, 105 Mass. 237; Wadsworth *v.* Gay, 118 Mass. 44; Ayres *v.* Sleeper, 7 Met. (Mass.) 45 (neglect or refusal by consignee to account does not affect character of the transaction); Audenried *v.* Betteley, 8 Allen (Mass.) 302; Brown *v.* Holbrook, 4 Gray (Mass.) 102; Alexander *v.* Tomlinson, 40 Ark. 216; Williams *v.* Davis, 47 Iowa 363; First Nat. Bank *v.* McAndrews, 5 Mont. 325; 51 Am. Rep. 51; Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609; Morss *v.* Stone, 5

mission.[1] If, however, the consignee or factor is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of sale.[2] There are cases which fall within neither class and where the intention and the particular incidents of the contract fix its status.[3]

V. AVOIDANCE OF CONTRACT—1. Mistake.—(See MISTAKE, vol. 15, p. 625; RESCISSION, vol. 21, p. 24.)

2. Failure of Consideration.—(See RESCISSION, vol. 21, p. 24.)

Barb. (N. Y.) 516; Elliot *v.* Bradley, 23 Vt. 217; Rosencranz, etc., Co. *v.* Hanchett, 30 Ill. App. 283; Boston, etc., R. Co. *v.* Warrior Mower Co., 76 Me. 251; Blood *v.* Palmer, 11 Me. 414; 26 Am. Dec. 547; Selden *v.* Beale, 3 Me. 178; Gooderham *v.* Marlett, 14 U. C., Q. B. 228; Dodds *v.* Durand, 5 U. C., Q. B. 623. See also AGENCY, vol. 1, p. 331; COMMISSION MERCHANTS, vol. 3, p. 317.

1. Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609; Weir Plow Co. *v.* Porter, 82 Mo. 23.

2. Jordan *v.* Easter, 2 Ill. App. 73; Hadfield *v.* Berry, 28 Ill. App. 376; Towle *v.* White, 21 W. R. 465; 29 L. T. N. S. 78; *In re* Linforth, 4 Sawy. (U. S.) 372; Wood M. & R. Co. *v.* Brooke, 2 Sawy. (U. S.) 576; Mutter *v.* Wheeler, 2 Low. (U. S.) 346; Reissner *v.* Oxley, 80 Ind. 580; First Nat. Bank *v.* McAndrews, 5 Mont. 325; 51 Am. Rep. 51; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; *Ex parte* White, L. R., 6 Ch. 397; Newmark on Sales, §§ 25, 26.

Where goods were billed by the seller to the buyer at factory prices in Chicago, less five per cent, the buyer paying freight at Pittsburg, the point of delivery, the buyer to receive for his services whatever price he could obtain above the invoice price and freight, it was held a contract of sale and not of bailment. Braunn *v.* Keally, 146 Pa. St. 519.

Defendants were given the exclusive right to sell a certain patent roofing manufactured by plaintiff in a certain territory, and ordered a car load of the roofing, plaintiff's agent making the following indorsement on the agreement given defendants as to handling the roofing: "Sold C. & Co. [that being defendant's firm name] one car load of roofing to be paid for as sold; settlement to be made monthly as sold." This language was held to be capable of but *one* construction and the transaction to have been a sale upon credit, and the title to have passed absolutely to the defendants. Roofing Co. *v.* Casler, 82 Mich. 466.

3. Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235; Reissner *v.* Oxley, 80 Ind. 584.

And where resort is had to the intention of the parties and to the situation and circumstances, in order to determine the character of the transaction, the question, being one of fact, must be submitted to the jury. Reissner *v.* Oxley, 80 Ind. 580.

The fact that a value of merchandise is stated in an "invoice" accompanying, does not, of itself, indicate absolutely that the property was sold and not consigned. Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235; Rosencranz, etc., Co. *v.* Hanchett, 30 Ill. App. 283. But a sale, and not a consignment, is presumed ordinarily from a shipment accompanied by bills in the usual form of merchants' bills of sale. Chapman *v.* Kerr, 80 Mo. 158.

The use of the word "consign" does not necessarily and conclusively determine that the transaction is a consignment, though it creates a presumption. Schenck *v.* Saunders, 13 Gray (Mass.) 37; Dittmar *v.* Norman, 118 Mass. 324; Reissner *v.* Oxley, 80 Ind. 584.

For various cases, see Thompson *v.* Barnum, 49 Iowa 395; Conable *v.* Lynch, 45 Iowa 84; Warder *v.* Hoover, 51 Iowa 491; Budlong *v.* Cottrell, 64 Iowa 234; Bayliss *v.* Davis, 47 Iowa 340; Head *v.* Miller, 45 Minn. 446; Simpson *v.* Pegram, 108 N. Car. 407; Rauber *v.* Sundback (S. Dak. 1890), 46 N. W. Rep. 927.

Instances.—In Alexander *v.* Tomlinson, 40 Ark. 216, A shipped goods to B under a contract that B should sell for A and account to him for the billed price, B to have all above the named price that he could sell them for. The transaction was not a sale of the goods to B, and A might retake them from an officer holding them by virtue of an execution against B.

In *Re* Linforth, 4 Sawy. (U. S.) 37,

3. Fraud.—(See FRAUDULENT SALES, vol. 8, p. 786; RESCISSION, vol. 21, p. 24.)

4. Illegality.—(See ILLEGAL SALES, vol. 9, p. 923; RESCISSION, vol. 21, p. 24.)

VI. PERFORMANCE OF CONTRACT — 1. Seller's Duties — *a.* WARRANTY.—A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty; but it is a collateral undertaking, forming part of the contract by the agreement of the parties, express, or implied.[1] The subject of warranty is treated elsewhere.[2]

b. DELIVERY—(I) *Duty to Deliver; in General.*—After the completion of the contract of sale the chief and immediate duty of the seller, in the absence of contrary stipulations, is to deliver the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him.[3]

A agreed with B to furnish the latter certain goods manufactured by A, at schedule prices, less a certain discount, B to have the exclusive right to sell such goods in a certain territory, to pay all freight and other charges, and at the end of every three months to settle with A by giving his notes for the agreed price; also at the end of the year to settle for all goods remaining on hand, if so required. It was held that the transaction was one of sale, and that B might make a valid assignment of the goods for the benefit of his creditors.

In Depew *v.* Keyser, 3 Duer (N. Y.) 336, there was this contract: "An agreement between David H. Tichenor and John H. Keysor, to wit: The stock furnished as per bill, by D. H. Tichenor, I do agree to sell and account to him for, and pay him the cost prices, and twenty per cent. in addition, for all articles sold at retail, and fifteen per cent. for all articles sold at wholesale." It was contended that this was not a sale of the goods, but that under the agreement Keysor was the mere agent or factor of Tichenor and was not liable as purchaser. The court held, however, that such was not the proper construction; that it was a contract of sale and not of agency or of guaranty. See also Marsh *v.* Wickham, 14 Johns. (N. Y.) 167; Jameson *v.* Gregory, 4 Metc. (Ky.) 369.

1. Benj. on Sales (6th Am. ed.), § 610; *citing* Foster *v.* Smith, 18 C. B. 156; 86 E. C. L. 155; Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; 22 E. C. L. 122; Chanter *v.* Hopkins, 4 M. & W. 399.

2. See IMPLIED WARRANTY, vol. 10, p. 85; WARRANTY.

3. Benj. on Sales (6th Am. ed.), 674. Until delivery, the seller cannot only maintain no action for the purchase price, but will be liable to an action by the buyer for non-delivery. Blackburn on Sales, 238; Benj. on Sales (6th Am. ed.), §§ 677, 869; Staunton *v.* Wood, 16 Q. B. 638; 15 Jur. 1123; 71 E. C. L. 639; Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 20 L. J., Q. B. 460; 79 E. C. L. 126; Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38; Gray *v.* Walton, 107 N. Y. 254. The buyer may waive any imperfection in the goods, or anything that would give him a right to refuse to accept, and if he does the seller is bound to deliver and will be liable to damages if he refuses. Townsend *v.* Shepard, 64 Barb. (N. Y.) 41.

Where, in an action for the price of goods, the buyer seeks to recoup damages for non-delivery of all the goods according to contract, unless he can show a loss of sales by such non-delivery, or that he had a demand for the goods, a verdict for such damages will be set aside. Wachsmuth *v.* Heil (Colo. 1891), 28 Pac. Rep. 17. And though the purchase price may be considered, in an action by the purchaser of goods at an auction sale, for their non-delivery, it is not the only evidence, nor even strong evidence, of their value. Gray *v.* Walton, 107 N. Y. 254.

Goods were ordered of H for C B, but by mistake were sent to J B, who, on discovering the mistake, sent them to C B. H afterwards wrote to C B

(2) *Various Uses of Term.*—Confusion is apt to result from the fact that the term "delivery" is sometimes used to denote the transfer of *title* as well as the transfer of *possession.* And again, even where it is used to signify the transfer of possession it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract, where the question arises as to the "actual receipt" or delivery necessary to give validity to a parol contract of sale under the statute of frauds, and the other having reference to the *performance* of the contract by delivery of possession of the bulk of the purchase to the buyer, so as to enable the seller to defend an action for non-delivery. This last, which is the proper meaning of the term, is the sense to which its use is confined in this section.[1]

enclosing a bill of the goods and a draft on him for the price, and it was held a ratification of the delivery to C B and that H could maintain no action against J B. Foreman *v.* Barrie, 24 Minn. 349.

Future Delivery.—In an action for breach of a contract for the future delivery of grain, the seller cannot set up as a defense that the intentions of the parties were that no grain should be actually delivered, but that the "difference" should be settled between them in cash. Porter *v.* Viets, 1 Biss. (U. S.) 177.

Buyer's Refusal to Accept Excuses Formal Tender. — The refusal of the buyer to accept any of the goods will excuse a formal tender and delivery. Grant *v.* Pendery, 15 Kan. 236; Hayden *v.* De Mets, 34 N. Y. Super. Ct. 344. And the rule is the same where the buyer notifies the seller that he will not pay the price agreed upon, but only a less price. Armstrong *v.* St. Paul, etc., Coal Co. (Minn. 1892), 50 N. W. Rep. 1029; *aff'g* 49 N. W. Rep. 233.

D agreed to deliver to S a certain quantity of ore at a specified price per ton "on the landing at C," and gave him an order therefor. In an action by S on this agreement for refusing to deliver the order, it having appeared that the seller had refused to deliver such order and informed the purchaser that he would not comply with the agreement, it was held that it was not necessary for the purchaser, after such refusal by the seller, to take boats to C for the ore, or demand the ore at C, the purchaser being able and willing to comply with such agreement as it existed in view of the usage. Steel Works *v.* Dewey, 37 Ohio St. 242.

1. See this misuse of terms adverted to in Benj. on Sales (6th Am. ed.), §§ 674–676, and American note; Tiedeman on Sales, §§ 84, 92; Story on Sales (4th ed.), § 295; Schouler on Pers. Prop. (2d ed.), § 383; Dixon *v.* Yates, 5 B. & Ad. 340; 27 E. C. L. 87; Marsh *v.* Hyde, 3 Gray (Mass.) 334. See also DELIVERY, vol. 5, p. 520a.

Even where the term is used to denote the delivery of possession in the performance of the contract a fresh source of confusion arises from the different meanings attached to the word possession. In general it is proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the seller.

The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them at his pleasure, and maintain trover for them, yet if he become insolvent the seller is said to have retained possession. Again, if the seller has delivered the goods to a carrier for conveyance to the buyer, he is said to have lost his lien because the goods are in the buyer's possession, the carrier being the agent of the buyer, but if the seller claims to exercise the right of stoppage *in transitu* while the carrier is conveying them, the goods are said to be only in the constructive, not in the actual, possession of the buyer. Benj. on Sales (6th Am. ed.), § 675.

Delivery does not necessarily mean a transfer of the possession, since there are cases in which the property sold is in the buyer's possession at the time of the sale, so that delivery is effected merely by the seller's expression of assent to the transfer of title. See Lake *v.* Morris, 30 Conn. 201; Nichols *v.* Patten, 18 Me. 231; 36 Am. Dec. 713;

(3) *Duty Prima Facie Only.*—The obligation to deliver may be said to be a *prima facie* obligation merely, as it may constitute one of the terms of the contract that the seller shall continue in possession of the goods until conditions shall have been performed. In the absence of anything said as to payment, the legal presumption is that the intention was that payment and delivery should be concurrent.[1]

(4) *Extent of Duty, in General.*—Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods sold. His duty is fulfilled by so placing them at the disposal of the buyer that they can be removed by him.[2] Having done this, an action lies

Hobart *v.* Littlefield, 13 R. I. 343; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202, in which latter case it was said that delivery consists rather in the surrender of possession and control of the goods than in the actual tradition of them. See also Upton *v.* Sturbridge Cotton Mills, 111 Mass. 453, where it was said: "Delivery, as applied to a change of possession in pursuance of a sale, ordinarily includes both the act of the seller in transferring the property, and that of the buyer in receiving it.

Various Uses of Term "Delivery."—As to delivery in the sense of transfer of title, see *supra*, this title, *Effect of Contract (in Passing Property)*.

As to the delivery sufficient to destroy the seller's lien for the price, see *infra*, this title, *Seller's Rights and Remedies—Lien.*

As to the delivery sufficient to terminate the right of stoppage *in transitu*, see STOPPAGE IN TRANSITU.

As to delivery sufficient to satisfy the statute of frauds, see FRAUDS, STATUTE OF, vol. 8, p. 729.

As to delivery sufficient to pass title as against creditors and subsequent purchasers of seller, see FRAUDULENT SALES, vol. 8, p. 890. See also *infra*, this title, *Rights of Bona Fide Purchasers.*

1. Bloxam *v.* Sanders, 4 B. & C. 941; 10 E. C. L. 477; Haskins *v.* Warren, 115 Mass. 533; Barnes *v.* Bartlett, 15 Pick. (Mass.) 77; Scudder *v.* Bradbury, 106 Mass. 427; Phelps *v.* Hubbard, 51 Vt. 489; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Tipton *v.* Feitner, 20 N. Y. 423; Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; Southwestern Freight, etc., Co. *v.* Plant, 45 Mo. 517; Terwilliger *v.* Murphy, 104 Ind. 32. And see Ackerman *v.* Astoria, etc., Lumber Co. (Supreme Ct.), 11 N. Y. Supp. 528. See Benj. on Sales (6th Am. ed.), § 677. See also *infra*, this title, *Conditional Sales.*

But this is only an implication of law and yields to any proof of intent of the parties. King *v.* Reedman, 49 L. T. N. S. 473; and it is often agreed that the buyer shall take possession before payment, or, in other words, the goods are sold on credit. Benj. on Sales (6th Am. ed.), § 677.

In Doyle *v.* Roth Mfg. Co., 76 Wis. 48, the buyer ordered a car load of apple waste; "terms to be five days' sight after receipt of goods." The seller took bill of lading in his own name and attached it to the draft with instructions to the bank not to deliver until draft had been paid. In an action for the non-acceptance of the draft it was held that there had been no sufficient delivery in performance of the contract.

The offer of delivery cannot be conditioned upon the buyer's paying the seller an amount alleged to be due upon a different contract. Filley *v.* Walker, 28 Neb. 506.

2. Benj. on Sales (6th Am. ed.), § 679; 2 Schouler on Pers. Prop. (2d ed.), §§ 383, 384; Story on Sales (4th ed.), § 301; Sanborn *v.* Benedict, 78 Ill. 309; Kohl *v.* Lindley, 39 Ill. 199; 89 Am. Dec. 294; Wade *v.* Moffett, 21 Ill. 110; 74 Am. Dec. 79; Means *v.* Williamson, 37 Me. 556; Smith *v.* Wheeler, 7 Oregon 49; 33 Am. Rep. 698; Morse *v.* Sherman, 106 Mass. 432; Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Bloxam *v.* Sanders, 4 B. & C. 941; 10 E. C. L. 480.

The word "deliver" is apt to be misunderstood as having an active rather than a passive meaning. It is defined by Webster: "To give or transfer; to yield possession or control of; to part

against the buyer for goods bargained and sold, even though the goods may never have left the seller's possession.[1]

(5) *Place of Delivery.*—Where the place of delivery is fixed by the contract, that of course controls,[2] but where nothing is said

with to." See also DELIVERY, vol. 5, p. 520a; DELIVER, vol. 5, p. 521. Delivery consists rather in the surrender of the possession and control of the goods than in the actual tradition of them by the seller to the buyer. Shurtleff *v.* Willard, 19 Pick. (Mass.) 202. In other words, goods are delivered when they are placed in the buyer's power so that he may immediately remove them, and cannot rightfully be prevented from so doing. Smith's Merch. Law (Pomeroy's ed.), § 599.

If, then, the seller has done all that is required of him, and the buyer, through neglect and carelessness, allows the goods to remain in the seller's hands, the seller is absolved from all liability for any injury resulting therefrom. Wood *v.* Tassell, 6 Q. B. 234; 51 E. C. L. 234. But where, by the announced terms of a public sale, the buyer has three days in which to remove the goods purchased, and the property is destroyed while in possession of the seller before the expiration of that time, the loss falls on the seller. Gleason *v.* Sykes, 18 La. Ann. 627.

1. Frazier *v.* Simmons, 139 Mass. 531; Morse *v.* Sherman, 106 Mass. 432; Turner *v.* Langdon, 112 Mass. 265; Stearns *v.* Washburn, 7 Gray (Mass.) 187; Wade *v.* Moffett, 21 Ill. 110; 74 Am. Dec. 79; Ballentine *v.* Robinson, 46 Pa. St. 177; Hayden *v.* Demets, 53 N. Y. 426; Dunston *v.* McAndrew, 44 N. Y. 72; Smith *v.* Wheeler, 7 Oregon 54; 33 Am. Rep. 698; Hinde *v.* Whitehouse, 7 East 558. See also Moody *v.* Brown, 34 Me. 107; 56 Am. Dec. 640; Kohl *v.* Lindley, 39 Ill. 195; 89 Am. Dec. 294 (delivery of part only).

Delivery Necessary to Sustain Action for Goods Sold and Delivered.—To maintain an action for goods sold and delivered, proof of an actual delivery of the goods to the buyer, or his agent, or of something equivalent to delivery, is essential. Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Messer *v.* Woodman, 22 N. H. 172; 53 Am. Dec. 241; Stearns *v.* Washburn, 7 Gray (Mass.) 187. If none, or part only, of the goods have been accepted by the buyer, the seller's remedy is an action of special assumpsit for goods bargained and sold. Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Hart *v.* Tyler, 15 Pick. (Mass.) 171. Hence, the price of grass growing on the land of the seller cannot be declared for in an action for goods sold and delivered. Stearns *v.* Washburn, 7 Gray (Mass.) 187. Nor can goods which were left with a third person with directions to deliver them to the buyer when called for, where they were never called for. Hart *v.* Tyler, 16 Pick. (Mass.) 171. And see Bement *v.* Smith, 15 Wend. (N. Y.) 493. The mere offer by the seller to deliver upon payment or security for the agreed price, and a refusal by the buyer to accept the goods, will not amount to a delivery. Messer *v.* Woodman, 22 N. H. 172; 53 Am. Dec. 241. But in *Massachusetts*, under their Practice Act, a count for goods bargained and sold was allowed to be maintained where the seller had the article still on hand ready for delivery, in a place known to the buyer and convenient for delivery to him, whenever he complied with the terms of the sale. Turner *v.* Langdon, 112 Mass. 265. And where goods were sold and sent to another store to be packed, and the receipt thereof acknowledged, it was held a sufficient delivery to sustain a count for goods sold and delivered. Stern *v.* Filene, 14 Allen (Mass.) 9. And see Hart *v.* Summers, 38 Mich. 399. Mr. Tiedeman says that the distinctions between the actions for goods *sold and delivered* and goods *bargained and sold* disappear altogether under all the *American* codes of procedure which are patterned after the *New York* Code. Tiedeman on Sales, § 104, note.

In an action for goods sold and delivered, the question of delivery is one of intent of the parties, and, where the evidence is conflicting, is properly a question of fact for the jury. Gibbons *v.* Robinson, 63 Mich. 146.

2. Story on Sales, § 308. Devine *v.* Edwards, 101 Ill. 138; Hepke *v.* Schmalholz, 7 N. Y. Supp. 67; Miles *v.* Roberts, 34 N. H. 245 (parties bound by a subsequent parol agreement as to place); Washburn Iron Co. *v.* Russell, 130 Mass. 543; Playford *v.* Mercer, 22 L. T. N. S. 41 (cargo sold "from the deck," seller held bound to pay ex-

upon the subject, it is taken for granted that the goods are to be at the buyer's disposal at the place where they are when sold.[1] It may be that the place remains to be designated by one of the parties, in which case he must designate it within a reasonable time or the

penses of removing cargo from the deck); Clark *v.* Cuson, 3 Head (Tenn.) 55 (delivery near the place fixed not sufficient). The agreement as to place of delivery may be changed by a subsequent parol contract. Hunt *v.* Thurman, 15 Vt. 336; 40 Am. Dec. 683; Miles *v.* Roberts, 34 N. H. 245; but not by a contemporaneous one. La Farge *v.* Rickert, 5 Wend. (N. Y.) 187; 21 Am. Dec. 209; Clark *v.* Cuson, 3 Head (Tenn.) 55. And also a stipulation in the contract that delivery shall be made at a specified place is merely a condition precedent imposed upon the party bound, and may be waived by the other party; and an agreement to accept delivery at a place other than that specified does not constitute a new contract or destroy the old. McCombs *v.* McKennan, 2 W. & S. (Pa.) 216; 37 Am. Dec. 505.

The place of delivery may be fixed by an implied agreement of the parties, arising from a well-known usage of trade, or from the custom of dealing between the parties in previous transactions. Williams *v.* Adams, 3 Sneed (Tenn.) 359 (delivery at warehouse where buyer usually had such articles delivered). In Bronson *v.* Gleason, 7 Barb. (N. Y.) 472, it was held that when the goods are a subject of general commerce and are purchased in large quantities for reshipment, and the purchaser resides at the place of reshipment and has at such place a storehouse and dock for that purpose, the place of business of the purchaser is ordinarily the place for delivery. And under a contract to deliver goods at a future time in a certain city, the tender must be made at the residence or place of business of the buyer, or if the goods be inconvenient to transport, the seller must seek the buyer a reasonable time before the day of delivery and ask him to name the place of delivery. Stillwell *v.* Bowling, 36 Mo. 310.

In *California*, mining stock is personal property and its delivery is governed by Civil Code, § 1754, providing that personal property shall be deliverable at the place where it is at the time of the sale, or agreement to sell, unless an option for its delivery is provided for or the seller has agreed to deliver it elsewhere. Mattingly *v.* Roach, 84 Cal. 207.

Where the place of delivery is fixed, the seller is not bound to make a tender of the thing sold at any other place, nor if tender is made at such other place is the buyer bound to accept. Lucas *v.* Nichols, 5 Gray (Mass.) 309; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158; 51 Am. Dec. 59; Buie *v.* Brown, 6 Ired. (N. Car.) 404; Schouler on Pers. Prop. (2d ed.), § 385.

1. "Unless some other place is required by the nature of the article, or by the usage of trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case," Clifford, J., in Hatch *v.* Standard Oil Co., 100 U. S. 134. And see Benj. on Sales (6th Am. ed.), § 682; 2 Kent's Com. 505; Bailey *v.* Ricketts, 4 Ind. 488; Janney *v.* Sleeper, 30 Minn. 475; Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Lewis *v.* Thomas, 14 Mo. App. 581; Jacoby *v.* Schwartzwelder, 1 Bibb (Ky.) 430; Sousely *v.* Burns, 10 Bush (Ky.) 87; Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Smith *v.* Gillett, 50 Ill. 290 (delivery of cattle sold at place where they are fed); Field *v.* Runk, 22 N. J. L. 525; Barr *v.* Myers, 3 W. & S. (Pa.) 299; Rice *v.* Churchill, 2 Den. (N. Y.) 145; Miles *v.* Roberts, 34 N. H. 253; Kraft *v.* Hurtz, 11 Mo. 109; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 380.

See also Rice *v.* Churchill, 2 Den. (N. Y.) 145; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377, where there were notes "payable in lumber," it was held that demand of payment must be made at the mill where the lumber was manufactured. Similar cases are seen in Kraft *v.* Hurtz, 11 Mo. 109; Mallory *v.* Grant, 4 Chand. (Wis.) 143.

If the seller removes the goods or attempts to make delivery elsewhere, he must assume all risks and answer for all additional expense incurred by the buyer. Story on Sales (4th ed.), § 308; 2 Schouler's Pers. Prop. (2d ed.), § 385; Benj. on Sales, § 682.

In some jurisdictions it is specifically provided that personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if is not then in existence it is

other party will be excused from performing his part of the contract.[1]

(6) *Buyer's License to Enter Seller's Premises.*—As it is the duty of the buyer, in the absence of a stipulation to the contrary, to call for the goods, it follows that ordinarily he has by implication a license to enter upon the premises of the seller where the goods are deposited, for the purpose of removing them; and the license, in such case, being coupled with an interest, may not be revoked.[2]

deliverable at the place where it is produced. Rev. Stat. of *Idaho*, § 3250; *California* Civ. Code, § 1754.

On the sale of a reaping machine, the delivery will not be complete until the different parts, which none but an expert can put together, have been set up so as to form a machine. Wood Mowing, etc., Mach. Co. *v.* Gaertner, 63 Mich. 520.

1. Benj. on Sales (6th Am. ed.), § 679; 2 Schouler on Pers. Prop. (2d ed.), § 385; Lucas *v.* Nichols, 5 Gray (Mass.) 311; Weiseger *v.* Wheeler, 16 Wis. 492; London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400; 21 L. J. Exch. 92; Knox *v.* Mayne, 7 Ir. C. L. 557; Brunshill *v.* Muir, 15 U. C., Q. B. 213.

Thus, where the seller agrees to deliver on board the buyer's ship, as soon as the latter is ready to receive the goods, he must name the ship and give notice of his readiness before he can complain of non-delivery. Armitage *v.* Insole, 14 Q. B. 728; 68 E. C. L. 727; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Davies *v.* McLean, 21 W. R. 264; 28 L. T. N. S. 113; Stanton *v.* Austin, L. R., 7 C. P. 651; 3 Moak's Rep. 417; Walton *v.* Black, 5 Del. 149; and where the seller is to deliver the goods on railroad cars to be furnished by the buyer at a specified time, and at such time he is ready and willing and offers to make delivery, but the buyer fails to furnish the cars and is not at the place of delivery to receive as required by the contract, it is not necessary for the seller to remove the goods in order to constitute a tender sufficient to support his right of action for the price. Smith *v.* Wheeler, 7 Oregon 49; 33 Am. Rep. 698; Bolton *v.* Riddle, 35 Mich. 13 (means of transportation must be furnished by buyer within reasonable time); Kunkle *v.* Mitchell, 56 Pa. St. 100 (buyer's duty to provide cars and to notify seller that they were ready); Chapman *v.* Dease, 34 Mich. 375.

And, conversely, where the place of delivery is at the option of the seller, he must give the buyer ample notice of the place, such notice being a condition precedent to his right to demand payment. Weiseger *v.* Wheeler, 16 Wis. 492; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221; Davis *v.* McLean, 21 W. R. 264.

Where the buyer agrees to name the time or place of delivery and fails to do so, the seller is excused from making a formal tender, it being sufficient if he has the goods ready for delivery at his shop. Hunter *v.* Wetsell, 84 N. Y. 549; 38 Am. Rep. 544; Lucas *v.* Nichols, 5 Gray (Mass.) 309.

In Canney *v.* Brown, 40 Minn. 461, the contract was for the delivery of one million feet of paving plank during the season of 1887, no place being specified. It was held that, in order to put the seller in default, a demand specifying the time and place of delivery was necessary.

If the place be designated by the party authorized, delivery must be made there and the place cannot be changed except by consent of all parties. Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158; 51 Am. Dec. 59 (place designated by buyer's agent); Hunter *v.* Wetsell, 84 N. Y. 549; 38 Am. Rep. 544; Boyd *v.* Gunnison, 14 W. Va. 1.

If buyer is to designate the place, a designation by his assignee is sufficient. Mewherter *v.* Price, 11 Ind. 199.

Notice must be given of when delivery is to be made so that the buyer may be there to receive it. Newcomb *v.* Cramer, 9 Barb. (N. Y.) 402. If the party required to give notice fails to do so, he becomes liable in damages on the contract. Weiseger *v.* Wheeler, 16 Wis. 492.

2. Implied License to Enter Seller's Premises.—In Wood *v.* Manley, 11 A. & E. 34; 39 E. C. L. 19, an auctioneer sold a rick of hay, then on the premises of one J, who had given a license to remove it. The license was read at the auction and the auctioneer delivered to the buyer a note addressed to J, request-

(7) *Delivery to Carrier.*—Where the duty of the seller is to send the goods to the buyer, the general rule is that delivery to a common carrier is equivalent to a delivery to the buyer himself, and particularly is this so if the carrier to whom the delivery is made has been designated by the buyer; the carrier is deemed the agent of the buyer and not the agent of the seller.[1] If, however,

ing him to permit the buyer to remove the hay. J refused and the buyer broke open the gates of his close, and entered and took the hay. Upon an action of trespass being brought against the buyer, it was held that J's license was irrevocable, and that the delivery to the buyer by the auctioneer's order was a complete delivery in performance of his contract. Salter *v.* Woolams, 2 M. & G. 650; 40 E. C. L. 559, was another action growing out of the same contract. In this case, upon J's refusal to allow the buyer to enter and take the hay he brought an action against the auctioneer for non-delivery; but the court held that the delivery was complete, the auctioneer having made the only delivery the nature of the goods permitted, and Tindal, C. J., said he saw no reason why the buyer could not maintain trover against J.

In Nettleton *v.* Sikes, 8 Met. (Mass.) 34, it was held that where one has cut down and peeled trees on another's land, under a valid agreement that he shall have the bark, the bark becomes his property, and he has a lawful right to enter upon the land and take it away. In McLeod *v.* Jones, 105 Mass. 403; 7 Am. Rep. 539, where the plaintiff gave a bill of sale mortgage of furniture in his dwelling house to the defendant, but the furniture remained in the plaintiff's custody, and he removed it to another dwelling house, and some time afterward went away leaving the house locked with the furniture in it, and the defendant unlocked and entered the house and took away the furniture, it was held that in the absence of proof of a license from the plaintiff, express or implied, the entry was a trespass, although the defendant believed upon reasonable cause that plaintiff did not mean to return. But the doctrine was recognized that the license might be implied, and that in contracts of sales it was implied, if the property remained on the premises of the seller. But see McNeal *v.* Emerson, 15 Gray (Mass.) 384, where it was held generally that a mortgagee of personal property had an implied license to enter upon the mortgagor's premises after foreclosure and take the property. And see Doty *v.* Gorham, 5 Pick. (Mass.) 487; 16 Am. Dec. 417; Heath *v.* Randall, 4 Cush. (Mass.) 195; Folsom *v.* Moore, 19 Me. 252; Bentall *v.* Burn, 3 B. & C. 423; 10 E. C. L. 138.

In Giles *v.* Simonds, 15 Gray (Mass.) 442; 77 Am. Dec. 373, it was held that the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter on his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation.

1. Benj. on Sales (6th Am. ed.), § 693; 2 Schouler on Pers. Prop. (2d ed.), § 396; FORWARDING MERCHANTS, vol. 8, p. 573; Hobart *v.* Littlefield, 13 R. I. 341; Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1; 3 Am. Dec. 277; Downer *v.* Thompson, 2 Hill (N. Y.) 137; Falvey *v.* Richmond, 87 Ga. 99; Watkins *v.* Paine, 57 Ga. 50; Garland *v.* Lane, 46 N. H. 245; Burton *v.* Baird, 44 Ark. 556; Sarbecker *v.* State, 65 Wis. 171; 56 Am. Rep. 624; Ranney *v.* Higby, 4 Wis. 154; Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Garbracht *v.* Com., 96 Pa. St. 449; 42 Am. Rep. 550; Finch *v.* Mansfield, 97 Mass. 89; Abberger *v.* Marvin, 102 Mass. 70; Frank *v.* Hoey, 128 Mass. 263; Kessler *v.* Smith, 42 Minn. 494. But the goods must be forwarded through the usual channels, and channels supposed to be in the contemplation of the purchaser. Comstock *v.* Affœlter, 50 Mo. 411.

And even where the goods are forwarded to the buyer C. O. D., the carrier is the agent of the buyer to receive the goods and of the seller to collect the purchase price, and the delivery is complete when the goods are delivered to the carrier. Pilgreen *v.* State, 71 Ala. 368; State *v.* Carl, 43 Ark. 359; 51 Am. Rep. 565, and *supra*, this title, *At What Place Title Passes*. But see *contra*, State *v.* O'Neil, 58 Vt. 140; 56 Am. Rep. 557.

But if the goods must be consigned to the buyer, and if the seller has them consigned to himself, there is no delivery. Sohn *v.* Jervis, 101 Ind. 578.

Such delivery effectuates a transfer of the title and is a sufficient performance of the contract to enable the seller to maintain an action for goods sold and delivered. Hill *v.* Gayle, 1 Ala. 275; Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Johnson *v.* Stoddard, 100 Mass. 306; Potter *v.* Lansing, 1 Johns. (N. Y.) 215; 3 Am. Dec. 310; Hague *v.* Porter, 3 Hill (N. Y.) 141; Bull *v.* Robinson, 10 Exch. 342; 24 L. J. Exch. 165; King *v.* Meredith, 2 Camp. 639 (even though carrier is paid by vendor); Wait *v.* Baker, 2 Exch. 1; Fragans *v.* Long, 4 B. & C. 219; 10 E. C. L. 313; Dunlop *v.* Lambert, 6 C. & F. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; 75 E. C. L. 363; 22 L. J., Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299; 101 E. C. L. 297; 30 L. J., Q. B. 261; Hart *v.* Bush, E. B. & E. 494; 27 L. J., Q. B. 271; 96 E. C. L. 492; Smith *v.* Hudson, 34 L. J., Q. B. 145. See also CARRIERS OF GOODS, vol. 2, p. 810; *supra*, this title, *Effect of Contract—Transfer of Title*. And this although the seller pays the carrier's charges. Dawes *v.* Peck, 8 T. R. 330; 4 Revised Repts. 675.

But if the delivery is not made in accordance with the terms of the contract as agreed upon, it is not considered that the delivery is made to the buyer's agent, but the title and risk remain in the seller. Finn *v.* Clark, 12 Allen (Mass.) 522. Thus in Barton *v.* Kane, 17 Wis. 44; 84 Am. Dec. 728, an order was sent for certain goods and the goods were forwarded by the seller, but in a quantity considerably in excess of that ordered. It was held that sending such a quantity was not a compliance with the order, and that the delivery to the carrier did not constitute delivery to the buyer so as to pass the title and risk. See also Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Downer *v.* Thompson, 2 Hill (N. Y.) 137. (This latter case was *reversed* in 6 Hill (N. Y.) 208, but not upon the point in question.)

Delivering goods to a carrier for the use of a third person, without his consent, express or implied, is not such a delivery to the third person as will found an action for goods sold and delivered. Hague *v.* Porter, 3 Hill (N. Y.) 141. There must be some proof of authority from the buyer for such delivery. Cobb *v.* Arundell, 26 Wis. 553; Everett *v.* Parks, 62 Barb. (N. Y.) 9. But in the absence of directions by the buyer as to delivery, he will be bound if the goods are sent by the usual mode. Garretson *v.* Selby, 37 Iowa 529; 18 Am. Rep. 14. As to what constitutes delivery to a carrier in particular cases, see Packard *v.* Getman, 6 Cow. (N. Y.) 757; 16 Am. Dec. 475.

Delivery to Warehouseman.—The same rule applies in case of delivery to a warehouseman. Gibson *v.* Stevens, 8 How. (U. S.) 384; Bradford *v.* Marbury, 12 Ala. 520; 46 Am. Dec. 264; Williams *v.* Lerch, 56 Cal. 330; Gibson *v.* Chillicothe Bank, 11 Ohio St. 311; Shepherdson *v.* Cary, 29 Wis. 34; Hunter *v.* Wright, 12 Allen (Mass.) 548; Knights *v.* Wiffen, L. R., 5 Q. B. 660; WAREHOUSEMEN; *supra*, this title, *Effect of Contract—Transfer of Title*. But the contrary is the rule where it is specifically provided that the warehouseman shall hold as agent of the seller. See Scudder *v.* Worster, 11 Cush. (Mass.) 573; Schouler on Pers. Prop. (2d ed.), § 385; WAREHOUSEMEN.

Or Other Third Party.—The rule of the text applies where any third party is made a bailee for the purchaser. Thus leaving property in the hands of a third party, by consent, to be delivered upon the payment of the price, is a sale and vests the property in the buyer. Wright *v.* Maxwell, 9 Ind. 192; Stapp *v.* Anderson, 1 A. K. Marsh. (Ky.) 539; Bickham *v.* Irwin, 3 Yeates (Pa.) 66; Wing *v.* Clark, 24 Me. 366; Bement *v.* Smith, 15 Wend. (N. Y.) 493.

The third party must hold, however, by consent of the buyer. Thus where the plaintiff left goods with a third person, and desired him to deliver them to the defendant when called for, but the defendant did not call for them, and they remained in the third person's possession, the plaintiff was held not entitled to recover on a count for goods sold and delivered. Hart *v.* Tyler, 15 Pick. (Mass.) 171. So where the maker of a bill of sale of personal property placed it in the hands of a third person to keep, or to hold it subject to the order of the depositor, there was no delivery, actual or constructive, to the other party. Alsop *v.* Swathell, 7 Conn. 500.

the seller undertakes to make the delivery himself to the buyer at a distant place, thus assuming the risk of carriage, the carrier is the seller's agent.[1]

It is the seller's duty to prepare the goods for shipment and to deliver them to the carrier in a merchantable condition,[2] and in delivering to a carrier he must take the usual precautions for insuring a safe delivery to the buyer.[3] Notice should be given to

1. Dunlop *v.* Lumbert, 6 C. & F. 600; Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 1; Jenkyns *v.* Brown, 14 Q. B. 495; 68 E. C. L. 495; Falvey *v.* Richmond, 87 Ga. 99.

Where the contract provides that the seller shall ship the goods to the place of business of a buyer and pay the freight, the place of delivery is the place of business of the buyer and the seller can maintain no action until he has complied with this duty. Any loss on the way must fall on the seller. Devine *v.* Edwards, 101 Ill. 138; Murray *v.* Nichols Mfg. Co., 11 N. Y. Supp. 734; See *v.* Bernheimer, 38 N. Y. Super. Ct. 40; Taylor *v.* Cole, 111 Mass. 363. See also Playford *v.* Mercer, 22 L. T., N. S. 41 (cargo sold "from the deck"). Thus where the seller of machinery agreed to supervise the entire transportation of it and had his own agent to set it up, who took charge of moving it with teams furnished at his request by the buyer, according to the contract, it was held that the buyer was not liable for injuries caused by the manner in which it was loaded. Allis *v.* Voigt (Mich. 1892), 51 N. W. Rep. 190.

2. And this duty is complied with if the goods are in a proper condition when delivered to the carrier, provided the injury received during the transit does not exceed that which must necessarily result from the transit. Benj. on Sales (6th Am. ed.), § 693. Where hoop iron was sold in Staffordshire, deliverable in Liverpool in the winter, the seller was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, on proof that this deterioration was the *necessary* result of the transit, and that the iron was bright and in good order when it left Staffordshire. Bull *v.* Robison, 10 Exch. 342; 24 L. J. Ex. 165.

3. Finn *v.* Clark, 10 Allen (Mass.) 484; 12 Allen (Mass.) 526 (failure by seller to have bill of lading properly signed or the package properly directed); Quimby *v.* Carr, 7 Allen (Mass.) 418; Whiting *v.* Farrand, 1 Conn. 60; Ward *v.* Taylor, 56 Ill. 494; Benj. on Sales (6th Am. ed.), § 694. See also Downer *v.* Thompson, 2 Hill (N. Y.) 137; 6 Hill (N. Y.) 208; Buckman *v.* Levi, 3 Camp. 414; Cothay *v.* Tute, 3 Camp. 129. In Clark *v.* Hutchins, 14 East 475, there was a regulation of the carrier by whom the goods were forwarded that he would not be liable for goods over five pounds in value unless notice of the value was given at the time of shipment. The seller failed to give this notice, and the goods being lost the loss was held to fall on him.

In an action by a purchaser to recover the price paid to a seller of goods which had been forwarded by a carrier, and lost in consequence of a failure to put his name or residence upon them or in the bill of lading, the fact that the purchaser, after knowledge of their imperfect direction, claimed the goods and endeavored to have them forwarded, would not establish a waiver of the seller's failure to ship them properly, unless so intended. Finn *v.* Clark, 12 Allen (Mass.) 522.

There is no rule of law which, in the absence of custom, makes it obligatory upon the seller of goods who delivers them to a railroad company, to be first transported on their road and thence forwarded by steamer, to take out an "internal bill of lading" and forward it to the buyer at or about the time of sending the goods. Johnson *v.* Stoddard, 100 Mass. 306.

Seller Must Follow Shipping Directions.—The seller is liable for any loss resulting from his failure to follow the shipping directions of the buyer. In Wheelhouse *v.* Parr, 141 Mass. 593, the buyer ordered goods to be shipped "care M, shipping merchant at L, as soon as possible for his next steamer." The goods were shipped as directed and duly received by the buyer, who acknowledged their receipt and ordered more goods, saying: "As regards the shipping of the goods just received, you have done everything

the buyer of the time and place of shipment, and of the carrier by whom they were forwarded.[1]

(8) *Time of Delivery*—(a) **In General.**—Where, under the contract, the obligation of sending the goods is on the seller and nothing is said as to time, he must send them within a reasonable time.[2] If, however, the contract fixes a time, this controls, and

satisfactory. Ship this order in like manner." The goods were sent according to the buyer's instructions to M, who upon receiving them wrote the seller as follows: "Are we to keep them for our steamer sailing 14th inst., or ship by the G, which is a very slow steamer sailing 7th inst., and will not, we think, arrive out before our steamer?" The G was a steamer for which M was not the agent. The seller wrote M to "send the goods by the steamer which will arrive first," who thereupon caused them to be shipped by the G. The G foundered at sea and the goods were lost, and it was held that the seller could not recover, as he had failed to follow the shipping directions of the buyer.

But an order calling for the shipment of an engine is complied with by an offer to deliver one there in the town where the order was written. Aultman *v.* Henderson, 32 Ill. App. 331.

Where the buyer of goods, to be delivered f. o. b. at one of two foreign ports at his option, selected one and named the rates of freight to be paid, it was held that the seller must ship at the rates named or notify the buyer of his readiness to deliver at that place so that he might name the vessel to which delivery might be made. Dwight *v.* Eckert, 117 Pa. St. 490.

1. The buyer must have notice of the time and place of delivery. Bradford *v.* Marbury, 12 Ala. 520; 46 Am. Dec. 268; Davies *v.* McLean, 21 W. R. 264; Goom *v.* Jackson, 5 Esp. 112; unless the carrier is designated by the buyer. Bradford *v.* Marbury, 12 Ala. 520; 46 Am. Dec. 268; Burton *v.* Baird, 44 Ark. 556; Dawes *v.* Peck, 8 T. R. 330; Cooke *v.* Ludlow, 2 B. & P., N. R. 119; Bushell *v.* Wheeler, 15 Q. B. 442; 69 E. C. L. 442.

Delivery of Bill of Lading.—If the goods are beyond the sea, the seller ought to send the bill of lading in a reasonable time in order that the buyer may have it in his power to go to market. Smith's Mer. Law (Holcombe & Gholsom's ed.) 623. And where by the terms of the contract of sale the seller was to deliver to the buyer a bill of lading for the cargo which had been purchased on the buyer's orders, it was held that a delivery of the bill of lading within a reasonable time after its receipt, and without reference to the unloading of the cargo, was incumbent on the seller, and that the buyer was justified in rejecting the purchase on a refusal to deliver the bill of lading. Barber *v.* Taylor, 5 M. & W. 527.

Where payment is to be made in cash in exchange for the bill of lading, it would seem to be the duty of the seller to forward the bill of lading to the buyer within a reasonable time after shipment of the cargo; but it is not an implied condition of the contract, entitling the buyer to reject the goods, that the bill of lading shall be in the hands of the buyer, or of his agent, before the arrival of the ship. Sanders *v.* Maclean, 11 Q. B. Div. 327.

It is provided frequently that the seller shall deliver the goods "f. o. b.," that is, "free on board." This means that the seller, at his own expense, shall place the goods on the car or vessel which is to carry them on account of the buyer, at whose risk they are from that time. Stock *v.* Inglis, 12 Q. B. Div. 573; Ogg *v.* Shuter, L. R., 10 C. P. 159; 11 Moak's Rep. 316; *Ex parte* Rosevear China Clay Co., 11 Ch. Div. 565; Browne *v.* Hare, 3 H. & N. 484; 27 L. J. Exch. 372; in Exch., 4 H. & N. 822; 29 L. J., Exch. 6; Silberman *v.* Clark, 96 N. Y. 522.

2. Reasonable Time.—Benj. on Sales (6th Am. ed), § 683; Whiting *v.* Gray, 27 Fla. 482; Blydenburgh *v.* Welsh, 1 Baldw. (U. S.) 331.

What is a reasonable time depends upon the facts and circumstances of each particular case, and is usually a question for the jury. Smith's Mer. Law (Pomeroy's ed.), § 599; 2 Schouler on Pers. Prop. (2d ed.), § 386; Robinson *v.* Brooks, 40 Fed. Rep. 525; State *v.* King, 44 Mo. 238; Henkle *v.* Smith, 21 Ill. 238; Danforth *v.* Walker, 40 Vt. 257; Roberts *v.* Mazeppa Mill Co., 30 Minn.

a failure by the seller to make a seasonable delivery releases the buyer from his obligation to accept the goods.[1]

413; Jones *v.* Fowler, 37 How. Pr. (N. Y.) 104; Ellis *v.* Thompson, 3 M. & W. 445; Chaffin *v.* Doub, 14 Cal. 384 (bulk and character of article sold to be considered; delivery of hay being mowed held sufficient as against seller's attaching creditor). *Compare* Pratt *v.* Craft, 19 La. Ann. 130 (reasonable time means immediately). Cochran *v.* Toher, 14 Minn. 385; Roberts *v.* Mazeppa Mill Co., 30 Minn. 413; Burton *v.* Griffiths, 11 M. & W. 817. See, generally, REASONABLE TIME, vol. 19, p. 1090. See also QUESTIONS OF LAW AND FACT, vol. 19, p. 640.

If the delay becomes unreasonable, although no injury results, the buyer may rescind the sale by giving notice to the seller. Benson *v.* Lamb, 9 Beav. 502.

Parol evidence is always admissible to prove such circumstances. Benj. on Sales (6th Am. ed.), § 683; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; Coates *v.* Sangston, 5 Md. 121; Roberts *v.* Mazeppa Mills Co., 30 Minn. 415; Stange *v.* Wilson, 17 Mich. 342; Ellis *v.* Thompson, 3 M. & W. 445; Jones *v.* Gibbons, 8 Exch. 920; Sansom *v.* Rhodes, 8 Scott 544.

A and B were competitive bidders for a contract for paving a street with granite blocks, and agreed that the one who obtained the contract should allow the other to furnish him with half the blocks at a specified price, no time for delivery being specified but the work being required to be begun by April 15th and completed by August 15th. A obtained the contract and B began shipping him blocks on May 7th, when on the next day (Wednesday) A telegraphed him that he must have all his blocks that week and to ship none after Saturday. It was held that, in the absence of any knowledge on the part of B of any necessity that the blocks should then be had, he could recover for blocks shipped within a reasonable time thereafter. Loftus *v.* Riley, (Iowa 1891), 50 N. W. Rep. 17.

Where the contract was for the sale of goods to be furnished at the seller's convenience, no damages can be recovered by reason of factory and men being idle through delay in furnishing them if they were furnished within a reasonable time. Muskegon Curtain Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132.

Where the buyer, by his interference and attempts to prevent delivery, causes delay, the seller will not be responsible, and a delivery as soon as possible, considering such attempts, is all that is required. Whitney *v.* Hop Bitters Mfg. Co. (Supreme Ct.), 2 N. Y. Supp. 438.

If anything is to be done by the buyer before delivery, the seller is not in default until it has been done; thus in a contract for the sale of clover seed the buyer was to furnish the sacks, and it was held that no obligation rested upon the seller unless the bags were furnished within the time specified for delivery of the seed, and that no demand for the bags was required. Russell *v.* Witt, 38 Ind. 9. But in Low *v.* Forbes, 14 Ill. 423, where F sold corn to L to be delivered at a place agreed on, L to furnish sacks and F to sack it, it was held that upon the failure of L to furnish the sacks, F was bound to deliver the corn in bulk.

Time to be Specified by Buyer.—Where goods are sold to be shipped "about" a certain time, shipping directions to be given by the buyer, the seller's right to recover is not affected by his failure to ship if no shipping directions are given. And though shipping directions have been given, the shipper may still recover where shipment has been indefinitely delayed at the subsequent request of the buyer, and no other directions given. Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294.

1. Where time is of the essence of the contract, the seller's failure to make delivery before the expiration of the time specified, releases the buyer from the obligation resting upon him to accept. Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255; *reversing* 17 Fed. Rep. 426; Welsh *v.* Gossler, 89 N. Y. 540; Hill *v.* Blake, 97 N. Y. 216; Pratt *v.* Lincoln (Me. 1888), 13 Atl. Rep. 689; Phelps *v.* McGee, 18 Ill. 155 (no demand by buyer necessary to render seller guilty of breach of contract); Dodge *v.* Barnes, 31 Me. 290 (transfer of stock two days early held proper); Raffles *v.* Wichelhaus, 2 H. & C. 906; Reuter *v.* Sala, 4 C. P. Div. 239; Wimshurst *v.* Deeley, 2 C. B. 253; 52 E. C. L. 252; Story on Sales (4th ed.), § 310. And see Temple *v.* Aders, 38 Ind. 506.

So also where it is the duty of the

buyer to call for goods sold within a specified time, and he fails to do so, although the seller is ready and willing to make delivery, he cannot maintain an action for a refusal to deliver after the time specified. Higgins *v.* Delaware, etc., R. Co., 60 N. Y. 553; Blossom *v.* Shotter, 128 N. Y. 679. But where the plaintiff purchased certain goods at an auction, which were to be paid for and removed before May 1st, and an incorrect bill was given him, which he repeatedly endeavored to have corrected before May 1st and expressed a willingness to pay the correct amount, but the bill was not corrected until May 2d, when plaintiff paid it, the seller was held not to be released from his obligation to deliver the goods. Gray *v.* Walton, 107 N. Y. 254.

Time is deemed to be of the essence of the contract at law, but it is not so in equity, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract. Voorhees *v.* DeMeyer, 2 Barb. (N. Y.) 37; *affirming* 3 Sandf. Ch. (N. Y.) 61; Wilson *v.* Roots, 119 Ill. 379; Carter *v.* Phillips, 144 Mass. 100; Hipwell *v.* Knight, 1 Y. & C. 401. See CONTRACT, vol. 3, p. 915; EQUITY, vol. 6, p. 706; SPECIFIC PERFORMANCE; TIME. See also Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255.

Where the contract expresses the time, the question is one of construction, and therefore one of law for the court, not of fact for the jury. Benj. on Sales (6th Am. ed.), § 684.

In Coddington *v.* Paleologo, L. R., 2 Exch. 193, the plaintiff contracted to supply defendants with certain goods "delivering on April 17th, complete May 8th." No delivery was made on April 17, and tenders made on subsequent days were refused. It was held that if plaintiff was bound to commence delivery on the 17th his failure to do so entitled the defendant to rescind the contract; as to whether the terms of the contract so bound the plaintiff the court was divided.

In Ledon *v.* Havemeyer, 121 N. Y. 179, plaintiffs contracted to sell, and defendants to buy, a quantity of sugar "for shipment within 30 days, by sail or steam, seller's option." The sugar was loaded within 30 days, the master of the vessel giving seller a bill of lading certifying to the shipment "in good order and condition," but the vessel was detained several days after by the charterer, without the knowledge or consent of the seller, seeking freight to fill out her cargo. It was held, on the buyer refusing the sugar on account of the delay, that the contract required the putting of the goods sold on board a vessel within 30 days, with the intent, in good faith, to have them cleared for the port of destination in the regular course of trade, or in a reasonable time after shipment; that it did not require the clearance of the vessel as well as the loading within the stipulated time; that the seller was not required to hire a ship especially for the transportation of the sugar, if that object could otherwise be reasonably obtained, and as the quantity contracted for was not sufficient to complete a cargo, they were authorized to select a vessel which they had reason to believe would sail within a reasonable time, and which had, or could obtain, a full cargo and thus diminish the charges in their consignment.

When the seller agrees to deliver to the buyer as fast as a third person delivers to him, the buyer cannot set a time within which the seller must complete the delivery or be deemed guilty of a breach of contract. Smith *v.* Snyder, 82 Va. 614.

The buyer will also have a right of action against the seller for damages arising for failure to deliver. Wimshurst *v.* Deeley, 2 C. B. 253; 52 E. C. L. 252; Phillips *v.* Taylor, 49 N. Y. Super. Ct. 318; New Haven, etc., Co. *v.* Quintard, 1 Sweeny (N. Y.) 89; Baldwin *v.* Farnsworth, 10 Me. 414; 25 Am. Dec. 252 (strict performance waived by acceptance); Van Winkle *v.* Wilkins, 81 Ga. 93; 12 Am. St. Rep. 299; Story on sales (4th ed.), § 310.

Delivery Between Certain Dates.—Where property sold is to be delivered between certain designated dates it is optional with the buyer to designate on which of the days he will receive it, and his failure to do so fixes the last day as that on which he may be required to perform the contract. Sousely *v.* Burns, 10 Bush (Ky.) 87; Richey *v.* Shinkle, 36 Kan. 516. And the seller must aver his readiness and willingness to deliver on that day. Chandler *v.* Robertson, 9 Dana (Ky.) 292.

Sale of Property to be Delivered at Option of the Buyer.—Where the contract of sale of personalty provides that it is to be delivered at the option of the buyer on or before a certain date, the

Although the contract provides for delivery "forthwith," "directly," "immediately," "as soon as possible," "on or before," etc., the better opinion seems to be that, aside from the interpretation given in particular cases,[1] the seller still has a reasonable time in which to perform. Thus, in Boston Ice Co. *v.* Potter, 123 Mass. 28, it was held that where the contract was silent as to the time of delivery, the buyer has a right to demand the immediate delivery thereof at any time up to that date; but if no demand is made until after the time stipulated, the seller is entitled to a reasonable time after demand within which to deliver. Holt *v.* Brown, 63 Iowa 319.

Where it is the buyer's duty to designate the time of delivery the seller is not bound to act until he has been notified of the place chosen. Shaw *v.* Grandy, 5 Jones (N. Car.) 56.

But where a coal-dealer in Boston purchased of a commission merchant in Philadelphia two thousand tons of coal, to be shipped from Port Richmond at the buyer's option between the date of the contract and September 1st, it was held that the option was well exercised by a letter of August 24th, notifying the seller that the buyer was ready to have the whole amount of coal delivered, but giving no directions where to ship to; that the seller was bound to ship it to Boston, though impossible to ship the whole before September 1st; and that evidence of the usage at Port Richmond, to interpret similar contracts as requiring the option to be given in such season as to allow the coal to be shipped between the dates named in the contract was inadmissible. Snelling *v.* Hall, 107 Mass. 134.

Where the contract was for delivery "from the 1st to the 10th" of the month, at the option of the buyer, it was held that the seller could not be put in default for not delivering until the buyer should first make his election of time for the delivery and give the seller reasonable notice thereof. Colvin *v.* Weedman, 50 Ill. 311.

Penalty for Delay.—It may be that the parties have agreed upon a penalty for any delay in the delivery, and in such case the contract is not to be rescinded, but the defaulting party becomes bound for the penalty agreed upon. In Bergheim *v.* Blaenavon Iron etc., Co., L. R., 10 Q. B. 319, the contract was for delivery of iron to commence January 15th and be completed by May 15th, the seller to pay a fine of 7s. 6d. per ton per week in the event of his exceeding that time. The delivery was not commenced until May nor completed until September, and it was held that the fine was to be calculated from the time at which the contract was to be completed, namely, the 15th of May.

Premature Delivery.—Where goods are delivered before the time specified in the order, the buyer, by accepting them and making no objection within a reasonable time, waives any objection to the premature delivery. Lee *v.* Bangs, 43 Minn. 23. But he is not bound to accept them before the time specified. Estill *v.* Weaver, 19 Tex. 543.

1. Forthwith.—For various definitions of the term "forthwith," see FORTHWITH, vol. 8, pp. 571–573.

In Staunton *v.* Wood, 16 Q. B. 638; 71 E. C. L. 638, the agreement was that delivery should be made "forthwith" and that the price should be paid fourteen days after the completion of the contract. It was held that "forthwith" meant at least sufficiently soon to make the delivery a condition precedent to payment. See also Roberts *v.* Brett, 11 H. L. Cas. 337.

Directly.—In Duncan *v.* Topham, 8 C. B. 225; 65 E. C. L. 225, it was held that a contract to be performed "directly" was to be performed not merely "within a reasonable time" but "speedily," or, at the least, "as soon as practicable."

Immediately. — See IMMEDIATELY, vol. 9, p. 933; Rommel *v.* Wingate, 103 Mass. 327 (contract to ship coal "immediately" not performed by shipment made nine days after); Neldon *v.* Smith, 36 N. J. L. 148. See also And. L. Dict., p. 523, where numerous cases construing the meaning of the word are collected.

On or Before.—Where the goods are deliverable "on or before" a day named, a breach cannot occur before the day named unless there has been a previous demand by the buyer. Phelps *v.* McGee, 18 Ill. 155.

As Soon as Possible.—For the construction of these words in contracts of sale see SOON, where all the authorities are collated. In Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. Div. 673; 29 Moak's Rep. 105, they were held to mean within a reasonable time, with an undertaking to do it in the shortest practicable time. And see Tufts *v.* McClure, 40 Iowa 317.

ble time in which to make delivery, though the use of these terms indicates an intention to hasten delivery, and so less time can be claimed than where the law implies a reasonable time in the absence of any stipulation whatever.[1]

Certain dealers in wheat in Duluth made a contract on May 25th to deliver wheat in Buffalo harbor "as soon as possible," and a delivery in Buffalo on June 18th, the wheat having been shipped on June 13th was held insufficient and the buyers held justified in refusing it, the known difficulty in procuring transportation for wheat furnishing no excuse for the delay. Arthur *v.* Wright, 57 Hun (N. Y.) 22.

"**To be Taken By.**"—Parol evidence by parties familiar with the glass business is admissible to show that, in a contract of sale of glass bottles, the words "to be taken by" a certain time mean, in that business, as the buyer might from time to time specifically order, and that if all are not ordered within the time specified, it is customary to send the buyer a bill for the balance, and hold such balance subject to his order for a reasonable time. Atkinson *v.* Truesdell, 127 N. Y. 230.

1. There have been numerous cases adjudicating the meaning of the terms "immediately," "forthwith," etc., as used in contracts or in statutes; and while it is conceded that the use of such terms implies an earlier performance than where the expression "within a reasonable time" is used (Duncan *v.* Topham, 8 C. B. 225; 65 E. C. L. 225; Maxwell *v.* Scarfe, 18 Ont. Rep. 529), yet it is universally held that such terms are to be construed liberally and with reference to the object had in view and the circumstances and intention of the parties. Such terms never mean the absolute exclusion of any interval of time, but mean only that no unreasonable length of time shall intervene before performance. The cases here cited, though not all arising upon contracts of sale, still sustain the reasoning adopted. See Thompson *v.* Gibson, 8 M. & W. 281; De Oleaga *v.* West Cumberland Iron, etc., Co., 4 Q. B. Div. 472; 29 Moak's Rep. 28; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. Div. 670; 29 Moak's Rep. 105; Staunton *v.* Wood, 16 Q. B. 638; 71 E. C. L. 639; Pybus *v.* Mitford, 2 Lev. 75; Toms *v.* Wilson, 4 B. & S. 442; 116 E. C. L. 440; Gaddis *ads.* Howell, 31 N. J. L. 316; Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 566; Edwards *v.* Lycoming Co. Mut. Ins. Co., 75 Pa. St. 378; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573 ("due diligence under the circumstances"); Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460 (immediate notice means notice within "a reasonable time according to the circumstances of each particular case"); New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468; Richardson *v.* End, 43 Wis. 316 ("immediate delivery of goods" sold is construed in law to mean "a delivery within such convenient time as is reasonably requisite for making it"); Cashan *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.)476; U. S. *v.* Baldridge, 11 Fed. Rep. 558.

Computation of Time.—In computing the time within which delivery may be made, the first day is usually to be excluded and the last day included. Webb *v.* Fairmaner, 3 M. & W. 473; 6 D. P. C. 493; Farwell *v.* Rogers, 4 Cush. (Mass.) 460; Stebbins *v.* Anthony, 5 Colo. 348. See also Pease *v.* Norton, 6 Me. 233; DAY, vol. 5, pp. 82, 83; SUNDAY.

But where delivery is to be made "between" two specific dates, or "by" a fixed time, it seems that the last day is also to be excluded. See generally DAY, vol. 5, pp. 82–84; SUNDAY.

In Cleveland *v.* Sterrett, 70 Pa. St. 204, it was impliedly held that where the agreement provided that delivery should be made at any time between July 1 and December 1, a delivery might be made on the latter day. See also for various meanings of the word "between" in such connections, BETWEEN, vol. 2, p. 187, and cases there collected.

In Conawingo Petroleum Ref. Co. *v.* Cunningham, 75 Pa. St. 138, the seller was to deliver oil, "buyer's option, at any time from this date to December 31, 1870," it was held that he had the whole of December 31 in which to make delivery. Souseley *v.* Burns, 10 Bush (Ky.) 87. See also as to the meaning of "to," To.

Where the property is to be delivered "from the 15th to the 28th" of a specified month, both the 15th and the 28th are to be excluded in computing the time, and a delivery on the 28th is too late. Newby *v.* Rogers, 40 Ind. 16, and numerous cases cited.

Where the first delivery has, on account of some informality, been properly rejected by the buyer, the seller may tender a second delivery if within the time limited by the contract.[1]

(b) **Hour of the Day.**—As to the hour of the day at which delivery must be made, this seems to be the rule: Where delivery may be made at any place, a tender at a convenient time before midnight is sufficient, but where the goods are to be delivered at a particular place and the buyer must be there to receive them, the law implies no obligation on his part to remain after sunset, so that delivery must be made at a convenient time before that hour, though should the seller happen to find the buyer at the place of delivery after sunset and make a tender of the goods, it will be sufficient, if the goods are such as can be examined by candle-light and there is time before midnight in which to examine and accept them.[2]

Where the contract is to deliver "on or before" a day named, delivery may be made on such named day. Adams *v.* Dale, 29 Ind. 274; Smith *v.* Smith, 8 Blackf. (Ind.) 208; Wall *v.* Simpson, 6 J. J. Marsh. (Ky.) 155; 22 Am. Dec. 72.

See also ON, vol. 17, pp. 184–5; BEFORE, vol. 2, p. 162.

A contract to deliver "by" a certain day excludes the day named. Rankin *v.* Woodworth, 3 P. & W. (Pa.) 48.

Compare, however, And. L. Dict., "By," where it is laid down that a duty to perform "by" a certain day may be discharged on or before that day. Higley *v.* Gilmer, 3 Mont. 433; Coonley *v.* Anderson, 1 Hill (N. Y.) 519. See also BY, vol. 2, p. 703.

"**Until**," "**Till**," **etc.**—For the meanings of these words in contracts of sale, see UNTIL. Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

Sunday.—As to Sunday in such computations, see SUNDAY.

Meaning of "Month," "Day," etc.—See MONTH, vol. 15, p. 712; DAY, vol. 5, pp. 82 *et seq.;* TIME.

1. In Borrowman *v.* Free, 4 Q. B. Div. 500; 29 Moak's Rep. 40, where there was a sale of a cargo of maize, the seller tendered a cargo which the buyer refused to accept on the ground that the shipping documents were not tendered with it. The dispute being referred to an arbitrator, he decided that the tender was invalid. The seller, within the time limited by the contract, tendered another cargo which the buyer refused to accept on the ground that he was not bound to accept any cargo in substitution for that of the first, the tender of which had been invalid. It was held that the buyer was bound to accept the second cargo offered and might be sued for any loss which the seller might have sustained from the refusal to accept.

But where a contract provided that the seller should furnish a monument as soon as convenient, and the first monument delivered was rejected because of the omission of a material inscription, it was held that the contract was at an end when the buyer refused to accept it, and that he was not bound to accept another. American White Bronze Co. *v.* Gillette, 88 Mich. 231.

2. Startup *v.* M'Donald, 6 M. & G. 593, is the leading case on this point. Here the plaintiff had sold a certain quantity of oil to the defendant, to be delivered in the last fourteen days of March. He made a tender of the oil at 8:30 P.M. on the last day of March, which the defendant refused to accept, claiming that the hour was unreasonable. The jury found that there was full time before twelve o'clock for the defendant to examine, weigh and receive the oil, but that the hour was an unreasonable and improper one. On these facts the court of common pleas decided in favor of the defendant (2 M. & G. 395), but in the Exchequer Chamber the decision was reversed and the rule stated by Parke, B., as given in the text. See Benj. on Sales (6th Am. ed.), 685; Smith's Mer. Law (Pom. ed.), § 599. And see Berry *v.* Nall, 54 Ala. 446.

See also McClartey *v.* Gokey, 31 Iowa 505, where payment after sundown of the last day was held sufficient. 2 Schouler on Pers. Prop. (2d ed.), § 387; Bass *v.* White, 7 Lans. (N. Y.) 171 (holding payment by check after

(9) *Postponement of Delivery.*—The postponement of delivery at the request of either party, unless amounting to a contract (in which case it must be reduced to writing to satisfy the statute of frauds), is a forbearance merely, and either may at any time insist upon his rights under the original contract.[1]

bank hours not within reasonable time); *reversed* in 65 N. Y. 565.

If the goods are such as that a proper examination can only be made by daylight, a delivery at night is, of course, at an unreasonable time. Croninger *v.* Crocker, 62 N. Y. 151.

In Avery *v.* Stewart, 2 Conn. 69; 7 Am. Dec. 240, the same rule was laid down that though the buyer is entitled to a delivery in such season as to enable him to examine and take an account of the articles before sunset, yet if the seller is present at the place of delivery, prepared to make delivery in proper season, and the buyer neglects to attend to receive them, a tender after sunset but by daylight is sufficient.

Plaintiff entered into an agreement with defendant to deliver certain live stock during "the first half of August," etc., at a specified place, and alleged delivery of said live stock at such place on the 16th day of August before noon. It was held, in an action for damages for failure to accept, that the fact that delivery had not been made before the 16th day of August was equivalent to notice that it would be made on that day; that such stock should have been kept at the place of delivery until noon, and that a delivery of live stock at such place on such day in the absence of the defendant and the removal of the same by the plaintiff before noon, though to a place near at hand, was not a delivery binding the defendant. Kirkpatrick *v.* Alexander, 60 Ind. 95.

1. Benj. on Sales (6th Am. ed.), § 688; Barnes *v.* Stacy, 79 Wis. 55; Ogle *v.* Vane, L. R., 3 Q. B. 272; *aff'g* L. R., 2 Q. B. 275.

In Hickman *v.* Haynes, L. R., 10 C. P. 598, the contract was for the sale of 100 tons of pig iron in monthly deliveries of twenty-five tons each, during the months of March, April, May and June. The amounts for March, April and May were delivered in accordance with the contract, but the seller agreed to postpone delivery of the remaining twenty-five tons at the verbal request of the buyer. At the expiration of the contract time, the seller tendered the residue of the iron, but the buyer refused to accept it. In an action by the seller for damages for breach of contract, it was contended for the buyer that a new agreement for the delivery and acceptance of the remaining 25 tons of iron had been substituted for the original written contract, and that this new agreement, being verbal, could not be enforced under the statute of frauds. But the court held that the assent to the request of the buyer to give time was not a valid agreement binding the seller, but merely a voluntary forbearance on his part.

In Plevins *v.* Downing, 1 C. P. Div. 220, 100 tons of pig iron were sold to be delivered "25 tons at once, and 75 tons in July next." By the end of July but 75 tons had been delivered. There was no evidence of any request by the buyer to the seller before July to delay delivery on the last 25 tons, but it was proved that in October the buyer verbally requested the seller's manager to deliver them, in consequence of which they were shipped to him in the same month, but he declined to receive them. It was held that, inasmuch as the seller could not prove that they were ready and willing to deliver the 25 tons at the end of July and had only withheld the delivery at the buyer's request, they could not sue on the original contract; and that the subsequent conversation with the seller's manager could not be relied upon either as a new contract, as that would have been to have substituted a parol for a written agreement, or as an arrangement for an altered time of delivery. In this case Brett, J., said: "It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favor of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is what is the test in such an action as the present, whether the case is within the one rule or the other.

Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is held that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in Hickman *v.* Haynes, L. R., 10 C. P. 598." And see Hill *v.* Blake, 48 N. Y. Super. Ct. 253; *aff'd* 97 N. Y. 216; and Clark *v.* Fey, 121 N. Y. 470. Also Haldeman *v.* Berry, 74 Mich. 424, where there had been no postponement.

But see Wichert *v.* Stafford, 25 Ill. App. 218, when it was held that where, under a contract for the sale of goods to be delivered within a certain time, the buyer asks the seller to make no delivery until ordered, and the latter acts upon such direction, the time fixed is enlarged to a reasonable time in which to perform the contract, and that the buyer cannot be put in default unless he refuses to receive the goods on tender of delivery within a reasonable time.

In Tyers *v.* Rosedale, etc., Iron Co., L. R., 10 Exch. 195, *reversing* L. R., 8 Ex. 305, the defendants were the sellers and the plaintiffs the buyers of iron, deliverable in monthly quantities from 1871. Defendants withheld delivery of various monthly quantities at the plaintiffs', request. Afterwards in December, the last month fixed in the contract for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery, it was held that, without reciting whether the defendants could be required to deliver in December at once the whole balance of the 2,000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defense to the action.

After the time of performance is past, an arrangement made between the parties for the performance of the contract at a different time is not binding unless supplemented by a new consideration. Hill *v.* Blake, 48 (N. Y.) Super. Ct. 253; *aff'd* 97 N. Y. 216. And see Phillips *v.* Taylor, 49 N. Y. Super. Ct. 322.

The seller of certain machinery who had agreed to have it ready for shipment within 30 days from June 21st, was ready within the time specified, and so notified the buyer, who wrote ordering some castings, and said: "When all are ready to ship let us know, as we want to put on some other machinery. Wait, so as to ship all together." The machinery had been selected by the buyer and no injury was caused by the delay, and it was held sufficient to support a finding that the seller had performed his contract. Barnes *v.* Stacy, 79 Wis. 55.

When the buyer of rock phosphate agreed to receive and remove the same between September 1, 1886, and April 30, 1887, and afterwards made an additional purchase, to be received and removed on completion of the first contract, say "between May and December, 1887," it was held that the seller, by delivering under the first contract as late as May, 1888, waived the failure of the buyer to remove within the time specified, and that as the second contract was not to be performed until the first was completed, the extension of the time of performance of the first operated as an extension of the time of the second, and that the seller was guilty

(10) *Quantity to be Delivered.*—The seller is bound to tender or deliver the exact quantity called for, neither more nor less.[1] He has not the right to send the goods sold mixed with other goods, and to

of a breach of the latter contract by refusing delivery after completion of the first, though it was after December, 1887. Pinckney *v.* Dambmann, 72 Ind. 173.

Where the seller contracted to deliver 1600 bushels of "dry, sound, shelled corn," in May, June and July, and at the time of the contract had 3,000 bushels of such corn out of which he intended to fill the contract, but the time of delivery was by agreement postponed until July 20, when the corn was found to have been damaged by heating, it was held that there was no sale of any specific corn but that the contract might have been performed by the delivery of any corn of the required quality, and that the buyer did not, by securing a postponement of delivery, assume the risk of damage to the corn. Davis *v.* Budd, 60 Iowa 144.

1. Entire Contracts.—See this subject discussed in CONTRACTS, vol. 3, pp. 916–920.

See also Waddington *v.* Oliver, 2 B. & P., N. R. 61 (contract to deliver 100 bags of hemp at a certain price by a certain time is entire and cannot be split); Bragg *v.* Cole, 6 Moore 114; 17 E. C. L. 19 (entirety of the contract disaffirmed by buyer); Baldey *v.* Parker, 2 B. & C. 37; 9 E. C. L. 16; Reuter *v.* Sala, 4 C. P. Div. 239; 30 Moak's Rep. 518; Smith *v.* Lewis, 40 Ind. 102. See generally, 2 Parsons on Contracts (7th ed.), pp. 648–651; 1 Whart. on Contr., §§ 233, 330–8; 1 Story on Contracts (5th ed.), § 24.

Partial Delivery.—The seller has no right to make delivery of smaller quantity than that agreed upon, "since in this case no such simple act as separation could put the parties where they agreed to stand." Schouler on Pers. Prop., § 388; Rockford, etc., R. Co. *v.* Lent, 63 Ill. 288; Collins *v.* Delaporte, 115 Mass. 159. The seller, therefore, cannot recover anything when he makes only a partial delivery if the contract is an entire one. Soloman *v.* Neidig, 1 Daly (N. Y.) 200; Dula *v.* Cowles, 7 Jones (N. Car.) 290; 75 Am. Dec. 463. See also Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157; Estill *v.* Weaver, 19 Tex. 543.

A contract for the sale of "sixty-five head of fat hogs to weigh 225 pounds and over" was construed to require delivery of hogs weighing 225 pounds each. Evidence that by custom this language meant that the hogs should average the amount named was held inadmissible. Buyer was under no obligation to comply with seller's request that he go into an adjoining lot owned by other parties and select a sufficient number of hogs to make up the deficiency. Cash *v.* Hinkle, 36 Iowa 623.

A particular case may arise when the seller is not guilty of a breach of the contract in delivering a part only. Thus in Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515, a sale was made of an invoice of sugar to arrive by a certain ship on or before a day named. The vessel had sailed before the sale was made and arrived after the day named, with only a part of the cargo, the remainder having been destroyed by a storm. It was held that the buyer was entitled to all that arrived sound, and at the price named, if he was willing to waive the delay; that the seller was not guilty of a breach of the contract, the stipulated amount having been shipped.

The rule is less rigid where goods are ordered from a correspondent who is an agent for buying them, the order being considered with reference to the circumstances and state of the market where the purchase is to be made. Thus, the defendant ordered 500 tons of sugar, "50 tons more or less of no moment, if it enables you to get a suitable vessel." So large a quantity of sugar as 500 tons could not be purchased in one lot at the Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time of different persons. The plaintiffs had thus purchased 400 tons when the defendant countermanded the order. It was held that the clause as to "50 tons more or less" was not a limitation of a quantity to be purchased, but was a discretion left to the plaintiffs that they might not be fettered in obtaining a vessel to carry the quantity ordered; that it was simply an order to purchase 500 tons, but that the defendant must be taken to have been giving an order

call upon the buyer to accept more than he bargained for, or to select the quantity bargained for out of a larger quantity delivered.[1] If the goods exceed or fall short in quantity that agreed upon, the buyer, as a general rule, may refuse the whole of them,[2] and

with reference to the circumstances of the Mauritius market; and therefore that each quantity, as it was purchased by the plaintiffs from the several sellers, was purchased on behalf of the defendant, and he was bound to accept and pay for the 400 tons. Ireland *v.* Livingston, L. R., 2 Q. B. 99; 36 L. J., Q. B. 50; L. R., 5 Q. B. 516; L. R., 5 H. L. 395. And see Johnston *v.* Kershaw, L. R., 2 Exch. 82; 36 L. J., Exch. 44; Jefferson *v.* Querner, 30 L. T., N. S. 867; Marland *v.* Stanwood, 101 Mass. 470.

When one sells wood which is in a general pile, not measured or set apart, and the seller merely notifies the buyer that the wood is at the place of delivery and continues to sell from the same general pile to other parties, there is not such a delivery as will enable him to recover the contract price, although the buyer may have taken and paid for a part of the wood. England *v.* Mortland, 3 Mo. App. 490.

Separable Orders.—Where A sent B the following order, "Will you please ship me H. M. A. 100–1, 75–2, 50–3, 4, 5, 50–6, 7, 8, 9, 10. And, if you please, you can send me at the same time 50–1, 2, 3, 4, 5, of Colonial," it was held that B might ship and recover for the goods mentioned in the first, without shipping those mentioned in the second, sentence of the order, but that he could not ship and recover for those mentioned in the second, without also shipping those mentioned in the first, sentence. Virtue *v.* Beacham, 17 N. Y. Supp. 450; *aff'd* 18 N. Y. Supp. 949.

Evidence. — In an action brought against the seller for his failure to deliver a certain number of car loads of wheat, evidence is admissible of what is customarily considered a car-load. Price *v.* Vanstone, 40 Mo. App. 207. And where the contract is definite and certain in respect to quantity, evidence of a custom to change or vary it cannot be received. O'Donohue *v.* Leggett, 8 N. Y. Supp. 426.

Benj. on Sales (6th. Am. ed.), § 689.

1. Reuter *v.* Sala, 4 C. P. Div. 239; 30 Moak's Rep. 518; Levy *v.* Green, 8 E. & B. 575; 92 E. C. L. 575 (seller's goods sent mixed up in crate with other goods not ordered); Cunliffe *v.* Harrison, 6 Exch. 903; Nicholson *v.* Bradfield Union, L. R., 1 Q. B. 620; 35 L. J., Q. B. 176; Croninger *v.* Crocker, 62 N. Y. 157; Clark *v.* Baker, 11 Met. (Mass.) 186; 45 Am. Dec. 199. See also Southwell *v.* Beezley, 5 Oregon 143; Goodwin *v.* Wells, 49 Ala. 309; Dixon *v.* Fletcher, 3 M. & W. 146; Tarling *v.* O'Riordan, L. R., 2 Ir. 82.

A contract for the sale of a cargo of from 700 to 800 tons of sugar, to be shipped from a certain port, is fulfilled by the delivery of only 700 tons, though shipped from said port as part of a cargo of 841 tons. Standard Sugar Refinery *v.* Castano, 43 Fed. Rep. 279. And see Brownfield *v.* Johnson, 128 Pa. St. 254.

In Iron Cliffs Co. *v.* Buhl, 42 Mich. 86, it was said that where ore is piled at the point of delivery in a mass larger than was contracted for, and nothing remains but to take the contract quantity from the pile, *it seems* that it is a sufficient delivery.

2. Wright *v.* Barnes, 14 Conn. 518 (delivery of less); Smith *v.* Lewis, 49 Ind. 98 (same); Rockford, etc., R. Co. *v.* Lent, 63 Ill. 288 (same); Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173; Reed *v.* Randall, 29 N. Y. 358; 86 Am. Dec. 305; Parke, J., in Oxendale *v.* Wetherell, 9 B. & C. 386; 17 E. C. L. 401; Cunliffe *v.* Harrison, 6 Exch. 903 (delivery of more); Hart *v.* Mills, 15 M. & W. 85 (same); Downer *v.* Thompson, 2 Hill (N. Y.) 137 (same); Rommel *v.* Wingate, 103 Mass. 327; Walker *v.* Dixon, 2 Stark. 281; 3 E. C. L. 410; Waddington *v.* Oliver, 2 B. & P., N. R. 61 (contract to deliver 100 bags of hemp at certain price an entire contract); Sefton *v.* Minnesota Type Foundry Co. (Oregon 1892), 29 Pac. Rep. 6; 2 Schouler on Pers. Prop. (2d ed.), § 388. And he is not bound to return the goods at his own expense. Landesman *v.* Gumersell, 16 Mo. App. 459.

He may accept what is delivered and reject the residue when unreasonably delivered. Wilson *v.* Wagar, 26 Mich. 452; Chandler *v.* De Graff, 27 Minn. 208.

But in Brandt *v.* Lawrence, 1 Q. B. Div. 344, there were two contracts, each for the purchase of 4500 quarters of

though, if he receives and retains part of them, he becomes liable for that part,[1] such acceptance and retention do not con-

Russian oats, more or less, "shipment by steamer or steamers during February," etc. The seller shipped on board one steamer 4511 quarters to answer the first contract, and 1139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity to complete the second contract. The first shipment was made in time, but the second was too late. It was held that the buyer was bound to accept the 1139 quarters shipped on time, because the contract provided that the shipment was to be "by steamer or steamers."

In Reuter *v.* Sala, 4 C. P. Div. 239, plaintiffs contracted to sell defendants 25 tons (more or less) Penang pepper, October or November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Plaintiffs, within the stipulated time, declared 25 tons, only 20 of which complied with the terms of the contract of shipment, and made no further declaration. Defendants declined to accept any portion of the pepper, and it was held that the contract was entire and that they were not bound to accept the 20 tons, but were entitled to insist upon the delivery of 25 tons according to contract.

In Welch *v.* Moffat, 1 Thomp. & C. (N. Y.) 575, the contract was as follows: "Bought of S. M. Welch, 340 bales of broom corn, 81,762 lbs. at 10 cents, $8,176.20. The above constitutes my entire stock of corn now held by me, and all upon the fourth floor of my store and sold to them entire." After purchase the corn was weighed and the quantity fell short 3,514 lbs. It was held, in an action on a note given for the purchase price, that the buyer was not relieved from his obligation to pay, on the ground that the seller had not delivered the quantity called for.

In Wheeler *v.* Britton (Supreme Ct.), 17 N. Y. Supp. 749, A proposed to deliver to B "not less than 3,500 tons of ice, and 4,000 if it holds out." B wrote accepting A's offer "to deliver 3,500 to 4,000 tons of good ice if the houses hold that amount." One of A's ice houses was burned and part of its contents destroyed, and it was held that the contract did not restrict A to the use of the ice contained in the houses mentioned in B's letter, and that he had a right to furnish the minimum amount called for, at all hazards, from other sources.

Where the buyer refuses to receive goods on account of defect in quality, it does not preclude him, on afterwards discovering a shortage in the quantity delivered from relying on that ground as a defense to an action for such refusal. O'Donohue *v.* Leggett (Supreme Ct.), 8 N. Y. Supp. 426.

If, on the buyer attempting to return the goods, they are injured, he is liable only for negligence as a voluntary bailee. Landesman *v.* Gumersell, 16 Mo. App. 459.

1. Is Liable for What He Receives and Retains.—Benj. on Sales (6th Am. ed.), § 690; Oxendale *v.* Wetherell, 9 B. & C. 386, 17 E. C. L. 401; Morgan *v.* Gath, 3 H. & C. 748; Barton *v.* Kane, 18 Wis. 262; Chapman *v.* Dease, 34 Mich. 375; Wilson *v.* Wagar, 26 Mich. 457; Marland *v.* Stanwood, 101 Mass. 470; Richards *v.* Shaw, 67 Ill. 222; Defenbaugh *v.* Weaver, 87 Ill. 132; Willamette, etc., Mfg. Co. *v.* Union Lumber, etc., Co., 94 Cal. 156; Cole *v.* Swanston, 1 Cal. 51; 52 Am. Dec. 288 (seller may recover stipulated price of part actually delivered, less the damages arising from non-delivery of the remainder); Keen *v.* Preston, 24 Ind. 395 (buyer's title not affected by non-delivery of the remainder); Downs *v.* Marsh, 29 Conn. 409; Swift *v.* Opdyke, 43 Barb. (N. Y.) 274; Couston *v.* Chapman, 2 Scotch & Div. App. 250; 3 Moak's Rep. 187.

But in *New York* the rule is somewhat different, and where the contract is entire it is held that a party may retain, without compensation, the benefits of a partial performance where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction is under no obligation to pay until the performance is complete. Smith *v.* Brady, 17 N. Y. 173; 72 Am. Dec. 442; Crane *v.* Knubel, 43 How. Pr. (N. Y.) 389; Nightingale *v.* Eisman, 50 Hun (N. Y.) 189; Catlin *v.* Tobias, 26 N. Y. 217; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258; Levene *v.* Rabitte, 2 N. Y. Supp. 389; Paige *v.* Ott, 5 Den. (N. Y.) 406. And see Pratt *v.* Gulick, 13 Barb. (N. Y.) 297; M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) 165; 7 Am. Dec. 299; Mead

stitute a waiver of his right of action for the seller's breach of contract.[1]

The quantity to be delivered is sometimes stated in the contract with the addition of such words as "about," "more or less," "say about," etc. These are considered words of estimate and expectation only, and indicate a purpose on the part of the seller not to bind himself to any precise quantity, but merely to keep

v. Degolyer, 16 Wend. (N. Y.) 632. "The principle established by Smith *v.* Brady, 17 N. Y. 173, has been followed as an authoritative exposition of the law." Crane *v.* Knubel, 43 How. Pr. (N. Y.) 393, and "has never been overruled." Preusser *v.* Florence, 4 Abb. N. Cas. (N. Y.) 136. But the buyer may waive his right to insist upon entire performance, and thus become liable for the price of any portion received and used, and where the delivery is not to be in parcels at different times, but there is to be only one and a single delivery, the acceptance of a portion by the buyer and the appropriation of the same to his own use, will be considered acts evincing an intention to waive this right, and he will become liable to pay for what is actually delivered. Avery *v.* Wilson, 81 N. Y. 344; 37 Am. Rep. 503; Flanagan *v.* Demarest, 3 Robt. (N.Y.) 173. And see Corning *v.* Colt, 5 Wend. (N. Y.) 253, and Tipton *v.* Feitner, 20 N. Y. 423. The question of waiver is frequently one of fact to be determined by the circumstances and the evidence. Avery *v.* Wilson, 81 N. Y. 344; 37 Am. Rep. 503; Vanderbilt *v.* Eagle Iron Works, 25 Wend. (N. Y.) 665. And see CONTRACT, vol. 3, p. 920.

Where the goods were to be delivered in quantities to be called for by the buyer during the course of one year, payment to be made at a specified time after each shipment, the seller is entitled to recover, having delivered all that were called for, though the last shipment, made at the end of the year, does not complete the quantity specified in the contract. Whitney *v.* Hop Bitters Mfg. Co. (Supreme Ct.), 2 N. Y. Supp. 438.

The seller cannot sue for the part actually delivered and accepted, until after the expiration of the time in which the residue is to be delivered. Waddington *v.* Oliver, 2 B. & P., N. R. 61; Oxendale *v.* Wetherell, 9 B. & C. 386; 17 E. C. L. 401; 1 Comyn's Dig., Actions, F. 2.

Where a specific quantity of merchandise is sold under an entire contract the buyer cannot retain a portion to his own use and return the remainder to the seller; and if he receives and holds a part, he will be liable for the whole. Morse *v.* Brackett, 98 Mass. 205.

In Wilson *v.* Wagar, 26 Mich. 457, it is said that this action by the seller, being an innovation upon the common law (which permitted no recovery for a partial performance of an entire contract), and being based upon equity principles, can only be maintained where he has honestly attempted to fully perform his contract, and where a refusal of it would work injustice and oppression.

In the case of Goodwin *v.* Wells, 49 Ala. 309, the buyer received goods in excess of those ordered, and on remitting the price for those ordered, wrote: "Balance of goods shipped me were not ordered. You will please have patience until they are sold; or they are subject to your order if you prefer it." It was held that neither this communication nor the retention of the excess of goods for several years without proof that he sold them, constituted in law any promise to pay for them, and that his liability was a question for the jury.

1. Action by Buyer for Breach of Contract.—The buyer's liability in the case of the acceptance of the part performance of an entire contract arises not upon the old contract but upon a new contract implied in law, to pay a reasonable price for what he has received and accepted. Wilson *v.* Wagar, 26 Mich. 457; Chapman *v.* Dease, 34 Mich. 380.

Therefore his right to an action for a breach of the original contract remains as if he had not accepted at all, though the damages are necessarily materially lessened. Wilson *v.* Wagar, 26 Mich. 457; Howell *v.* Medler, 41 Mich. 643; McKnight *v.* Dunlop, 5 N. Y. 537; 53 Am. Dec. 370.

And in Tyers *v.* Rosedale, etc., Iron Co., L. R., 10 Exch. 195; 12 Moak's

reasonably close to the amount named,[1] for where the terms of the contract do not provide the exact quantity, and admit of

Rep. 631, *reversing* L. R., 8 Exch. 305; 7 Moak's Rep. 273, where the buyer accepted a large portion of the iron contracted for, he was allowed to maintain an action for the non-delivery of the residue after demand, although previously he had requested seller to postpone delivery.

1. Benj. on Sales (6th Am. ed.), § 691; 2 Schouler on Pers. Prop., § 389; McConnel *v.* Murphy, L. R., 5 P. C. 203; 8 Moak's Rep. 164; Brawley *v.* U. S., 96 U. S. 168; Shepard *v.* Lynch, 26 Kan. 377. And see Hayward *v.* Scugall, 2 Camp. 56; Barker *v.* Windle, 6 E. & B. 675.

See, as to bills of lading, Tamvaco *v.* Lucas, 1 E. & E. 581; 102 E. C. L. 581; as to "average weight," Cash *v.* Hinkle, 36 Iowa 623.

"About."—See ABOUT, vol. 1, p. 33; Bourne *v.* Seymour, 16 C. B. 337; 81 E. C. L. 336; Clapp *v.* Thayer, 112 Mass. 296 (question for jury as to whether contract for "about 400 castings" substantially complied with by delivery of 331); Norrington *v.* Wright, 115 U. S. 204; Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173; Kreuger *v.* Blanck, L. R., 5 Exch. 179 ("a small cargo of wood, in all about sixty fathoms"). An agreement to sell "a cargo of old iron to be shipped per barque Charles William—about 300 or 350 tons—" is complied with by a delivery of as much as that vessel, if seaworthy and in good order, can carry, though only two hundred and twenty-seven tons. Pembroke Iron Co. *v.* Parsons, 5 Gray (Mass.) 589. See rules laid down in Brawley *v.* U. S., 96 U. S. 171; *infra*, this note, *More or Less*.

"More or Less."—See generally MORE OR LESS, vol. 15, p. 722; and also Shepard *v.* Lynch, 26 Kan. 377; Ireland *v.* Livingston, L. R., 2 Q. B. 99.

Where the quantity to be delivered is qualified by the words "more or less" or "about," the U. S. Supreme Court in Brawley *v.* U. S., 96 U. S. 171, has laid down the following rules of construction: *First*—Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the seller in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. *Second*—But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight. *Third*—If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith.

The above rules were *quoted* and *approved* in Day *v.* Cross, 59 Tex. 604. In Brawley *v.* U. S., 96 U. S. 171, there was an agreement to deliver "880 cords of wood, more or less, as should be determined to be necessary by the post commander," etc., and it was held that the post commander, having determined that only 40 cords were needed, the United States was not liable for any number of cords delivered beyond the 40 required.

In Day *v.* Cross, 59 Tex. 595, there was a sale of certain marks and brands of cattle containing ten thousand head, more or less. Only five thousand and sixty-one head were delivered. It was held that the contract was for the sale of the marks and brands without ref-

some latitude of construction, the courts are inclined to adopt a liberal construction in favor of the seller and hold a substantial compliance on his part to be sufficient.[1]

(11) *Quality to be Delivered.*—Questions relating to quality fall ordinarily within the subject of warranty, express or implied, and are dealt with elsewhere.[2]

(12) *Right to Inspect.*—The seller is under obligation to afford to the buyer opportunity for examination of the goods, so that

erence to the number estimated, and that the only question, therefore, was whether the sellers had used due diligence in collecting and delivering the cattle of the said marks and brands.

See also as supporting the rules and classification laid down in this case, Robinson *v.* Noble, 8 Pet. (U. S.) 197; Merriam *v.* U. S., 107 U. S. 437; Norrington *v.* Wright, 115 U. S. 200; Gwillim *v.* Daniel, 2 C. M. & R. 61.

In Holland *v.* Rea, 48 Mich. 218, the agreement was for 500,000 feet of lumber, "more or less." It was considered that the parties understood that a reasonable shortage would not avoid the contract, and that 473,000 was not unreasonably short of the amount specified.

The phrase will not cover the deficiency where the contract was for 23,000 feet of lumber and only 16,000 feet were delivered. Creighton *v.* Comstock, 27 Ohio St. 548. Nor will it cover an excess where the contract was for three hundred quarters, and three hundred and fifty were delivered. Cross *v.* Eglin, 2 B. & Ad. 106; 22 E. C. L. 36. Nor a difference where two hundred and sixty-two head of cattle were contracted for and only one hundred and seventy-eight head delivered. Tilden *v.* Rosenthal, 41 Ill. 385; 89 Am. Dec. 388.

"**Say About.**" — In McConnel *v.* Murphy, L. R., 5 P. C. 203, there was a sale "of all the spars manufactured by A, say about 600." It was held that the words "say about 600" were words of expectation and estimate only, not amounting to an understanding that the quantity should be exactly 600. The effect of the word "say," when prefixed to the word "about," was considered as emphatically marking the seller's purpose to guard himself against being supposed to have made an absolute promise as to quantity.

But in a charter-party, a contract to deliver "a full and complete cargo, say about" a specific quantity, the words "say about" would bear a different meaning than what they would in an ordinary contract, and are not mere words of limitation, and, therefore, of contract. Morris *v.* Levison, 1 C. P. Div. 155; 45 L. J., C. P. 409; 16 Moak's Rep. 496.

"**Say From.**"—In Gwillim *v.* Daniel, 2 C. M. & R. 61; 4 L. J., Exch. 174, the agreement was that the plaintiff should accept all the naphtha that defendant should happen to manufacture, "say from 1,000 to 1,200 gallons per month." In the absence of fraud or bad faith the contract was fulfilled by a delivery of all the naphtha manufactured, though it may be far less than the amount mentioned. See Brawley *v.* U. S., 96 U. S. 172.

But in Tamvaco *v.* Lucas, 1 E. & E. 581; 102 E. C. L. 581, a contract for "about 2,000 quarters, say from 1,800 to 2,200 quarters," was, in view of its other stipulations, construed as fixing a minimum and maximum limit.

"**Say Not Less Than.**"—In Leeming *v.* Snaith, 16 Q. B. 275; 71 E. C. L. 275; 20 L. J., Q. B. 164, there was a contract for the sale of wool, "say not less than one hundred packs." These words were held to be not mere words of expectation, but to amount to a contract to deliver at least the quantity named.

1. 2 Schouler on Pers. Prop., § 389.

It is usually a question for the jury as to whether there has been a substantial compliance with the contract. Clapp *v.* Thayer, 112 Mass. 296.

It is said that under a contract to sell and deliver goods in a warehouse in Liverpool the giving of a delivery order of about the quantity is a sufficient delivery, evidence being given of a well-known usage of warehouse keepers not accepting delivery orders in any other form. Moore *v.* Campbell, 10 Exch. 323.

2. See IMPLIED WARRANTY, vol. 10, p. 89; WARRANTY.

he may satisfy himself that they are in accordance with the contract.[1]

(13) *Manner of Delivery.*—Provisions in the contract as to the manner of delivery are, of course, to be followed,[2] and in some cases a well established usage may be permitted to control the construction of doubtful requirements.[3]

(14) *Delivery by Instalments.*—There has been some conflict of authority where the delivery is by instalments, but the rule now seems to be settled in the *United States* that where the contract of sale is entire, delivery to be made by instalments, the failure of the seller to deliver, or of the buyer to accept, one instalment, constitutes such a breach of contract as will give the other party the right to rescind the contract and sue for damages.[4] If, how-

1. Right to Inspect.—Benj. on Sales (6th Am. ed.), § 695.

Where the buyers, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, and on application to inspect the goods were shown two closed casks said to contain them, but were not allowed to open the casks, it was held that the seller had made no valid delivery. Isherwood *v.* Whitmore, 11 M. & W. 347. And see Startup *v.* Macdonald, 6 M. & G. 593; 46 E. C. L. 591; per Park, B. But see Sawyer *v.* Dean, 114 N. Y. 469.

Where five car-loads of oats were sold by sample and the seller shipped two car-loads and drew on the buyer for the price of these, the refusal of the latter to pay the draft, on the ground that the cars had not arrived and he had had no opportunity to inspect, and the protesting of the draft by the bank, does not justify the seller in failing to send forward the remaining cars. Erwin *v.* Harris, 87 Ga. 333.

It is not necessary that the buyer of goods under an executory contract should examine them at the place agreed upon for delivery to the carrier. It is sufficient that he make the inspection at the place of consignment. Fogle *v.* Brubaker, 122 Pa. St. 7.

In the case of a vessel sold to be delivered at a certain port, while the buyer is entitled to an opportunity to examine the vessel before acceptance, he cannot insist upon putting the seller to such an unusual expense as would be involved in putting the vessel into a dry-dock and making the delivery there. Lincoln *v.* Gallagher (Me. 1887), 8 Atl. Rep. 883.

2. See *infra*, this title, *Delivery by Instalments;* Robinson *v.* U. S., 13 Wall. (U. S.) 363.

Where there was a sale of rice in "double bags" the buyer was not bound to accept a tender of the rice in single bags, there being proof that this mode of packing rice made a difference in the sale. Makin *v.* London Rice Mill Co., 20 L. T., N. S. 705; 17 W. R. 768.

Where wool lying in bulk on the seller's premises was sold, payable on delivery by weight, the seller was not allowed, in the absence of an express agreement, to recover the cost of labor, etc., in putting the wool into sacks furnished by the buyer, the wool not having been weighed until after being put into the sacks. Cole *v.* Kerr, 20 Vt. 21.

3. In Robinson *v.* U. S., 13 Wall. (U. S.) 363, the contract was to deliver 1,000,000 bushels of barley, but there was no specification as to whether it should be "in bulk," loose, or in sacks. A portion was delivered, but was refused by the buyer because it was not in sacks. In an action for non-delivery it was held that evidence of the usage of trade with reference to the delivery of barley might be introduced to show the seller's duty as to delivery. See also Cole *v.* Kerr, 20 Vt. 21; *compare* Groat *v.* Gile, 51 N. Y. 431.

4. Norrington *v.* Wright, 115 U. S. 188; Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255; Pope *v.* Porter, 102 N. Y. 366; Catlin *v.* Tobias, 26 N. Y. 217; 84 Am. Dec. 183; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417; Nichols *v.* Scranton Steel Co. (Supreme Ct.), 18 N. Y. Supp. 623; Azema *v.* Levy, 5 N. Y. Supp. 418; Van Sickle *v.* Nester, 34 Hun (N. Y.) 64; King Philip Mills *v.* Slater, 12 R. I. 82; 34 Am. Rep. 603; Bollman *v.* Burt, 61

Md. 415, distinguishing Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218, on the ground that in that case the failure to deliver had been condoned. Haines *v.* Tucker, 50 N. H. 307; Hughs *v.* U. S., 4 Ct. of Cl. 64. And the action for the breach may be brought without waiting until the time for the delivery of the last instalment has passed. Hill *v.* Chipman, 59 Wis. 218.

In Norrington *v.* Wright, 115 U. S. 188, a contract was made in Philadelphia for the sale of "5,000 tons iron rails for shipment from European port or ports at the rate of about 1,000 tons per month, shipment beginning February, 1880, but whole contract to be shipped before August 1, 1880," and it was held that the sellers were bound to ship 1,000 tons in each month from February to June inclusive, except that slight and unimportant deficiencies might be made up in July, and that if only 400 tons were shipped in February and 885 tons in March, and the buyer accepted and paid for the February shipment on its arrival in March, at the stipulated price, in ignorance that no more had been shipped in February, and was first informed of that fact after the arrival of the March shipments, and before accepting or paying for either of them, he might rescind the contract by reason of the failure to ship "about 1,000 tons" in each of the months of February and March. In delivering the opinion of the court in this case, Gray, J. said: "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn *v.* Burness, 3 B. & S. 751; 113 E. C. L. 749; Shand *v.* Bowes, L. R., 2 App. Cas. 455; Lowber *v.* Bangs, 2 Wall. (U. S.) 728; Davison *v.* Von Lingen, 113 U. S. 40.

"The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. Mersey Steel, etc., Co. *v.* Naylor, L. R., 9 App. Cas. 439. . . . The times of shipment, as designated in the contract, are 'at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880.' These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill; in which case the mention of the quantity, accompanied by the qualification of 'about,' 'more or less,' is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: 'When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words, "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, weight or measure.' Brawley *v.* U. S., 96 U. S. 168.

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had

been agreed that all the goods should have been delivered at once. . . .

"The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties. . . .

"The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

"For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commerical contracts of this kind, is greatly to be deprecated, it is proper to add that, upon a careful examination of the cases referred to, they do not appear to us to establish any rule inconsistent with our conclusion.

"In the leading case of Hoare *v.* Rennie, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price, payable on delivery, the declaration alleged that the plaintiffs performed all things necessary, to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped; but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants. Chief Baron Pollock saying: 'The defendants refused to accept the first shipment because, as they say, it was not a performance, but a breach, of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract. They tendered a much less quantity. The defendants had a right to say that this was no performance of the contract and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.' 5 H. & N. 28. So in Coddington *v.* Paleologo, L. R., 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods 'delivering on April 17th, complete 8th May,' bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

"On the other hand, in Simpson *v.* Crippin, L. R., 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyers sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt *v.* Lawrence, 1 Q. B. Div. 344, in which the contract was for the purchase of 4,500 quarters, ten per cent. more or less of Russian oats, "shipped by steamer or steamers during February," or, in case

of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

"Such being the condition of the law of England as declared in the lower courts, the case of Bowes *v.* Shand, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of 'Madras rice to be shipped at Madras or coast, for this port, during the months of March and, or, April, 1874, per Rajah of Cochin.' The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered, the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions. Lord Chancellor Cairns said: 'It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.' 2 App. Cas. 463. 'If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning; it is no observation which can dispose of or get rid of or displace that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.'

"The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in Mersey Steel, etc., Co. *v.* Naylor, L. R., 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. Div. 648, and following the decision of the Court of Common Pleas in Freeth *v.* Burr, L. R., 9 C. P. 208. "But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment. Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in Simpson *v.* Crippin, and to disparage the decisions in Hoare *v.* Rennie and Honck *v.* Muller, above cited, yet in the House of Lords Simpson *v.* Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck *v.* Muller, distinguished Hoare *v.* Rennie and Honck *v.* Muller from the case in judgment. 9 App. Cas. 444.

"Upon a review of the English decisions, the rule laid down in the earlier cases of Hoare *v.* Rennie and

Coddington *v.* Paleologo, as well as in the later cases of Reuter *v.* Sala and Honck *v.* Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson *v.* Crippin and Brandt *v.* Lawrence, and to accord better with the general principles affirmed by the House of Lords in Bowes *v.* Shand, while it in no wise contravenes the decision of that tribunal in Mersey Co. *v.* Naylor.

"In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are Hill *v.* Blake, 97 N. Y. 216, which accords with Bowes *v.* Shand, and King Phillip Mills *v.* Slater, 12 R. I. 82; 34 Am. Rep. 603, which approves and follows Hoare *v.* Rennie. The recent cases in the Supreme Court of *Pennsylvania*, cited at the bar, support no other conclusion. In Shinn *v.* Bodine, 60 Pa. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, 'coal to be delivered on board vessels as sent for during months of August and September,' was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan *v.* McKee, 77 Pa. St. 228, and in Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for and used a previous instalment of the goods. The decision of the Supreme Judicial Court of *Massachusetts* in Winchester *v.* Newton, 2 Allen (Mass.) 492, resembles that of the House of Lords in Mersey Co. *v.* Naylor.

"Being of opinion that the plaintiff's failure to make such shipments in February and March, as the contract required, prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk *v.* Spence, 4 Camp. 329; Graves *v.* Legg, 9 Exch. 709; Reuter *v.* Sala, 4 C. P. Div. 239."

In Gardner *v.* Clark, 21 N. Y. 399, *reversing* 6 How. Pr. (N. Y.) 449, the contract was that the buyer should pay upon the delivery of each instalment. It was held that by failure to pay upon demand as agreed upon the whole contract was broken; also that the seller did not waive his right to demand payment by failing to exercise it at the first and second deliveries. And see Bright *v.* Dean, 2 N. Y. Supp. 658.

But see Blackburn *v.* Reilly, 47 N. J. L. 290; 54 Am. Rep. 159, where the court, in adopting the rule laid down in Mersey Steel, etc., Co. *v.* Naylor, L. R., 9 App. Cas. 434, said by Dixon, J.: "Defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default is such as to evince an intention to abandon the contract, or a desire no longer to be bound by its terms." But there was reason to suppose there had been a waiver in this case. And see Trotter *v.* Heckscher, 40 N. J. Eq. 612; Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351; Lee *v.* Sickles Saddlery Co., 38 Mo. App. 201; Bigelow *v.* Bemis, 2 Allen (Mass.) 496; Miller *v.* Moore, 83 Ga. 685; 20 Am. St. Rep. 329. See also a note by Mr. Landreth in 21 Am. Law Reg. (N. S.) 398, maintaining that the weight of American authority is opposed to the rule as laid down in Norrington *v.* Wright, 115 U. S. 188.

The failure to deliver an instalment does not terminate the contract, unless a buyer sees fit to so treat and regard it. O'Neill *v.* James, 43 N. Y. 84; and if he waives the delivery of the whole or any part of an instalment, he does not acquire the right to carry it to the next instalment and demand the amount then due together with the deficiency on the preceding instalment. Johnson *v.* Allen, 78 Ala. 387; 56 Am. Rep. 34.

A suit having arisen between the parties to a sale of ore, a manager was, with their consent, placed by the court in possession of the seller's mine to make deliveries and receive payments. A creditor of the seller attached the money due him for ore in the hands of the buyer, who thereupon refrained

ever, the contract is not entire, but one made up of several independent agreements, a breach of one part does not affect the remainder.[1]

(15) *Constructive or Symbolical Delivery.*—The law only requires such a delivery as is consistent with the nature and situation of the thing sold, and so where the goods are ponderous or bulky, or cannot conveniently be delivered manually, or where they are not in the personal custody of the seller, actual delivery is dispensed with and symbolical or constructive delivery will suffice.[2] Thus, sufficient delivery in the performance of the

from making payment for the last monthly shipment, on account of which the manager stopped shipments for three months. It was held that a decree that the buyers should, after the expiration of this time, receive, in addition to their regular monthly quotas, parts of the ore which had been detained by the manager, was erroneous. Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678.

Rule in England.—There has also been much conflict in the English cases. Hoare *v.* Rennie, 5 H. & N. 19; 29 L. J. Exch. 73, and Honck *v.* Müller, 7 Q. B. Div. 92, holding that the failure to make or accept delivery of one instalment enabled the other party to rescind the contract, while Simpson *v.* Crippin, L. R., 8 Q. B. 14, holds that such failure does not enable the other party to rescind. It is impossible to reconcile these conflicting decisions, and it is, in fact, unnecessary, since Lord Selborne, in Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 434, *aff'g* 9 Q. B. Div. 648, laid down an intelligible principle by which the courts may be guided in the future. He said: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation and to an absolute refusal to perform the contract such as would amount to rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." And see Freeth *v.* Burr, L. R., 9 C. P. 208; Withers *v.* Reynolds, 9 App. Cas. 438, and Pordage *v.* Cole, 1 Wm. Saund. 543 (ed. 1871), n. And examine and compare Jonassohn *v.* Young, 4 B. & S. 296; 32 L. J., Q. B. 385; 116 E. C. L. 295; Bradford *v.* Williams, L. R., 7 Exch. 259; Brandt *v.* Lawrence, 1 Q. B. Div. 344; and Reuter *v.* Sala, 4 C. P. Div. 339.

1. See Veerkemp *v.* Hulburd, Canning, etc., Co., 58 Cal. 229; 41 Am. Rep. 265 (sale of all the fruit that seller should raise); CONTRACT, vol. 3. pp. 916–920.

It seems to be regarded as a general rule, that where the performance of the contract is to be carried out by separate deliveries, called for at the option of the buyer, each delivery is in the nature of a separate and distinct contract, and consequently a failure to respond to one demand of the buyer is not a breach of the entire contract, and does not affect the other deliveries. Deming *v.* Kemp, 4 Sandf. (N. Y.) 147. Here there was a contract for the delivery of carbon, during the winter following, at various times as the buyer might require, not exceeding forty tons, and in parcels of 20,000 pounds. It was held that "these separate deliveries were to be considered as in their nature separate contracts." This case is quoted and its ruling is followed in Johnson *v.* Allen, 78 Ala. 387; 56 Am. Rep. 34. And in Wood's Mayne on Damages (1st Am. ed.), § 206, it is said: "But where the contract is to deliver goods at certain periods in specified quantities, this is in fact a set of different contracts."

2. Story on Sales (4th ed.), §§ 311–311b; Benj. on Sales (6th Am. ed.), § 696; Gant *v.* Broadway (Arizona, 1887), 15 Pac. Rep. 862; 2 Kent's Com. 500. In Chaplin *v.* Rogers, 1 East 192, it was said by Lord Ellenborough that "Where goods are ponderous and incapable of being handed over from one to another there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property." Ellis

contract may be made by delivering the key of the warehouse in which the goods are stored,[1] or by a transfer of the warehouse

v. Hunt, 3 T. R. 464; Wilkes *v.* Fontaine, 5 Johns. (N. Y.) 335; Hayden *v.* Demets, 53 N. Y. 426; Glasgow *v.* Nicholson, 25 Mo. 29 (delivery of city weigher's certificate); Jewett *v.* Warren, 12 Mass. 300; 7 Am. Dec. 74; Kingsley *v.* White, 57 Vt. 565; Ruffer *v.* U. S., 15 Ct. of Cl. 291; Bolin *v.* Huffnable, 1 Rawle (Pa.) 20; Lambeth *v.* Wells, 12 Rob. (La.) 51; Cocke *v.* Chapman, 7 Ark. 197; Atwell *v.* Miller, 6 Md. 10; 61 Am. Dec. 294; Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396; Van Brunt *v.* Pike, 4 Gill (Md.) 270; 45 Am. Dec. 126; Boynton *v.* Veazie, 24 Me. 286; McKee *v.* Garcelon, 60 Me. 167; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9; 99 Am. Dec. 572; Wheeler *v.* Nichols, 32 Me. 233 (symbolic delivery of property under attachment); Hinde *v.* Whitehouse, 7 East 558 (goods in custody of revenue officers, duty not having been yet paid). See also Noble *v.* Smith, 2 Johns. (N. Y.) 52; 3 Am. Dec. 399; CROPS, vol. 4, p. 893; FRAUDULENT SALES, vol. 8, p. 890. Constructive delivery may be made where the goods sold, though ordinarily susceptible of being handed are not so at the time of the sale because they are not in seller's possession. Thus where goods are assigned while under attachment, delivery may be effected constructively by a delivery of the instrument of assignment. Whipple *v.* Thayer, 16 Pick. (Mass.) 25; 25 Am. Dec. 626; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388; 23 Am. Dec. 688; Wheeler *v.* Nichols, 32 Me. 240. *Compare* Stevens *v.* Stewart, 3 Cal. 140, holding that symbolic delivery is effective only when followed by actual delivery.

There should be some act indicating a purpose to pass the property absolutely to another. Barrett *v.* Turner, 2 Neb. 172.

Upon the sale and purchase of a wagon, at public auction, the delivery is sufficient if the wagon be pointed out when it is put up for sale, and the purchaser is informed, when he bids it off, that he can take it, though the purchaser may not remove it, or take manual possession of it. Beller *v.* Block, 19 Ark. 566.

See also CONSTRUCTIVE, vol. 3, p. 763; DELIVERY, vol. 5, p. 520*a*. Questions concerning constructive delivery arise most frequently in fraudulent sales and in questions concerning the delivery necessary to satisfy the statute of frauds. See FRAUDULENT SALES, vol. 8, p. 890. FRAUDS, STATUTE OF, vol. 8, pp. 729–731.

Part Delivery.—For a delivery of part, as indicating a delivery of the whole, see Boynton *v.* Veazie, 24 Me. 286 (delivery of a raft of lumber as indicating delivery of all lumber of same mark). Hammond *v.* Anderson, 1 N. R. 69; Kohl *v.* Lindley, 39 Ill. 195; 89 Am. Dec. 294.

In Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86, it was said by Littledale, J.: "It is said that there was a part delivery here, and that that, in point of law, operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of the part is intended to be a delivery of the whole."

And in Pratt *v.* Chase, 40 Me. 269, it was held that a receipt acknowledging payment and delivery of a portion of the goods sold did not necessarily transfer to the buyer title in the whole of the property; that the intention of the parties was to govern; and whether a delivery of the part is meant to be for the whole must be determined by the jury. The same view is held in Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; and Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86.

Where it is the custom to detain until certain disbursements are paid, a delivery of a part is not constructive delivery of the whole. Holderness *v.* Shackels, 8 B. & C. 618; 15 E. C. L. 315.

1. Packard *v.* Dunsmore, 11 Cush. (Mass.) 282 (delivery of key with intent to surrender possession sufficient as against subsequent attaching creditors of seller). Wilkes *v.* Fontaine, 5 Johns. (N. Y.) 335 (same); Parker *v.* Jervis, 34 How. Pr. (N. Y.) 257; 3 Abb. App. Dec. (N. Y.) 444 (same); Benford *v.* Schell, 55 Pa. St. 393 (delivery of safe by handing over the key to it and also key to room in which it stood). Gray *v.* Davis, 10 N. Y. 285; Vining *v.* Gilbreth, 39 Me. 496 (delivery of a shop sold made by handing over the key).

In Chappel *v.* Marvin, 2 Aik. (Vt.) 79; 16 Am. Dec. 684, there was an actual delivery of a portion of the goods sold and a delivery of the key of a

receipt.[1] So, also, delivery may be effected by the transfer of a bill of sale, particularly in the case of a vessel and cargo at sea,[2]

shop containing the residue, to a third person in pursuance of the agreement. It was held that this constituted a delivery of the whole so as to enable the buyer to maintain trespass against a subsequent purchaser, notwithstanding such purchaser first obtained actual possession by borrowing the key of the third party.

1. Tuxworth *v.* Moore, 9 Pick. (Mass.) 347; 20 Am. Dec. 479; Farnum *v.* Pitcher, 151 Mass. 470; Davis *v.* Russell, 52 Cal. 611; 28 Am. Rep. 647; Horr *v.* Barker, 8 Cal. 609; Adams *v.* Foley, 4 Iowa 44; Hayden *v.* Demets, 53 N. Y. 427; *aff'g* 34 N. Y. Super. Ct. 344; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; 4 Am. Dec. 364; Gibson *v.* Stevens, 8 How. (U. S.) 384; Zwinger *v.* Samuda, 7 Taunt. 265 (transfer of dock warrants).

It has been held in *Oregon* that where the warehouse receipt is not in negotiable form, but restricts the warehouseman's undertaking to a delivery to the bailor personally, an assignment of the receipt does not pass the possession of the property without the warehouseman's consent. Gill *v.* Frank, 12 Oregon 507; 53 Am. Rep. 378. And see Mitchell *v.* McLean, 7 Fla. 329; Hallgarten *v.* Oldham, 135 Mass. 1; 46 Am. Dec. 432. But it passes the property and is a sufficient delivery as between the buyer and the seller. Salter *v.* Woollams, 2 M. & G. 650; 40 E. C. L. 559.

Delivery Order.—In Edwards *v.* Meadows, 71 Ala. 42, one party agreed to sell to another a threshing machine, which had been loaned to, and was at the time in the possession of, a third party, and gave to the purchaser an order on the party in possession for the machine, the purchaser giving his note for the purchase money. It was held that, in the absence of proof that the parties so intended, this did not constitute a delivery of the machine, or vest the title thereto in the purchaser; that to constitute a delivery in such a case, the party in possession must deliver the machine, or consent to attorn to the purchaser so as to become his bailee. *Compare* Sahlman *v.* Mills, 3 Strobh. (S. Car.) 384; 51 Am. Dec. 630.

But a seller's order on the captain of a vessel to deliver to the buyer's agent at the destined port, goods already on board and consigned to seller's agent there, was held to constitute a good constructive delivery, although vessel and goods were lost before reaching port. Davis *v.* Jones, 3 Houst. (Del.) 68.

Where flour was deliverable upon a day certain, and the seller sent the buyer a delivery order upon a barge, in the hold of which the flour was deposited, but the captain of the barge declined to deliver the flour when demanded, and said that he would do so as soon as he could get his boat up to the dock, which was not until after the time limited for delivery, it was held that the giving of the delivery order was not a compliance with the contract, there being no actual delivery, or tender of delivery, on the day specified. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133.

2. Brinley *v.* Spring, 7 Me. 241; Smith *v.* Davenport, 34 Me. 520; Whipple *v.* Thayer, 16 Pick. (Mass.) 25; 26 Am. Dec. 626; Southworth *v.* Sebring, 2 Hill (S. Car.) 587; Harper *v.* Dougherty, 2 Cranch (C. C.) 284; D'Wolf *v.* Harris, 4 Mason (U. S.) 515; Atkinson *v.* Maling, 2 T. R. 462; 1 Revised Rep. 524; SHIPPING. See also Gardner *v.* Howland, 2 Pick. (Mass.) 599; Badlam *v.* Tucker, 1 Pick. (Mass.) 389; 11 Am. Dec. 202; Nair *v.* Glennie, 4 M. & S. 240.

The transfer is effected by delivery of the bill of sale subject to be defeated by the negligence of the buyer in failing to take actual possession within a reasonable time after the ship arrives. Brinley *v.* Spring, 7 Me. 241; Joy *v.* Sears, 9 Pick. (Mass.) 4; Putnam *v.* Dutch, 8 Mass. 287; Turner *v.* Coolidge, 2 Met. (Mass.) 350; Meeker *v.* Wilson, 1 Gall. (U. S.) 421; Dawes *v.* Cope, 4 Binn. (Pa.) 258.

Constructive delivery by bill of sale is by no means confined to the sale of vessels, but applies to sales of other personalty as well. See Gibson *v.* Stevens, 8 How. (U. S.) 397; Ingalls *v.* Herrick, 108 Mass. 351; 11 Am. Rep. 360; Dugan *v.* Nichols, 125 Mass. 43; Hardy *v.* Potter, 10 Gray (Mass.) 89; Thorndike *v.* Bath, 114 Mass. 116; 19 Am. Rep. 318; Whipple *v.* Thayer, 16 Pick. (Mass.) 25; 26 Am. Dec. 626; Trieber *v.* Andrews, 31 Ark. 163; Manton *v.* Moore, 7 T. R. 67; Stoveld *v.* Hughes, 14 East 308. See also McKee *v.* Garcelon, 60 Me. 165; 11 Am. Rep. 200, where delivery of cattle sold was held not sufficiently made by

or of a bill of lading for goods in course of transportation.[1] Delivery of the foregoing character is usually known as symbolical delivery, as distinguished from other forms of constructive delivery, and is generally to be preferred as affording more positive evidence of the transfer of title.[2]

Constructive delivery may also be made by an arrangement that the seller, or some third party in possession of the goods, shall hold them as bailee of the buyer,[3] or by a mere agreement

mere bill of sale, and Dempsey *v.* Gardner, 127 Mass. 381; 34 Am. Rep. 389; Packard *v.* Wood, 4 Gray (Mass.) 307; Floege *v.* Wiedner, 77 Tex. 311.

If goods in the possession of a third party are sold, and a bill of sale given to the buyer, and notice of the sale given to the third party with a request that he hold the goods as bailee for the buyer, it will constitute a valid constructive delivery, although the third party does not consent to hold them. Carter *v.* Willard, 19 Pick. (Mass.) 1; but if no notice is given to the person in possession, and there is nothing to prevent actual delivery, a bill of sale will not suffice. Burge *v.* Cone, 6 Allen (Mass.) 412; Solomons *v.* Chesley, 58 N. H. 238.

1. By Transfer of Bill of Lading.—Benj. on Sales (6th Am. ed.), § 813; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386; Lickbarrow *v.* Mason, 2 T. R. 63; 1 H. Bl. 360; 5 T. R. 683; 1 Smith's L. Cas. (ed. 1879) 753. See also Peters *v.* Ballistier, 3 Pick. (Mass.) 495; First Nat. Bank *v.* Northern R. Co., 58 N. H. 204; Pratt *v.* Parkman, 24 Pick. (Mass.) 42; Adams *v.* Steamer Trent, 19 La. Ann. 262; First Nat. Bank *v.* McAndrews, 5 Mont. 325; 51 Am. Rep. 51; Allen *v.* Jones, 24 Fed. Rep. 11. See also BILL OF LADING, vol. 2, p. 240.

But the mere indorsement of the bill of lading, without a delivery of it, does not transfer the property in the goods. Buffington *v.* Curtis, 15 Mass. 528; 8 Am. Dec. 175.

2. Symbolical delivery is often used as synonymous with constructive delivery, but it is rather a particular species of the latter. See Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9; And. L. Dict., *Delivery;* Abb. L. Dict., *Delivery.*

The symbol employed must have been delivered with the intention of transferring the title to the property sold, and must be of such a character as to indicate such transfer. Therefore, where there was a sale of oxen, a delivery merely of the brass knobs which had been worn upon their horns is not sufficient to act as a symbolical delivery of the oxen, unless the parties had so specially agreed. Clark *v.* Draper, 19 N. H. 419.

For other instances of symbolic delivery, see Cooke *v.* Hallett, 119 Mass. 148 (delivery of stock by transfer of certificate); Winslow *v.* Fletcher, 53 Conn. 398; 55 Am. Rep. 122.

3. Thus, in Barney *v.* Brown, 2 Vt. 374; 19 Am. Dec. 720, the buyer having purchased a number of sheep, which were then in the possession of B, requested B to act for him in the selection of the sheep and to take a delivery of and keep them for him. B assented, and shortly afterwards the selection was made and the sheep delivered by the seller to B, who marked them with the buyer's name and kept them as before. The sheep being attached by the creditor of the seller, it was held that there had been a sufficient delivery of possession, and that the attaching creditor was liable to the buyer for trespass. Other cases sustain the same view. Potter *v.* Washburn, 13 Vt. 558; 37 Am. Dec. 615; Shumway *v.* Rutter, 8 Pick. (Mass.) 443; 19 Am. Dec. 340; Cushing *v.* Breed, 14 Allen (Mass.) 376; 92 Am. Dec. 777; Bullard *v.* Wait, 16 Gray (Mass.) 55; Carpenter *v.* Graham, 42 Mich. 191 (in this case the barrels of oil sold were a small part of a large stock—the agreement by seller to act as bailee was considered a sufficient delivery as against the seller's creditors, although the barrels sold had not been designated or set apart); Webster *v.* Anderson, 42 Mich. 554; 36 Am. Rep. 452 (sale of hogs); Buhl Iron Works *v.* Tenton, 67 Mich. 630; Hodges *v.* Hurd, 47 Ill. 363 (delivery effected by mere notice to bailee, of the transfer); Walden *v.* Murdock, 23 Cal. 541; 83 Am. Dec. 135 (sale of cattle roaming at large—collecting them and branding with buyers' name held sufficient delivery); Barrett *v.* God-

between the parties; as where a large lot of floating lumber was sold and the seller verbally assured the buyer that he thereby transferred his possession.[1]

(16) *Non-Delivery Through Accident.*—Where a contract is made for the sale and delivery of certain specified articles under circumstances where the title does not pass, and the property is destroyed by accident, before delivery, without the fault of the seller, the latter is not liable upon the contract for damages sustained by the buyer.[2]

(17) *As to Creditors and Subsequent Purchasers.*[3]—(See FRAUDULENT SALES, vol. 8, pp. 786 *et seq.*)

2. Buyer's Duties—*a.* IN GENERAL.—In general and in the absence of express stipulations imposing other conditions, it may be

dard, 3 Mason (U. S.) 107; Hatch *v.* Lincoln, 12 Cush. (Mass.) 31 (carrier as bailee); Hatch *v.* Bayley, 12 Cush. (Mass.) 27; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Ingalls *v.* Herrick, 108 Mass. 351; 11 Am. Rep. 360; Robinson *v.* Safford, 57 Me. 163; Lane *v.* Sleeper, 18 N. H. 214; Stowe *v.* Taft, 58 N. H. 445; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Bates *v.* Conkling, 10 Wend. (N. Y.) 390; Cartwright *v.* Phoenix, 7 Cal. 281; Montgomery *v.* Hurt, 5 Cal. 366; Keil *v.* Harris (Pa. 1886), 6 Atl. Rep. 750; Means *v.* Williamson, 37 Me. 558; Hardy *v.* Potter, 10 Gray (Mass.) 89 (sale of lumber); Lucas *v.* Dorrien, 7 T. R. 278; Searle *v.* Reeves, 1 Esp. 598; Bentall *v.* Burn, 3 B. & C. 423; 10 E. C. L. 138. See also FRAUDULENT SALES, vol. 8, pp. 890 *et seq.*, where many cases are collected.

Constructive possession accompanies the title to cattle running on a range which is common pasturage to everybody, for they are in the actual possession of no one. Budd *v.* Power, 9 Mont. 99.

Goods in Possession of Buyer.—Where the goods are in the possession of the buyer at the time of the sale, no formal delivery is necessary. Lake *v.* Morris, 30 Conn. 201; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202 (sale by a partner to his copartner); Chapman *v.* Searle, 3 Pick. (Mass.) 45; Warden *v.* Marshall, 99 Mass. 305; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Nichols *v.* Patten, 18 Me. 231; 36 Am. Dec. 713; Manton *v.* Moore, 7 T. R. 67; 4 Revised Rep. 376; Pressel *v.* Bice, 142 Pa. St. 263 (whether sufficient change of possession question for jury).

Sale of an Undivided Interest.—The same rule applies to sales of undivided interests by one tenant in common to another. Kittredge *v.* Sumner, 11 Pick. (Mass.) 50. And where one advanced money to the constructor of certain machines, to enable him to manufacture them, under an agreement that he should have a share in the machines equal to the advances so made, he becomes thereby a tenant in common with the constructor without any manual delivery. Beaumont *v.* Crane, 14 Mass. 400.

1. Jewett *v.* Warren, 12 Mass. 300; 7 Am. Dec. 74; Hutchins *v.* Gilchrist, 23 Vt. 88 (such delivery is valid as against the seller's creditors); Cartwright *v.* Phœnix, 7 Cal. 281; 2 Kent's Comm. (4th ed.) 591; Story on Sales (4th ed.), § 311b.

2. Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415. A party who contracted to sell all the pine blocks cut by a certain mill during the sawing season, is excused from delivering any for three months, where the failure is caused by the mill shutting down during that time. McFadden *v.* Aletherbee, 63 Mich. 390.

3. It must be noticed that if, after delivery has been made, the parties mutually agree to rescind the sale, the same formalities of delivery, etc., are necessary to revest the property in the original seller, as against creditors and other third parties, which were necessary in the first instance. Quincy *v.* Tilton, 5 Me. 277; Gleason *v.* Drew, 9 Me. 79; State *v.* Intoxicating Liquors, 61 Me. 520. See also Beecher *v.* Mayall, 16 Gray (Mass.) 376, where the delivery was held sufficient in such a case, though the original buyer retained possession in order to make repairs for the seller. *Compare* Shaul *v.* Harrington, 54 Ark. 305 (redelivery

said that the seller having performed his part of the contract, the duties of the buyer are, first, to accept the goods, and, second, to pay the price.[1]

b. ACCEPTANCE—(1) *In General; Nature of Duty.*—Acceptance, in its relation to the statute of frauds, is treated elsewhere.[2] Acceptance, at common law, is the correlative of delivery. Upon delivery by the seller[3] the duty of acceptance by the buyer follows.[4] As has been said elsewhere, the obligation to accept may require a buyer to send for the goods,[5] and for an unreasonable delay in doing this he may render himself liable in damages.[6]

held unnecessary as against buyer's purchaser).

1. Benj. on Sales (6th. ed.), § 669.

2. See FRAUDS, STATUTE OF, vol. 8, p. 729.

3. The buyer's duty to accept depends altogether on the sufficiency or insufficiency of the delivery offered by the seller. Benj. on Sales (6th Am. ed.), § 701. We have seen, *supra*, this title, *Delivery*, that delivery must be made of the quantity and quality of goods called for by the contract, at the proper time and place. See also IMPLIED WARRANTY, vol. 10, pp. 127 *et seq.*; WARRANTY.

An instruction is wrong which permits the jury to find for the plaintiff (the seller) without finding either an acceptance by the buyer or that goods of the quality required by the contract were delivered at the time and place agreed on. Brewer *v.* Housatonic R. Co., 104 Mass. 594.

As to what facts will authorize the buyer to refuse to accept the goods purchased, see Fenton *v.* Braden, 2 Cranch (C. C.) 550; Murphy *v.* Toner, 19 Ind. 228; Downer *v.* Thompson, 6 Hill (N. Y.) 208.

4. The duty of acceptance is one imposed by the contract, and if the buyer refuses compliance with it the law presumes an acceptance and allows the seller to maintain an action for goods sold and delivered without any proof of actual acceptance. Nichols *v.* Morse, 100 Mass. 523; Barton *v.* McKelway, 22 N. J. L. 165 (where defendant tendered delivery at proper time and place and left the goods at such place, it was no defense to an action for the price that no one was there to receive them); Rodman *v.* Guilford, 112 Mass. 405; Sedgwick *v.* Cottingham, 54 Iowa 512; Owen *v.* Matthews, 19 N. Y. Supp. 813; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 274 (goods shipped by steamer—no notice of arrival necessary). In Loftus *v.* Riley (Iowa, 1891), 50 N. W. Rep. 17, where the buyer rejected ten car loads of paving blocks after inspecting only two, and there was evidence that the remaining loads were superior to those rejected, he was held liable to pay for the latter unless they did not substantially conform to the specifications of the contract.

The buyer cannot refuse to accept because the goods were not packed in the usual wrappers with which he was familiar, it not appearing that he was injured by the seeming variance from his order. Forke *v.* E. C. Meacham Arms Co. (Tex. 1892), 19 S. W. Rep. 550.

The purchaser of coffee bearing the name of a district in Java in which it is grown cannot be compelled to accept coffee bearing the name of a plantation in an adjoining district, which is not so well known and which does not command so high a price. O'Donohue *v.* Leggett (N. Y. 1892), 31 N. E. Rep. 269.

5. See *supra*, this title, *Delivery—Extent of Duty in General.*—But where the goods are sent by carrier, and the seller has them consigned to himself, it is no delivery to the buyer, and he is not obliged to take them from the carrier or to make inquiry of the carrier for goods not consigned to him. Sohn *v.* Jervis, 101 Ind. 578.

6. "If the vendee make default in fetching away the goods within a *reasonable time* after the sale, upon request made by the vendor, the vendee will be liable for warehouse rent and other expenses growing out of the custody of the goods, or in an action for damages if the vendor be prejudiced by the delay." Benj. on Sales (6th Am. ed.), § 700; and per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426; also per Bayley, J., in Bloxam *v.* Sanders, 4 B. & C. 941; 10 E. C. L. 477. And see Nicholson *v.* Paston, 11 N. Y. Supp. 567; Dibble *v.* Corbett, 5 Bosw.

(2) *What Constitutes.*—Acceptance includes more than the mere receipt of that which is tendered; it comprehends a receipt of the goods in pursuance of a previous agreement and with the intention of retaining what is received.[1] The buyer is entitled to a reasonable time for examination and inspection

(N. Y.) 202 (fact that contract provided that title should not pass until delivery and acceptance no defense to action for unreasonable delay in accepting); Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Sanborn *v.* Benedict, 78 Ill. 309; Greaves *v.* Ashlin, 3 Camp. 426 (no time specified—parol condition that goods should be immediately removed is admissible as evidence); Maclean *v.* Dunn, 4 Bing. 722; 15 E. C. L. 129.

The seller having tendered proper delivery may recover all damages sustained by him by reason of the buyer's failure to receive and carry away the goods offered. Dibble *v.* Corbett, 5 Bosw. (N. Y.) 202.

In Cameron *v.* Wells, 30 Vt. 633, the buyer purchased two hundred bushels of corn lying at a mill, at a fixed price per bushel, to be paid for on delivery. Soon after the formation of the contract the buyer received and paid for one hundred and twenty bushels. Five years later he called for the remainder. It was held that too long a time had elapsed, and that the seller had a right to refuse delivery.

In Jones *v.* Gibbons, 8 Exch. 920, it was held no defence to an action by the buyer for non-delivery "as required," that he had not requested delivery within a reasonable time. If the seller wanted to get rid of his obligation because of unreasonable delay in taking the goods, or in requiring delivery, it was for him to offer delivery, or to inquire of the buyer whether he would take the goods, and he had no right to treat the contract as rescinded by mere delay.

1. See Black's L. Dict.

This distinction is recognized in the provision of the statute of frauds requiring an actual acceptance and receipt, etc. See FRAUDS, STATUTE OF, vol. 8, pp. 729, *et seq.* There may be a receipt without any acceptance, and an acceptance without any receipt. Blackb. on Sales (2d ed.), p. 22; Simpson *v.* Krumdick, 28 Minn. 355; Demens *v.* Le Moyne, 26 Fla. 323.

The acceptance required by the statute of frauds is by no means the same as an acceptance of the property in performance of the contract as showing the satisfaction of the buyer with the quality and quantity. Morton *v.* Tibbett, 15 Q. B. 428; 69 E. C. L. 428 (Lord Campbell). See also Gibbs *v.* Benjamin, 45 Vt. 124; Strong *v.* Dodds, 47 Vt. 351; Cusack *v.* Robinson, 1 B. & S. 299; 101 E. C. L. 298; Menzies *v.* Dodds, 19 Wis. 343; 2 Schouler on Pers. Prop. (2d ed.), § 404.

Where goods are sent by carrier, we have seen, *supra*, this title, *Delivery to Carrier*, that the carrier is the agent of the buyer to receive the goods and transport them, but he is not the buyer's agent to accept them. Pierson *v.* Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831.

What Constitutes an Acceptance.—What constitutes an acceptance must of course depend in each case upon the particular circumstances arising. An acceptance may be by express language, or, as is almost invariably the case, by a mere inference from the conduct of the buyer, as, for example, his detention of the property sold, or his exercising acts of ownership over it, etc. See 2 Schoul. on Pers. Prop. (2d ed.), §§ 406, 407. See also, for a particular case in which the evidence was held insufficient to establish acceptance, Gowing *v.* Knowles, 118 Mass. 232; Houdlette *v.* Tallman, 14 Me. 400 (question of law or fact); Clark *v.* Wright, 5 Phila. (Pa.) 439.

There must be some definite act of the parties which amounts to a transfer of possession and an actual receipt by the buyer depriving the seller of his lien for the price, in order to constitute an acceptance. Edwards *v.* Grand Trunk R. Co., 54 Me. 105. And see generally, Wilde *v.* Smith, 2 Ont. App. 8; Hamilton *v.* Myles, 24 U. C., C. P. 309; Cox *v.* Jones, 24 U. C., Q. B. 81.

In Hayner *v.* Sherrer, 2 Ill. App. 536, the buyer claimed that, upon receipt of goods purchased, he had written seller that he would not receive them because not shipped in time, and that they were held in his store subject to seller's order, which

and to determine whether the goods are of the character and quality provided for in the contract.[1] The receipt of the goods may become an acceptance if the right of rejection is not exercised within a reasonable time,[2] or if any act is done by the

letter was never received by seller. About ten days afterwards the buyer wrote the seller complaining of the amount of freight charges on the goods and saying: "The drill trade will be light this season. I'll do the best I can, and in case I don't get them off, would like you to help me." It was held that even if the buyer had written the letter declining to accept the drills, his subsequent letter, written while they were still in his possession, was of itself a sufficient acceptance and waiver of all former objections.

Where the buyer of wood saw a portion of it as it was delivered from day to day at the place designated in the contract, and examined it there and made no objection, he was held to have accepted the wood examined, though it had not been measured. Small *v.* Stevens, 65 N. H. 209.

1. See *supra*, this title, *Delivery; Right to Inspect.* The rule of the text is sustained in Shields *v.* Reibe, 9 Ill. App. 598 (and the right also to use just so much of the goods as are necessary to ascertain whether they answer the contract); Doane *v.* Dunham, 65 Ill. 512; Doane *v.* Dunham, 79 Ill. 131; Pierson *v.* Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831; Henkel *v.* Welsh, 41 Mich. 664; Knoblauch *v.* Kronschnable, 18 Minn. 302, and cases cited; Boughton *v.* Standish, 48 Vt. 594; Gilson *v.* Bingham, 43 Vt. 410; Bartholomae *v.* Paull, 18 W. Va. 771; Ancrum *v.* Wehmann, 15 S. C. 118; Fisk *v.* Tank, 12 Wis. 303; Woodle *v.* Whitney, 23 Wis. 55; 99 Am. Dec. 102 (may inspect and if not suitable return them and recover all sums paid with interest); Street *v.* Blay, 2 B. & Ad. 456; 22 E. C. L. 122; Toulmin *v.* Hedley, 2 C. & K. 157; 61 E. C. L. 155; Lorymer *v.* Smith, 1 B. & C. 1; 8 E. C. L. 1; Benj. on Sales (6th Am. ed.), § 701.

In some instances, owing to the peculiar circumstances of the case, this right may not exist, as, for example, in auction sales, or where the contract itself or a usage of trade forbids it. Pettit *v.* Mitchell, 4 M. & G. 819; 43 E. C. L. 423.

Evidence is admissible that under mercantile usage the proper storage of herring (or any other article of commerce) on receiving it without immediate examination, does not waive objections to its quality or variance from the order given. Henkel *v.* Welsh, 41 Mich. 665.

A rejection for only one reason may be a waiver of any other objection. Johnson *v.* Oppenheim, 55 N. Y. 291; Smith *v.* Pettee, 70 N. Y. 17; Knox *v.* Schoenthal (Supreme Ct.), 13 N. Y. Supp. 7; Kelly *v.* Berry, 39 Wis. 669.

Where the buyer examines the goods at the time of the purchase and says it is just what she wants, and orders certain alterations made at her expense and that it be delivered on board a certain vessel for shipment to her, a finding that she had accepted it is justified. Bozzoni *v.* Woodward (Supreme Ct.), 10 N. Y. Supp. 644.

Under a contract to deliver potatoes of a certain kind and size, in good shipping order, the receipt by the buyer of a part in bad shipping order is not a waiver of the quality. Hollfield *v.* Black, 20 Mo. App. 328.

Where the seller sold for clover seed a mixture of plantain, it was held that though the buyer was unable to look at them at the time of purchase, he was bound to examine them before sowing. Fox *v.* Everson, 27 Hun (N. Y.) 355.

Not Bound to Return.—If the goods tendered are not of the quantity or quality ordered, the buyer is not bound to send them back to the seller or to place them in neutral custody; he has only to notify the seller of his non-acceptance and that they are held thenceforward at his (the seller's) risk; Grimoldy *v.* Wells, L. R., 10 C. P. 391; 12 Moak's Rep. 451 (expressly overruling a *dictum* to the contrary in Couston *v.* Chapman, L. R., 2 Scotch Div. App. 250); Lucy *v.* Mouflet, 5 H. & N. 233; Heilbutt *v.* Hickson, L. R., 7 C. P. 438; 3 Moak's Rep. 328. But such notice may be waived by the seller. Wartman *v.* Breed, 117 Mass. 18; Suit *v.* Bonnell, 33 Wis. 180; and need not necessarily point out the alleged defects, especially if they be already known to the seller. American White Bronze Co. *v.* Gillette, 88 Mich. 231.

2. Merchin *v.* Ball, 68 Cal. 205; Pennell *v.* McAfferty, 84 Ill. 364; Hirshorn

v. Stewart, 49 Iowa 418 (six months an unreasonable time—question of reasonable time for the court); Mackey *v.* Swarts, 60 Iowa 711; Winelander *v.* Jones, 77 Iowa 401; Knoblauch *v.* Kronschnabel, 18 Minn. 302; Haase *v.* Nounemacher, 21 Minn. 486; Lee *v.* Bangs, 43 Minn. 23; Rosenfield *v.* Swenson, 45 Minn. 190; Reed *v.* Randall, 29 N. Y. 358; Bartholomae *v.* Paull, 18 W. Va. 779; Empire Steam Pump Co. *v.* Inman, 59 Hun (N. Y.) 230; Golden Gate Concentrator Co. *v.* Caplice, 55 N. Y. Super. Ct. 439; Coplay Iron Co. *v.* Pope, 108 N. Y. 232; Neaffie *v.* Hart, 4 Lans. (N. Y.) 4; Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40; Reimers *v.* Ridner, 17 Abb. Pr. (N. Y.) 292; Greenthal *v.* Schneider, 52 How. Pr. (N. Y.) 133; Duford *v.* Patrick (Supreme Ct.), 15 N. Y. Supp. 285; U. S. Reflector Co. *v.* Rushton, 7 Daly (N. Y.) 410; Downs *v.* Marsh, 29 Conn. 409; Delamater *v.* Chappell, 48 Md. 244; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; McCormick Harvesting Machine Co. *v.* Martin, 32 Neb. 723; Clark *v.* Wright, 5 Phila. (Pa.) 439; Pratt *v.* Peck, 70 Wis. 620; Gammon *v.* Abrams, 53 Wis. 323; Comstock *v.* Sanger, 51 Mich. 497; Graff *v.* Foster, 67 Mo. 512; Goodhue *v.* Butman, 8 Me. 116; Cash *v.* Giles, 3 C. & P. 407; 14 E. C. L. 372; Percival *v.* Blake, 2 C. & P. 514; 12 E. C. L. 241; Milner *v.* Tucker, 1 C. & P. 15; 11 E. C. L. 300 (six months' retention of chandelier); O'Kell *v.* Smith, 1 Stark. 107; 2 E. C. L. 50; Beverley *v.* Lincoln Gaslight, etc., Co., 6 A. & E. 829; 33 E. C. L. 222; Harrison *v.* Allen, 2 Bing. 4; 9 E. C. L. 291; 9 Moore 28; Moss *v.* Sweet, 16 Q. B. 493; 71 E. C. L. 493; Bianchi *v.* Nash, 1 M. & W. 545; Couston *v.* Chapman, L. R., 2 Scotch & Div. App. 250; 3 Moak's Rep. 187. *Compare* Henkel *v.* Welsh, 41 Mich. 665 (this presumption rebuttable by proof of certain usage of trade); Shipman *v.* Graves, 41 Mich. 675; Yates *v.* Pym, 2 Marsh. 141; 6 Taunt. 446. See also *infra*, this title, *Conditional Sales;* Benj. Sales (6th Am. ed.), § 595.

In Treadwell *v.* Reynolds, 39 Conn. 31, A purchased by his agent a quantity of wool from B, a total stranger, whose name and address were unknown to A. Three days after receipt of the wool A notified his agent of his refusal to accept, but did not then or at any other time direct him to notify B, nor did he make any effort to notify him until six weeks afterwards, wool having then fallen two cents a pound. A's objection to the wool was solely on account of the fact that its delivery was delayed until after the time agreed upon. It was held that A's retention had been for longer than a reasonable time, and therefore amounted to an acceptance by him.

In Sanders *v.* Jameson, 2 C. & K. 557; 61 E. C. L. 555; it was proven that, by the custom of the Liverpool corn market, the buyer was only allowed one day for objecting that corn sold was not equal to sample, after which delay the right of rejection was lost, and Rolf, B., held it to be a reasonable usage, binding on the purchaser.

But where the purchaser of an article on trial asked the seller where he should notify him of the result of the trial, and the seller said he would call and learn the result, but did not call, and the buyer did not notify him of the failure until he chanced to meet him two months afterwards, it was held that there had been no acceptance. Gibson *v.* Vail, 53 Vt. 476.

In Spencer *v.* Hale, 30 Vt. 314; 73 Am. Dec. 309, the right to refuse acceptance was denied because the buyer had allowed an unreasonable time to elapse after receipt before indicating his refusal. The time was two days; all that was to be done was the inspection of a carload of posts. So where wine sold by sample was kept for seven weeks when one week would have sufficed. Couston *v.* Chapman, 2 Scotch & Div. App. 250; 3 Moak's Rep. 187.

Inspection Should be Made Promptly on Receipt.— Stafford *v.* Pooler, 67 Barb. (N. Y.) 143 (Contract in this case provided that rejection should be made immediately at time and place of delivery); Spencer *v.* Hale, 30 Vt. 314; 73 Am. Dec. 309 (right to reject must be exercised "immediately"); Boughton *v.* Standish, 48 Vt. 594 ("as soon as he has time and opportunity" to ascertain the defect); Couston *v.* Chapman, 2 Scotch & Div. App. 250; 3 Moak's Rep. 187 (buyer must inspect "without delay"); Sanders *v.* Jameson, 2 C. & K. 557; 61 E. C. L. 555 (custom to examine on day of sale).

It is said in one case to be the buyer's duty, when the article purchased is open and susceptible of ready inspection, and delivery is to be made at a specified place, to provide for its inspection before it has left the place of

buyer which he would have no right to do, unless as owner of the goods.[1]

delivery in pursuance of his directions. Pease *v.* Copp, 67 Barb. (N. Y.) 132; Stafford *v.* Pooler, 67 Barb. (N. Y.) 143; Dyment *v.* Thomson, 12 Ont. App. 659. *Compare* Pierson *v.* Crooks, 42 Hun (N. Y.) 576; Brownlee *v.* Bolton, 44 Mich. 219. But this is not the correct rule in all cases. Circumstances may forbid proper examination at any place other than the buyer's factory or place of business, etc., and in such cases inspection may properly be made after the goods have been forwarded from their place of delivery. Trotter *v.* Hiekscher, 40 N. J. Eq. 612.

In Toulmin *v.* Hedley, 2 C. & K. 157; 61 E. C. L. 155, the rule is laid down that when one has bought goods, to arrive on a particular ship, he has the right, on the arrival of the ship, to make an inspection in order to see whether the goods are of the character ordered. But if he allows the cargo to be landed and delivered he is estopped to refuse acceptance.

Cannot Annex Conditions to the Return.—The buyer, in offering to return the goods, cannot annex conditions, and if he does and the seller refuses to accept them, and the buyer thereupon retains the goods, he will be liable for the price. Howard *v.* Hayes, 47 N. Y. Super. Ct. 89.

An Exception.—The retention by the buyer of the goods sold for an unreasonable length of time is conclusive upon himself, but it seems that others are not estopped from showing that the title had not then passed to him. Thus, in Shipman *v.* Graves, 41 Mich. 675, the goods were forwarded for acceptance, if satisfactory, but acceptance and payment were delayed for an unreasonable length of time, and meanwhile the consignee became insolvent and made an assignment. In an action of replevin by the seller it was held that notwithstanding this unreasonable detention, the title had not passed to the buyer and was, therefore, not included in his assignment. See also Lentz *v.* Flint, etc., R. Co., 53 Mich. 444.

"It is only where the buyer, by some artifice of the seller, or under other circumstances imputing to himself no negligence, is really deprived of his proper opportunity to examine, that his right of acceptance after the seller has tendered delivery may not remain in abeyance." 2 Schoul. on Pers. Prop. (2d ed.), § 408; Dutchess Co. *v.* Harding, 49 N. Y. 321.

Detention of the goods and failure to notify seller of refusal to accept may not constitute an acceptance where, on delivery, it was agreed that the buyer should retain possession until the seller's agent should call for them. Suit *v.* Bonnell, 33 Wis. 180. See also Kahn *v.* Klabunde, 50 Wis. 235 (an agreement somewhat similar to the above; the question, being doubtful, was left to the jury; buyer's detention held only *prima facie* evidence of acceptance); Fairfield *v.* Madison Mfg. Co., 38 Wis. 346; and see Cole *v.* Homer Common Council, 53 Mich. 438; Mansfield Mach. Works *v.* Common Council, 62 Mich. 554, where articles were sold to be kept some time on trial.

1. White *v.* Hanchett, 21 Wis. 415, Schuchman *v.* Winterbottom, 58 N. Y. Super. Ct. 105; Underwood *v.* Wolf, 31 Ill. App. 637; *aff'd* 131 Ill. 425; 19 Am. St. Rep. 40; Freedman *v.* Morrow Shoe Mfg. Co., 122 Pa. St. 25; Dennis *v.* Stoughton, 55 Vt. 371; Hedden *v.* Roberts, 134 Mass. 38; 45 Am. Rep. 276; Hunter *v.* Leavitt, 36 Ind. 141.

In Parker *v.* Palmer, 4 B. & Ald. 387; 6 E. C. L. 529, the buyer, after seeing fresh samples drawn from the bulk of rice purchased by him, which were inferior in quality to the original sample by which he bought it, offered the rice for sale at a limited price at auction, but the limit was not reached and the rice not sold. He then rejected it as inferior to sample, but it was held that, by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score. In Chapman *v.* Morton, 11 M. & W. 534, the defendant, the purchaser of a cargo of oil-cake, had notified the seller that it did not come up to sample and had been stored at seller's risk, and that if he did not take it back or give directions as to its disposal, he would sell it and apply the proceeds in part satisfaction of his damages, for he had paid for the cargo by acceptances, before its arrival, and had taken up these acceptances, which were in the hands of third parties. The plaintiff wrote that he considered the transaction closed. The defendant then advertised the cargo in *his own name*,

and sold it in *his own name*, and by so doing was held to have accepted the cargo.

Where, by the terms of an executory agreement, the delivery of goods is to be at a specified place, to a specified person, who, as between the parties, is not authorized to inspect the goods, but has a general authority to receive, weigh and forward such goods as the seller sends, and goods are in fact received by this agent and by him consigned to another agent of the buyer at a distant place, for sale, the buyer will be held to have accepted the goods, and is precluded, in the absence of fraud, from subsequently calling in question the quantity or quality of the property sold, in an action brought by the seller for the contract price. Pease *v.* Copp, 67 Barb. (N. Y.) 132.

After a purchaser has retained goods for nearly two months without giving notice of his rejection of them, his appropriation of a part by a sale thereof will be an appropriation of the whole. Watkins *v.* Paine, 57 Ga. 50.

In Brown *v.* Foster, 108 N. Y. 387, plaintiff bought of defendant certain machinery, which, after it was set up, was rejected as unsatisfactory, but which, by seller's permission, he used for the purposes of his business until their manager reached the place. The manager made some alterations in the machinery, and the plaintiff thereafter, though still finding some fault with it, continued to use it for nearly three months until the close of the season's business, and then took it down and stored it with notice to defendants. It was held that the use of the machinery after the visit of the manager was, in law, an acceptance of the same, and that the buyer thereupon became liable for the contract price. But in Cooke *v.* Underhill Mfg. Co., 57 Hun (N. Y.) 107, where defendant asked plaintiffs to remove an engine put up by them, as it did not give satisfaction, but continued to use it, and in subsequent correspondence refused to change his opinion but still requested plaintiff to remove it, it was held that there was no acceptance of the engine by user, and that it was error to submit the question to the jury.

In Norton *v.* Dreyfuss, 106 N. Y. 90, a manufacturer delivered goods corresponding in quantity with the order of a purchaser, but some faults being alleged in their quality, he took them back and attempted to remedy the alleged defects, and finally redelivered the whole quantity to the buyer, who still claimed that they did not correspond with the articles the manufacturer had contracted to make. When the manufacturer demanded payment the buyer refused, and also, upon demand, refused to return the goods, saying that he would not give them up, as he wished to consult his counsel as to his right to keep them for reimbursement of damages. The trial court thereupon held that the refusal to return the goods amounted to an acceptance under the contract, but it was held that this was error, as the question was one of fact for the jury.

Retraction of Acceptance Where Sample Is Defective.— Where goods are bought and sold by sample, and accord with the sample, there is still an implied warranty that they are merchantable as to such matters as cannot be judged of by sample, and hence, where goods have been accepted and a latent defect, which renders them unmerchantable, afterwards appears, they may yet be rejected, although such defect existed in the sample. Thus, in Mody *v.* Gregson, L. R., 4 Ex. 49, the defendants, manufacturers, agreed to supply plaintiffs with a quantity of gray shirtings according to sample, each piece to weigh seven pounds. The goods were delivered and accepted according to sample, and of the agreed weight, but it was afterwards discovered that the weight was made up by introducing into the fabric 15 per cent. of china clay, which rendered the goods unmerchantable. The presence of the clay could not be discovered by an ordinary examination of the sample, and in an action against the defendants the plaintiffs were allowed to recover. In Hilbutt *v.* Hickson, L. R., 7 C. P. 438, there was a sale of 30,000 black army shoes as per sample. On the inspection of the shoes, the soles were not opened, and without opening them it was impossible to tell of what the fillings of the soles consisted. Shoes with paper in the soles were not fit for army shoes. After accepting a large quantity of the shoes, circumstances occurred which gave rise to suspicions on the part of the plaintiff that the shoes so accepted might contain paper in the soles, and on a considerable part of them being opened a very large proportion were found to contain paper in the soles. The plaintiffs gave notice to the defendants that they re-

Even where goods are not ordered, but are voluntarily sent to one, his receipt of them and exercise of ownership over them may constitute an acceptance and preclude him from denying his liability for the price.[1]

Acceptance may be conditioned upon some further performance by the seller, in which case the acceptance does not become absolute until the condition is performed.[2]

Where delivery is to be made by instalments, an acceptance of one instalment does not affect the buyer's right to refuse any subsequent instalment, when such subsequent instalment is not of the proper quality or quantity, or is not delivered within the time specified in the contract.[3]

jected the shoes delivered and refused to receive any more, and they were allowed to recover, although the sample shoe was found to contain a paper filling in the sole, as it was a defect which could not have been discovered by any inspection which ought reasonably to have been made.

In Drummond *v.* Van Ingen, 12 App. Cas. 284; 56 L. J., Q. B. 563, cloth merchants ordered of cloth manufacturers worsted coatings which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers and tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for the purposes of which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent and was not discoverable by due diligence upon such inspection as was ordinarily usual upon sales of cloths of that class. It was held, affirming the decision of the court of appeals, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily were used.

1. Retaining Goods Not Ordered.—Bartholomae *v.* Paull, 18 W. Va. 771 (what is a reasonable time within which the goods may be rejected is a question for the jury); Wellauer *v.* Fellows, 48 Wis. 105; Reed *v.* Randall, 29 N. Y. 358; Schouler on Pers. Prop. (2d ed.), § 407.

In a contract in writing for the delivery of a specified quantity of goods at a fixed price, if the purchaser receive more than he is entitled to, he must pay for the excess what it is worth, whether he had knowledge of it or not. Caldwell *v.* Dawson, 4 Metc. (Ky.) 121; Bours *v.* Watson, 1 Mill Const. (S. Car.) 393; Barton *v.* Kane, 18 Wis. 262; *supra*, this title, *Delivery—Quantity to be Delivered.*

2. Conditional Acceptance.—Thus in Belt *v.* Stetson, 26 Minn. 411, A and B entered into an agreement by which A was to furnish and put upon a building of B's, shutters corresponding with a particular sample and description and quality for a stipulated price, to be paid for after full performance. A furnished and partly put up shutters of an entirely different description, which B declined to accept; A, however, went on and put up such shutters with the understanding that he would thereafter so alter them as to satisfy the contract, and that B should not be obliged to take them or to make payment until that was done. Without altering the shutters or doing anything more A brought an action to recover the value of those put up. It was held that his action could not be maintained. See also Smith *v.* Brady, 17 N. Y. 173; 72 Am. Dec. 442; Uhlman *v.* Day, 38 Hun (N. Y.) 298.

3. In Hubbard *v.* George, 49 Ill. 275, G made a contract with H & B, by the terms of which he sold to them at a specified price a quantity of wheat by sample, to be delivered at a future time and to be of the same quality as the sample. Upon delivery of the first load, H inspected it and remarked that "it would do," but on the arrival of the other loads, they were examined by both H and B, and refused as not being equal to the sample, and thereupon G sold the grain to other parties. It was held, in an action by G to recover for non-

(3) *Effect.*—When there has once been an acceptance by the buyer it is absolutely binding and conclusive upon him. It renders him liable for the price agreed on, precludes him from alleging that the goods are not of the character and quality called for by the contract, or from insisting that a proper quantity was not delivered.[1] He is not estopped, however, from alleging that his

performance of the contract, that the declaration by H, upon the examination of the first load, that "it would do," could only be regarded as an admission that the wheat filled the sample to the extent of such load; that they were not thereby concluded as to the whole purchase, and had the right to reject the other loads if they were not equal to the sample. And see Pierson *v.* Crooks, 115 N. Y. 539; 12 Am. St. Rep. 831; Cahen *v.* Platt, 69 N. Y. 348; 25 Am. Rep. 203; Kipp *v.* Meyer, 5 Hun (N. Y.) 111; Plant Seed Co. *v.* Hall, 14 Kan. 553; *supra*, this title, *Delivery by Instalments*. But if a party accepts and pays for part of a quantity of goods delivered, without reserving the right to object subsequently, and does not offer to return such goods but retains them, he waives any defect in their quality and cannot make such defect a ground of objection to subsequent deliveries which are in accordance with the contract. Guernsey *v.* West Lumber Co., 87 Cal. 249. And see Mason *v.* Smith (Supreme Ct.), 8 N. Y. Supp. 301; Cahen *v.* Platt, 69 N. Y. 348; 25 Am. Rep. 203.

1. Mackey *v.* Swartz, 60 Iowa 710; Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587 (waives "all known and patent defects"); Goodhue *v.* Butman, 8 Me. 116 (not allowed to object to quality, there being no warranty or fraud); Haase *v.* Nonnemacher, 21 Minn. 486; Larrowe *v.* Lewis, 128 N. Y. 593; *aff'g* 58 Hun (N. Y.) 601; Studer *v.* Bleistein, 115 N. Y. 316; Welsh *v.* Gossler, 47 N. Y. Super. Ct. 104; Sprague *v.* Blake, 20 Wend. (N. Y.) 61; Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587; Pease *v.* Copp, 67 Barb. (N. Y.) 132; Reed *v.* Randall, 29 N. Y. 358; 86 Am. Dec. 310; McCormick *v.* Sarson, 45 N. Y. 265; 6 Am. Rep. 80; *aff'g* 38 How. Pr. (N. Y.) 190; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 519; U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75; Defenbaugh *v.* Weaver, 87 Ill. 132; Carondelet Iron Works *v.* Moore, 78 Ill. 69; Jones *v.* McEwan (Ky. 1891), 16 S. W. Rep. 81; Davidson *v.* Clark, 36 Ill. App. 313; Seay *v.* Diller (Tex. 1891), 16 S. W. Rep. 642; Proctor *v.* Spratley, 78 Va. 254; Vanderhorst *v.* M'Taggart, 2 Bay (S. Car.) 498; Mitchell *v.* McBee, 1 McMull. (S. Car.) 267; 36 Am. Dec. 264; Gilson *v.* Bingham, 43 Vt. 415; Cram *v.* Watson, 28 Vt. 22; Cole *v.* Champlain Transp. Co., 26 Vt. 87; Locke *v.* Williamson, 40 Wis. 377; Olson *v.* Mayer, 56 Wis. 551; Harnor *v.* Groves, 15 C. B. 667; 80 E. C. L. 667; Parker *v.* Palmer, 4 B. & Ald. 387; 6 E. C. L. 529; Street *v.* Blay, 2 B. & Ad. 456; 22 E. C. L. 122; Story on Sales (4th ed.), § 405; Implied Warranty, vol. 10, p. 108.

In Dowell *v.* Williams, 33 Kan. 319; *aff'd* 40 Kan. 753, there was a sale of hogs. Some time previous to delivery the seller expressed doubts to the buyer as to whether they were of the quality stipulated; the buyer did not then object, but when delivery was made he declined to receive them because they were not of proper quality. It was held that he had not waived his right to reject them by not objecting previous to the delivery.

In Giles' Lithographic, etc., Co. *v.* Chase, 149 Mass. 459; 14 Am. St. Rep. 439, defendants ordered certain cards subject to his acceptance of a finished proof. The proof was sent and returned by him marked "O. K." After the cards were printed it was discovered that a material misprint had been made and overlooked by both parties, and it was held that defendant could not refuse to accept them.

Acceptance is also a waiver of other grounds of objection, *e. g.*, that the property was not delivered at the time agreed upon. But in such case it is competent for the buyer to allege and prove that his acceptance was qualified by a reservation of the right to claim damages caused from the delay. Bock *v.* Healy, 8 Daly (N. Y.) 156; Baldwin *v.* Farnsworth, 10 Me. 414; 25 Am. Dec. 252 (delivery at another time and place); Adams *v.* Helm, 55 Mo. 468; Baker *v.* Henderson, 24 Wis. 509; Duford *v.* Patrick (Supreme Ct.), 15 N. Y. Supp. 285 (delivery of more).

acceptance was fraudulently obtained; nor is his right of action for a breach of warranty affected.[1]

c. PAYMENT AND TENDER.—The second and most important duty of the buyer in the performance of a contract of sale is to pay the price in the manner agreed upon.[2] By the terms of the sale absolute payment in cash may be required, or a conditional payment in promissory notes or acceptances, in both of which cases the payment is a condition precedent to the buyer's right of possession,[3] and sometimes to the vesting of the title to the sub-

1. See, generally, FRAUDULENT SALES, vol. 8, pp. 807 *et seq.*; IMPLIED WARRANTY, vol. 10, pp. 108, 111.

The receipt and retention of an article sold is not a waiver of the right to sue for a breach of warranty subsequently discovered, unless the fault was obvious at time of receipt. Scott *v.* Raymond, 31 Minn. 437; Cosgrove *v.* Bennett, 32 Minn. 371; Clements *v.* Smith, 9 Gill (Md.) 156; Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. Rep. 164; Polhemus *v.* Heiman, 45 Cal. 573; Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 42; Willard *v.* Merritt, 45 Barb. (N. Y.) 295; Gilson *v.* Bingham, 43 Vt. 410.

And where the buyer had seen the property before taking possession and had ample opportunity to examine it, and no concealment was used on the part of the seller nor fraudulent representations made, he cannot object, after his receipt and retention of the property, on the ground of fraud or deceit. Carondelet Iron Works *v.* Moore, 78 Ill. 65. See also Becker *v.* Brawner, 18 Ill. App. 39; Thompson *v.* Libby, 35 Minn. 443; 36 Minn. 287.

2. Benj. on Sales (6th ed.), § 706. The general subject of payment—what is sufficient to constitute it, when, where, and by and to whom it is to be made, the medium to be employed, etc. —is treated in PAYMENT, vol. 18, p. 148. See also SET OFF, vol. 22—TENDER. As to part payment to satisfy the statute of frauds. See FRAUDS, STATUTE OF, vol. 8, p. 736.

If the exact mode of payment is prescribed by the contract, the seller is not obliged to accept payment in any other way, nor is the buyer bound to tender it in any other way than that prescribed. Thus, in Wilmshurst *v.* Bowker, 2 M. & G. 792; 40 E. C. L. 629, the contract provided for "payment by banker's draft on London." The buyers instead sent their own acceptance for the price. It was held that this was no payment.

So in Galway *v.* Shields, 66 Mo. 313; 27 Am. Rep. 351, the agreement was that the goods should be paid for in specific land to be conveyed by the buyer to the seller. It was held that the seller could maintain no action, it appearing that the buyer was ready and willing to make the conveyance. The same principle is laid down in a case where the seller had agreed to take the debt of a third person in payment. Evans *v.* Cox, 3 Rich. (S. Car.) 106. Not so, however, where he had agreed to accept the notes of a third person, when, at the time the notes are tendered, the maker was insolvent. Benedict *v.* Field, 4 Duer (N. Y.) 154.

3. Where the sale is for cash, payment or tender is a condition precedent to the buyer's right of possession and the seller is not bound to deliver until payment is made or tendered. Barr *v.* Logan, 5 Harr. (Del.) 52; Bradley *v.* Michael, 1 Ind. 551; Kirby *v.* Studebaker, 15 Ind. 45; Whitney *v.* Eaton, 15 Gray (Mass.) 225 (agreement to give negotiable note); Cook *v.* Ferral, 13 Wend. (N. Y.) 285; Clarkson *v.* Carter, 3 Cow. (N. Y.) 84; Jennings *v.* West, 40 Kan. 372; Metz *v.* Albrecht, 52 Ill. 491. See also Wilmshurst *v.* Bowker, 2 M. & G. 792; 40 E. C. L. 629, where property in wheat passed to buyer but right of possession did not pass until payment.

Plaintiff, a merchant, shipped certain goods to the buyer which were to be paid for "cash on arrival." The goods were received and the freight paid, but the buyer failed to remit the purchase price. He stored the goods and within three days wrote to the plaintiff that he was unable to make the payment, but that the property was his and he had placed it in the hands of a reliable party who would care for it. Upon the receipt of this letter the plaintiff determined to take the property back, but in the meanwhile the goods had been attached by one of the creditors of the buyer. It was held that the sale and

ject of the sale in him.[1] Again, by agreement the buyer may have credit for a certain time without payment either absolute or

shipment were on condition of payment in cash upon arrival of the goods, and in an action of replevin the plaintiff was entitled to recover his property. Daugherty *v.* Fowler, 44 Kan. 628.

For a particular case where, though the sale was "terms cash," payment was held not a condition precedent to delivery, see Nelson *v.* Patrick, 2 C. & K. 641; 61 E. C. L. 641.

But the seller may waive his right, and having done so by making delivery he may maintain an action for the price. Presumption of payment does not arise from mere fact of delivery. Kirby *v.* Studebaker, 15 Ind. 45; Robbins *v.* Harrison, 31 Ala. 160; Payne *v.* Shadbolt, 1 Camp. 427; Warder *v.* Hoover, 51 Iowa 491.

Or he may rescind the contract and in some cases replevy the thing sold. D'Wolf *v.* Babbett, 4 Mason (U. S.) 289 (concealment of fact of insolvency); Goldsmith *v.* Bryant, 26 Wis. 35. In this last case carpets had been sold and delivered, and the seller was allowed to retake them on the ground that his delivery was conditioned on the immediate payment of the price.

Evidence of Cash Payment.—During negotiations concerning a proposed sale of certain patents the purchaser obtained an option on them for $1000, which was to be forfeited if the purchase was not completed within a certain time. The time, however, was extended in favor of the purchaser and the forfeiture waived. Subsequently a contract was entered into by the terms of which a cash payment of $1,500 was to be made. Five hundred dollars of this was paid by the purchaser, but he testified that the $1,000 paid on the previous contract was understood to be a part of the cash payment, and it was held that an unequivocal acknowledgment by the seller in the contract of the receipt of $1,500 in cash sufficiently established the claim of the purchaser that the $1,000 paid for the option formed part of the cash payment. Hull *v.* Pitrat, 45 Fed. Rep. 94.

Payment by Note.—The buyer of a sewing machine gave a note for the agreed price, and at the same time the seller agreed that cattle would be accepted in payment at a specified price, the legal title to the machine to remain in the seller until such payment. It was held that if the seller sent an agent to receive the cattle and deliver the note at the time and place appointed, and this was accordingly done, the title to the machine vested in the buyer; but another creditor being present and claiming a lien on the cattle, the buyer could deliver them to him and give back the note to the agent, whereby the payment and satisfaction of the note would be cancelled and the title to the machine again vests in the seller. Bolling *v.* Kirby, 90 Ala. 215; 24 Am. St. Rep. 789.

Delivery and Payment Concurrent.—It follows from what has been seen that where no special provisions exist as to payment or delivery, they are concurrent acts, and neither party can complain of a failure by the other until he himself has tendered performance of his own duty. Cole *v.* Swanston, 1 Cal. 51; 52 Am. Dec. 288; Fishback *v.* Van Dusen, 33 Minn. 111.

See *infra*, this title, *Mutual and Concurrent Conditions.*

But they are not concurrent when the sale is on credit. Thus a promise to pay for goods, partly in cash and remainder by note payable at a future date, is not a promise to pay on delivery. Harlow *v.* Sass, 38 Mo. 34.

When grain was sold to be paid for when weighed and no time was specified for weighing, this was a sale on credit, and delivery and payments were not concurrent. Bell *v.* Farrar, 41 Ill. 400.

1. Here the question, of course, depends on the character of the agreement. If there is an express stipulation that payment shall precede the vesting of the title in the buyer, no title passes, even though there is complete delivery, but in the absence of such understanding it seems that the transfer takes place merely by virtue of the executed contract. See *supra*, this title, *Sale of Specific Chattels Unconditionally; infra*, *Conditional Sales.*

In Upham Mfg. Co. *v.* Sanger, 80 Wis. 34, it appeared that in a contract to "sell, assort and deliver" certain lumber on cars, it was provided that the title to such lumber should pass to the defendants upon a partial payment therefor, allowing them to reserve fifty cents per thousand feet, to be paid upon the loading of the lumber on the cars. The lumber was burned before

conditional, and in such case he has a right to demand possession of the goods at once,[1] but in the absence of a special provision or understanding to the contrary a cash sale is generally presumed to have been contemplated,[2] and it is said that the buyer, if the goods are ready for delivery, must at once make payment without waiting for a demand from the seller, and that an action is maintainable against him for failure to do so.[3] But an offer by the buyer of an amount of money equal to the price of the goods sold is a tender of payment, and is as much a performance and,

loading and it was held that the plaintiff could recover the reserved sum.

Where the owner of certain patents agreed in writing "to sell and does hereby sell them" for a designated sum in cash, and another sum to be paid a year from date, and the purchaser has as part of the purchase price bound himself to convey to the seller two hundred lots within a certain time, with an abstract showing clear title, and also to convey to a trustee the title to other lands to secure the deferred purchase money, it was held that the conveyance of the lots to the seller, the execution of a trust deed, and the payment of the entire money consideration were conditions precedent for the vesting of the title to the patents in the purchaser, and that therefore the contract was only an executory contract of sale, and did not operate to pass the title. Hull *v.* Pitrat, 45 Fed. Rep. 94.

In Briggs *v.* McEwen, 77 Iowa 303, it was held that when a sale is made with the understanding that the title to the subject thereof is not to pass until full payment is made, the sale is not complete, although the property may have been delivered to the buyer.

1. Where Credit Is Given.—Where the sale is on credit, delivery is, of course, a condition precedent to the right to demand payment; though if it occurs that the seller retains possession until the time of credit has expired, his lien revives. Staunton *v.* Wood, 16 Q. B. 638; 71 E. C. L. 638; Spartali *v.* Benecke, 10 C. B. 212; 70 E. C. L. 212.

In computing the time of credit on a mercantile contract the day on which the contract was made is to be excluded from the reckoning. Webb *v.* Fairmaner, 3 M. & W. 473; 6 D. P. C. 549.

Until the time of credit is expired the seller has, of course, no right of action for the price. Broomfield *v.* Smith, 1 M. & W. 542; Heritage *v.* Lawrence, 2 F. & F. 532 (promise to pay before expiration of credit is *nudum pactum* and void); Price *v.* Nixon, 5 Taunt. 338; 1 E. C. L. 50; Ferguson *v.* Carrington, 3 C. & P. 457; 14 E. C. L. 387; 9 B. & C. 59; 17 E. C. L. 330 (this is true, even though it be proven that the goods were not bought in a fair way of trade but for a fraudulent purpose).

Credit Implied.—Credit will be implied where seller makes delivery without insisting upon payment, and in such case the buyer has a reasonable time after demand is made in which to tender payment. Anstedt *v.* Sutter, 30 Ill. 164; Powell *v.* Bradlee, 9 Gill & J. (Md.) 221.

2. That is that payment is to be made at the time of delivery. As is said in 2 Kent's Com. (13th ed.) *497: "Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and the delivery are immediate concurrent acts and the vendor may refuse to deliver without payment, and if the payment be not immediately made the contract becomes void." *Citing* Comyn's Dig., tit., *Agreement*, B. 3. And this rule is sustained in many cases. Robbins *v.* Harrison, 31 Ala. 160; Barr *v.* Logan, 5 Harr. (Del.) 52; Robinson *v.* Marney, 5 Blackf. (Ind.) 329; Hundley *v.* Buckner, 6 Smed. & M. (Miss.) 70; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56; Genin *v.* Thompkins, 12 Barb. (N. Y.) 265; Clark *v.* Dales, 20 Barb. (N. Y.) 61; Coil *v.* Willis, 18 Ohio 28; M'Combs *v.* McKennan, 2 W. & S. (Pa.) 216; 37 Am. Dec. 505; Goldsmith *v.* Bryant, 26 Wis. 34. See also CASH, vol. 3, pp. 31–34.

3. Benj. on Sales (6th ed.), § 707. *Compare* St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, where it was held that a promissory note being payable at a specified bank, the mere deposit of money in such bank to be applied in payment of the note does not constitute payment, the note not having been

discharge of his duty as an actual payment[1] if such tender be made unconditionally.[2]

It may be said generally that the buyer is discharged if the payment is made as directed by the seller.[3] If the seller directs that payment be made by mail, or if such direction is to be inferred from a well established usage, the money while thus in transit is at the risk of the buyer.[4]

left there by the holder for collection or payment. The bank receives the money as the agent of the person depositing it. See also King *v.* Paterson, etc., R. Co., 29 N. J. L. 504; Middlesex *v.* Thomas, 20 N. J. Eq. 39.

Of course, however, it may be provided that payment is to be made upon demand, in which case reasonable time must be allowed the buyer to fetch the money. Thus in Toms *v.* Wilson, 4 B. & S. 442; 116 E. C. L. 440, it was held that a promise to pay immediately on demand could not be construed so as to deprive the debtor of an opportunity to get the money which he may have in bank or near at hand. See Massey *v.* Sladen, L. R., 4 Exch. 13; Brighty *v.* Norton, 3 B. & S. 305; 113 E. C. L. 304.

1. Benj. on Sales (6th ed.), § 712. As to tender generally, its requirements, effect, etc. See TENDER.

In Morgan *v.* East, 126 Ind. 42, the claim of the appellee was founded upon a purchase made by him at an auction sale. The terms of sale were that for all sums over a certain amount "a credit of eight months will be given, the purchaser executing a note with approved surety . . . bearing six per cent. interest." The purchaser refused to execute such note, but afterwards made a tender of money which was refused, the seller retaining possession of the property. It was held that the tender of money, instead of the note as required, was insufficient and the change of ownership in the property was not complete.

2. Tender Must be Unconditional.—See TENDER. Thus in Tompkins *v.* Batie, 11 Neb. 147; 38 Am. Rep. 361, it appeared that the defendant "showed" the plaintiff $500 "and told him he could have it for his claim." It was held that this offer meant that if the plaintiff would surrender his entire demand he would give him $500, and that such was a conditional offer, by accepting which the plaintiff would be barred from all further claim and it was therefore unavailing as a tender. See Greenwood *v.* Sutcliffe (1892), L. R., 1 Ch. 1.

3. Benj. on Sales (6th ed.), § 710; PAYMENT, vol. 18, p. 195.

4. The payment is then completed by the payor's depositing the letter in the post office, and the debt is discharged, though the letter may never reach the payee. Warwick *v.* Noakes, Peake 68; Kington *v.* Kington, 11 M. & W. 233; Palmer *v.* Phœnix Mut. L. Ins. Co., 84 N. Y. 63; Wakefield *v.* Lithgow, 3 Mass. 249; Gurney *v.* Howe, 9 Gray (Mass.) 404; 69 Am. Dec. 299; True *v.* Collins, 3 Allen (Mass.) 438; Follett *v.* Eastman, 16 Vt. 19; Benj. on Sales (4th Am. ed.), § 710; Tiedeman on Sales, § 154. See Dodge *v.* Smith, 34 Vt. 178.

Authority to transmit money by mail may be implied from a request by mail "to remit to us as soon as received." Townsend *v.* Henry, 9 Rich. (S. Car.) 323.

So also where A sent to B a note by mail for collection; he forwarded it by mail to C to collect, and wrote to A of what he had done. A then wrote to C of his receipt of B's letter, "saying that he had forwarded the note to you for collection," and directed him (C) to "forward" the proceeds when collected. It was held that this letter warranted C in believing that he was authorized to forward the proceeds by mail. Buell *v.* Chapin, 99 Mass. 594; 97 Am. Dec. 58. Likewise where one sent by mail an execution to a sheriff with directions to "collect and remit," the officer was authorized to send the money collected, by mail. Morgan *v.* Richardson, 13 Allen (Mass.) 410.

But in Williams *v.* Carpenter, 36 Ala. 9; 76 Am. Dec. 316, it was said: "To absolve a debtor who transmits money by mail to his creditor for the payment of his debt from the hazard of loss in the transmission, it is necessary that the remittance should be made by the authority, express or implied, of the creditor and in the manner and with the precautions prescribed by him. (Warwicke *v.* Noakes, Peake 67; Hawkins *v.* Rutt, Peake 186; Townsend *v.* Henry, 9

VII. Rights of Bona Fide Purchasers—1. Generally.—The general doctrine is that a buyer acquires by the sale no better title than his vendor had, even though he buy *bona fide*, for value, and without notice.[1] If one sells an article not belonging to him,

Rich. (S. Car.) 318.) If it is impossible for the debtor to transmit the money in the manner and under the precautionary attendant circumstances directed by the creditor, he cannot make the remittance at the risk of the creditor; his authority is to remit in the manner and under the circumstances prescribed, and if he remits without pursuing the directions, he acts without authority." In this case a letter of the plaintiff authorized the defendant to transmit the money by mail at their risk in sums of one and two hundred dollars at a time, taking the post-master's receipt, prepaying the postage and registering the letter under the new post-office regulation. The money being lost and it appearing that the sender did not comply with these instructions, it was held that the loss could not fall upon the creditor, and this notwithstanding the fact that it was impossible to comply with the instructions.

See also Holland *v.* Tyus, 56 Ga. 56, where it was said that the debtor is bound to give notice to creditor where by the latter's order he makes payment to a third party. A letter which creditor never receives is not sufficient.

Burden of Proof.—The burden of proving that this mode of remittance was authorized by the creditor, or that such was the well established usage of the parties, is upon the debtor. Yon *v.* Blanchard, 75 Ga. 519; Crane *v.* Pratt, 12 Gray (Mass.) 348; Gurney *v.* Howe, 9 Gray (Mass.) 404; 69 Am. Dec. 299.

1. Sumner *v.* Woods, 67 Ala. 139; 42 Am. Rep. 104; Fairbanks *v.* Eureka Co., 67 Ala. 109; 42 Am. Rep. 105; Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165; Andrews *v.* Cox, 42 Ark. 473; 48 Am. Rep. 68; Putnam *v.* Lamphier, 36 Cal. 151; Brown *v.* Fitch, 43 Conn. 512; Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 278; Sargeant *v.* Marshall, 28 Ill. App. 177; Gibbs *v.* Jones, 46 Ill. 319; Klein *v.* Seibold, 89 Ill. 540; McCully *v.* Hardy, 13 Ill. App. 631; Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec. 476; Bates *v.* Smith, 83 Mich. 347; Tuttle *v.* Campbell, 74 Mich. 660; 16 Am. St. Rep. 652; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Parish *v.* Morey, 40 Mich. 417; Sumner *v.* Cottey, 11 Mo. 121; Barnard *v.* Campbell, 55 N. Y. 460; Williams *v.* Merle, 11 Wend. (N. Y.) 80; 25 Am. Dec. 604; Puffer *v.* Reeve, 35 Hun (N. Y.) 480; 15 Abb. N. Cas. (N. Y.) 338; Sargent *v.* Eureka Spund Apparatus Co., 46 Hun (N. Y.) 19; McLachlin *v.* Brett, 105 N. Y. 391; Austin *v.* Dye, 46 N. Y. 500; Walker *v.* Mitchell, 25 Hun (N. Y.) 527; Smith *v.* Clews (Supreme Ct.), 12 N. Y. Supp. 471; Hamet *v.* Letcher, 37 Ohio St. 356; 41 Am. Rep. 519; Frank *v.* Ingalls, 41 Ohio St. 560; Roland *v.* Gundy, 5 Ohio 202; Church *v.* Melville, 17 Oregon 413; Kinder *v.* Shaw, 2 Mass. 398; Bearce *v.* Bowker, 115 Mass. 129; Chapman *v.* Cole, 12 Gray (Mass.) 141; 71 Am. Dec. 739; Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Galvin *v.* Bacon, 11 Me. 28; 25 Am. Dec. 258; Quinn *v.* Davis, 78 Pa. St. 15; Mann *v.* English, Pa. Co. Ct. Rep. 637; McCombs *v.* Guild, 9 Lea (Tenn.) 81; Mayes *v.* Bruton, 1 Tex. Civ. Cas., § 699; Riford *v.* Montgomery, 7 Vt. 411. *Compare* Sumner *v.* Woods, 52 Ala. 94; Dudley *v.* Abner, 52 Ala. 572.

The rule of *caveat emptor* applies and casts upon the buyer the risk of title. Wright *v.* Solomon, 19 Cal. 64; 79 Am. Dec. 196 (unauthorized sale by factor); Putman *v.* Lamphier, 36 Cal. 158; Fawcett *v.* Osborn, 32 Ill. 425; 83 Am. Dec. 282 (stolen goods); Gibbs *v.* Jones, 46 Ill. 319; Wolf *v.* Esteb, 7 Ind. 448 (unauthorized sale by bailee); Robinson *v.* Skipworth, 23 Ind. 312 (stolen goods); Alexander *v.* Swackhamer, 105 Ind. 86; 55 Am. Rep. 182; Parsons *v.* Webb, 8 Me. 38; 22 Am. Dec. 220 (no demand by owner necessary to maintain replevin against a *bona fide* purchaser from one without title); Symonds *v.* Hall, 37 Me. 358; 59 Am. Dec. 53 (execution sale); Prime *v.* Cobb, 63 Me. 200; Browning *v.* Magill, 2 Har. & J. (Md.) 308; Levi *v.* Booth, 58 Md. 305; 42 Am. Rep. 302; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; 48 Am. Dec. 643 (bailee mortgaging property without authority); Gilmore *v.* Newton, 9 Allen (Mass.) 171; 85 Am. Dec. 749, and cases cited (purchaser had no title and could not therefore maintain conversion against one who took from himself); Wilson *v.* Crocket, 43 Mo. 216; 97 Am. Dec.

whether it was obtained by theft,[1] or finding,[2] or by any other means without consent of the owner, such owner may reclaim it in the hands of the buyer, although it was sold and purchased *bona fide* and for a valuable consideration.[3] The buyer's remedy

389 (stolen property); Bryant *v.* Whitchell, 52 N. H. 158 (sale of A's property under execution against B); Wheelwright *v.* De Peyster, 1 Johns. (N. Y.) 478; 3 Am. Dec. 345; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; 32 Am. Dec. 541; Barnard *v.* Campbell, 65 Barb. (N. Y.) 286, *affirmed* in 55 N. Y. 460; 14 Am. Rep. 290 (sale by fraudulent purchaser); Roland *v.* Gundy, 5 Ohio 202 (unauthorized sale by bailee); Church *v.* Melville, 17 Oregon 413; Whitney *v.* State Bank, 7 Wis. 620; Ventrees *v.* Smith, 10 Pet. (U. S.) 175 (unauthorized sale of slaves by an administrator; no title acquired by *bona fide* purchaser); Whistler *v.* Forster, 1 C. B. N. S. 254; 108 E. C. L. 254 (unindorsed bill of exchange); Cundy *v.* Lindsay, L. R., 3 App. Cas. 459; 24 Moak's Rep. 345 (purchase by fraudulent representations); Marsh *v.* Keating, 1 Bing. N. Cas. 198; 27 E. C. L. 358 (stock sold without owner's knowledge under forged power of attorney); Story on Sales (4th ed.), § 188.

1. Barstow *v.* Savage Min. Co., 64 Cal. 388; 49 Am. Rep. 705; Breckenridge *v.* McAfee, 54 Ind. 141; Galvin *v.* Bacon, 11 Me. 30; 25 Am. Dec. 258; Williams *v.* Merle, 11 Wend. (N. Y.) 80; 25 Am. Dec. 604; Hoffman *v.* Carow, 20 Wend. (N. Y.) 21; Parham *v.* Riley, 4 Coldw. (Tenn.) 9; Lindsay *v.* Cundy, L. R., 3 App. Cas. 463.

Where a stolen horse was purchased at public auction, and afterwards sold in good faith, without any knowledge that the horse had been stolen or any notice of the owner's claim, the purchaser was held responsible to the owner of the horse for its value. Robinson *v.* Skipworth, 23 Ind. 311. See Hoffman *v.* Carow, 22 Wend. (N. Y.) 284.

A *bona fide* purchaser of timber cut by a trespasser does not acquire title as against the owner. Reid *v.* King, 89 Ky. 388.

2. Mann *v.* Arkansas Valley Land, etc., Co., 24 Fed. Rep. 261. See Winter *v.* Belmont Min. Co., 53 Cal. 428; Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412; McAvoy *v.* Medina, 11 Allen (Mass.) 548; 87 Am. Dec. 733; Lindsay *v.* Cundy, L. R., 3 App. Cas. 463; Bridges *v.* Hawkesworth, 7 Eng. L. & Eq. 424. See also FINDER OF PROPERTY, vol. 7, p. 990.

3. Wilson *v.* Crocket, 43 Mo. 218; 97 Am. Dec. 389.

Where a husband takes the personal property of his wife and sells the same to a third person, and she is not present at the sale or afforded an opportunity to give notice of her rights, and has made no sale to her husband or delivery to him under any contract of sale, she will not be estopped from asserting her title as against the purchaser, though he has no notice of her title. Klein *v.* Seibold, 89 Ill. 540.

When Demand Necessary Before Bringing Action.—There is no settled rule as to when a demand should be made before bringing an action against a *bona fide* purchaser for refusing to give up possession of goods wrongfully retained. Some cases hold that a demand is necessary, particularly where property has been purchased from a bailee. Parker *v.* Middlebrook, 24 Conn. 207; Sherry *v.* Picken, 10 Ind. 375; Wood *v.* Cohen, 6 Ind. 455; 63 Am. Dec. 389; Barrett *v.* Warren, 3 Hill (N. Y.) 348; Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 333; Rawley *v.* Brown, 18 Hun (N. Y.) 456; Ely *v.* Ehle, 3 N. Y. 506; Storm *v.* Livingston, 6 Johns. (N. Y.) 44; Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Twinam *v.* Swart, 4 Lans. (N. Y.) 263; Marshall *v.* Davis, 1 Wend. (N. Y.) 109; 19 Am. Dec. 463; Nash *v.* Mosher, 19 Wend. (N. Y.) 431; Fuller *v.* Lewis, 13 How. Pr. (N. Y.) 219; Houston *v.* Dyche, Meigs (Tenn.) 76; 33 Am. Dec. 130. Other cases hold that the owner may maintain an action for property acquired by a *bona fide* purchaser without a previous demand, especially where it is purchased from a thief or from a fraudulent buyer. Heckle *v.* Lurvey, 101 Mass. 344; 3 Am. Rep. 366; Surles *v.* Sweeney, 11 Oregon 21; McNeill *v.* Arnold, 17 Ark. 154; Harpending *v.* Meyers, 55 Cal. 555; Robinson *v.* McDonald, 2 Ga. 116; Gibbs *v.* Jones, 46 Ill. 319; Trudo *v.* Anderson, 10 Mich. 357; 81 Am. Dec. 795; Harker *v.* Dement, 9 Gill (Md.) 7; 52 Am. Dec. 670; Johnson *v.* White, 13 Smed. & M. (Miss.) 584; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; 48 Am. Dec. 643; Chapman *v.* Cole, 12 Gray (Mass.) 141;

in such case lies in an action against the seller for a breach of implied warranty of title.[1]

There are, however, some exceptions to this rule. *Bona fide* purchasers of negotiable instruments for a valuable consideration acquire a good title thereto.[2] A *bona fide* purchaser from a seller who has obtained goods through fraud is also protected.[3] The latter exception is allowed because the seller has invested the buyer with the possession and apparent ownership of the goods and must suffer from his misplaced confidence rather than the innocent purchaser who has been misled in his reliance upon the fraudulent buyer's apparent ownership of the goods.[4] For the same reason a *bona fide* purchase from an agent whom the principal has held out as being possessed of the authority to sell is good as against the claims of the original owner.[5] In England there is an exception in case of sales made in market overt. One who buys chattels in market overt acquires a good title even though his vendor has no title.[6] This exception, however, is not recognized in the United States.[7]

71 Am. Dec. 739; Gilmore *v.* Newton, 9 Allen (Mass.) 171; 85 Am. Dec. 749; Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Carter *v.* Kingman, 101 Mass. 537; Galvin *v.* Bacon, 11 Me. 28; 25 Am. Dec. 258; Freeman *v.* Underwood, 66 Me. 229; Rodick *v.* Coburn, 68 Me. 170; Parsons *v.* Webb, 8 Me. 38; Whipple *v.* Gilpatrick, 19 Me. 427; Grant *v.* King, 14 Vt. 367; Deering *v.* Austin, 34 Vt. 330; Bucklin *v.* Beal, 38 Vt. 653; Riford *v.* Montgomery, 7 Vt. 411; Ward *v.* Carson River Wood Co., 13 Nev. 44; Whitman Gold, etc., Min. Co. *v.* Tritle, 4 Nev. 494; Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Lovejoy *v.* Jones, 30 N. H. 164; Oleson *v.* Merrill, 20 Wis. 462; 91 Am. Dec. 428; Eldred *v.* Oconto Co., 33 Wis. 133; *Compare* Sadler *v.* Lewers, 42 Ark. 148.

1. Klein *v.* Seibold, 89 Ill. 540. See IMPLIED WARRANTY, vol. 10, p. 117; WARRANTY.

2. Bay *v.* Coddington, 5 Johns. Ch. (N. Y.) 54; 9 Am. Dec. 268; Sims *v.* Lyles, 1 Hill (S. Car.) 39; 26 Am. Dec. 156. See BILLS AND NOTES, vol. 2, p. 390; NEGOTIABLE INSTRUMENTS, vol. 16, p. 479; RAILROAD SECURITIES, vol. 19, p. 723.

3. Carme *v.* Rauh, 100 Ind. 247; Globe Milling Co. *v.* Minneapolis Elevator Co., 44 Minn. 153; Frey *v.* Harrison, 29 Ill. App. 300; Sword *v.* Young, 89 Tenn. 126; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Jones *v.* Christian, 86 Va. 1017. See FRAUDULENT SALES, vol. 8, p. 833.

4. See Tiedeman on Sales, § 529; Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; 55 N. Y. 456; 58 N. Y. 73. See also Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Saltus *v.* Everett, 20 Wend. (N. Y.) 279; 32 Am. Dec. 541; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Craig *v.* Marsh, 2 Daly (N. Y.) 61; Hall *v.* Hinks, 21 Md. 417; Cochran *v.* Stewart, 21 Minn. 435; Combes *v.* Chandler, 33 Ohio St. 184.

5. Story on Sales (4th ed.), § 199.

See *infra*, this title, *Sales by Factor or Agent.*

6. 2 Bl. Com. 449; Benj. on Sales (6th Am. ed.), § 14; Story on Sales (4th ed.), § 190; 2 Chit. C. L. 148; Dyer *v.* Pierson, 3 B. & C. 42; 10 E. C. L. 13; Hiern *v.* Nill, 13 Ves. 114; Peer *v.* Humphrey, 2 A. & E. 495; 29 E. C. L. 158; Lindsay *v.* Cundy, L. R., 3 App. Cas. 463; Benjamin *v.* Andrews, 5 C. B. N. S. 299; 94 E. C. L. 299; Lee *v.* Bayes, 18 C. B. 599; 86 E. C. L. 597; Crane *v.* London Dock Co., 5 B. & S. 313; 117 E. C. L. 311; Lyons *v.* De Pass, 11 A. & E. 326; 39 E. C. L. 106; Carmicheal *v.* Buck, 10 Rich. (S. Car.) 332; 70 Am. Dec. 226.

7. See MARKET OVERT, vol. 14, p. 458; 2 Kent's Com. (13th ed.), *323; Ventrees *v.* Smith, 10 Pet. (U. S.) 176; Rogers *v.* Hine, 1 Cal. 429; 54 Am. Dec. 300; Worthy *v.* Johnson, 8 Ga. 236; 52 Am. Dec. 399; Dame *v.* Baldwin, 8 Mass. 518; Wilson *v.* Crocket, 43 Mo. 216; 97 Am. Dec. 389; Koch *v.* Branch, 44 Mo. 542; 100 Am. Dec. 324; Wheelwright *v.* Depeyster, 1

2. In Judicial Sales.—A *bona fide* purchaser at a sale "on judicial process" acquires no title if the goods levied upon do not belong to the person against whom the writ of execution was issued. The purchaser and the officer who conducts such a sale are liable in trover for the conversion of the goods, or the goods may be recovered from the purchaser in an action of replevin.[1] If the property is exempt a *bona fide* purchaser in an execution sale acquires no title as against the debtor.[2] Informalities in the sale, such as a failure to give notice to the owners, may defeat the title of a *bona fide* purchaser.[3] The doctrine of *caveat emptor* applies both as to the title and condition of the property. The purchaser buys at his peril.[4]

3. In Conditional Sales.—See *infra*, this title, *Conditional Sales*.

4. In Sales by Bailee or Pledgee.—A *bona fide* purchaser from a bailee takes no title as against the true owner.[5] Especially is this true in case of bailments of depositum,[6] commodatum, or loan,[7] for hire,[8] for transportation[9] or for expenditure of work on the property bailed.[10] If the right of purchase is added to the bailment, as where property is delivered to a hirer to keep and use for a certain time and then to be returned, with privilege of buying and keeping, the bailee has no power to sell and cannot

Johns. (N. Y.) 470; Hosack *v.* Weaver, 1 Yeates (Pa.) 478; Roland *v.* Gundy, 5 Ohio 203; Towne *v.* Collins, 14 Mass. 500; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; 32 Am. Dec. 541; Hoffman *v.* Carow, 22 Wend. (N. Y.) 292; Browning *v.* Magill, 2 Har. & J. (Md.) 308; Bryant *v.* Whitcher, 52 N. H. 158; Levi *v.* Booth, 58 Md. 305; 42 Am. Rep. 332; King *v.* Richards, 6 Whart. (Pa.) 418; 37 Am. Dec. 420; Coombs *v.* Gorden, 59 Me. 111; Easton *v.* Worthington, 5 S. & R. (Pa.) 130; Heacock *v.* Walker, 1 Tyler (Vt.) 341; Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 282; Robinson *v.* Skipworth, 23 Ind. 313; Benj. on Sales (4th ed.), § 7, note; Newmark on Sales, §§ 178–80.

1. Boggs *v.* Fowler, 16 Cal. 559; 76 Am. Dec. 561; Bartholomew *v.* Warner, 32 Conn. 102; Symonds *v.* Hall, 37 Me. 354; 59 Am. Dec. 53; Combs *v.* Gordon, 59 Me. 111; Champney *v.* Smith, 15 Gray (Mass.) 512; Shearick *v.* Huber, 6 Binn. (Pa.) 2; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703; Homesly *v.* Hogue, 7 Jones (N. Car.) 431; Griffith *v.* Fowler, 18 Vt. 390; Sanborn *v.* Kittridge, 20 Vt. 640; 50 Am. Dec. 58; Burk *v.* McWhirter, 35 U. C. Q. B. 1; Kirby *v.* Cahill, 6 U. C. Q. B. 510.

2. Williams *v.* Miller, 16 Conn. 143; Johnson *v.* Babcock, 8 Allen (Mass.) 583; Cooper *v.* Newman, 45 N. H. 339.

3. Miller *v.* Thompson, 60 Me. 322; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; Harris *v.* Saunders, 2 Strobh. Eq. (S. Car.) 370; Wills *v.* Ragland, 1 Swan. (Tenn.) 501.

4. Boggs *v.* Fowler, 16 Cal. 560; 76 Am. Dec. 561; Barron *v.* Mullin, 21 Minn. 374; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703. See also JUDICIAL SALES, vol. 12, pp. 223, 234; SHERIFF'S SALES.

5. Burton *v.* Curyea, 40 Ill. 320; 89 Am. Dec. 350; Roland *v.* Gundy, 5 Ohio 202; Buckmaster *v.* Mower, 21 Vt. 204; Sanders *v.* Wilson, 19 D. C. 555.

The fact that a bailee holds himself forth as owner will not avail an innocent purchaser, if it is not done with the consent of the owner. Montague *v.* Ficklin, 18 Ill. App. 99.

6. Tiedeman on Sales, § 316. See Stanley *v.* Gaylord, 1 Cush. (Mass.) 536; 48 Am. Dec. 643.

7. Gilmore *v.* Newton, 9 Allen (Mass.) 171; 85 Am. Dec. 749; Riford *v.* Montgomery, 7 Vt. 411.

8. Sanborn *v.* Colman, 6 N. H. 14; 23 Am. Dec. 703; Dodd *v.* Arnold, 23 Tex. 97.

9. Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Linnen *v.* Cruger, 40 Barb. (N. Y.) 633; Covill *v.* Hill, 4 Den. (N. Y.) 323.

10. Tiedeman on Sales, § 316. See Wooster *v.* Sherwood, 25 N. Y. 278; Buckmaster *v.* Mower, 21 Vt. 204.

give a good title to a purchaser from him.[1] Where the owner of goods or chattels delivers them to a purchaser for an agreed price payable at a future time, and under an express condition and agreement that the title shall not pass until the price is paid, such owner may reclaim the property from one to whom such buyer sells it;[2] it is otherwise, however, if there is an understanding, express or implied, that the property may be sold by such buyer, as, for example, in the case of a sale by a manufacturer to a retail dealer.[3]

A *bona fide* purchaser of a pledge from a pledgee who holds it as security for an unpaid debt may acquire a good title.[4] But if the sale is made before there is any default in payment, or if the sale is void by reason of any irregularity, the purchaser does not

1. Chamberlain *v.* Smith, 44 Pa. St. 431.

Where the owner of cattle leased them, with a farm, for four years, under an agreement that, at the expiration of the four years, the lessee might either return the cattle or pay a stipulated price for them, and the lessee sold the cattle before the four years had expired, it was held that such sale determined the lessee's right of possession, and that the owner might maintain trover for the cattle against both seller and purchaser. Grant *v.* King, 14 Vt. 367.

B took the plaintiff's cow into his possession under an agreement that he should be paid for her keeping by the milk she would yield, and if, at any time within four months, he should pay the plaintiff thirty-five dollars, the title to the cow should vest in him. B did not pay for the cow but sold and delivered her to the defendant, who bought her in good faith, supposing her to be the property of B. In an action of trover against such purchaser, it was held that the plaintiff was entitled to recover. Hart *v.* Carpenter, 24 Conn. 427.

2. Thomas *v.* Winters, 12 Ind. 322; Dunbar *v.* Rawles, 28 Ind. 225; 92 Am. Dec. 311; Bradshaw *v.* Warner, 54 Ind. 58; McGirr *v.* Sell, 60 Ind. 249; Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 322; Payne *v.* June, 92 Ind. 252; Lanman *v.* McGregor, 94 Ind. 301; Baals *v.* Stewart, 109 Ind. 371.

3. Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31; 58 Am. Rep. 382; Devlin *v.* O'Neill, 6 Daly (N. Y.) 305; Ludden *v.* Hazen, 31 Barb. (N. Y.) 650. See also Griswold *v.* Sheldon, 4 N. Y. 591.

In Lawrence *v.* Owens, 39 Mo. App. 325, the court by Gill, J., said: "It is a matter of common knowledge that our retail merchants buy goods on credit. Their stores are stocked with goods not yet paid for, and with this knowledge, will it be said that purchasers may in good faith pay for and receive the goods from the retailer and then have the wholesale dealer follow and levy on the same goods to satisfy a balance claimed from said retail dealer? We think not. To so hold would work serious embarrassments to mercantile trade. It would create in fact a practical embargo on our local commerce, besides violating every principle of law and right."

But where it is understood by dealers that goods delivered in this way do not confer a power to sell, but simply authority to show them to customers and report to the owner, and it is well-known to the purchaser, he will not be protected. Smith *v.* Clews (Supreme Ct.), 12 N. Y. Supp. 471.

Plaintiffs, according to the custom of the trade, well-known to defendant, sold mineral waters in syphons, which were to be returned when empty, and to which they retained title, and plaintiffs' names were stamped on the glass of each syphon. It was held that defendant who had purchased the syphons from various parties was not a *bona fide* purchaser. Lighte *v.* Finan (Supreme Ct.), 3 N. Y. Supp. 148.

4. Rohrle *v.* Stidger, 50 Cal. 207; Robinson *v.* Hurley, 11 Iowa 410; 79 Am. Dec. 497; Elder *v.* Rouse, 15 Wend. (N. Y.) 218; Washburn *v.* Pond, 2 Allen (Mass.) 474; Stevens *v.* Bell, 6 Mass. 339; Davis *v.* Funk, 39 Pa. St. 243; 80 Am. Dec. 519; Johnson *v.* Stear, 15 C. B. N. S. 330; 109 E. C. L. 330; Pigot *v.* Cubley, 15 C. B. N. S. 701; 109 E. C. L. 701; Martin *v.* Reid,

get an absolute title as against the pledgor.[1] He will, however, get whatever title the selling pledgee had and will have the right to hold the pledge against the demand of the pledgor until the latter pays the debt to secure which the pledge was given.[2]

5. In Sales by Factor or Agent.—A *bona fide* purchaser of goods from an agent or factor who has been authorized by his principal to sell will acquire a valid title.[3] But when an agent exceeds his authority in selling the goods of his principal, as where he sells them in payment of his own debts,[4] or exchanges them for other goods instead of selling them, a *bona fide* purchaser acquires no title as against the principal.[5] *Bona fide* purchasers who buy from a factor in due course of business and without knowledge of his real relation to the goods are, however, protected by statute in several of the States.[6] Similar statutes also exist in England and Canada.[7] Under these statutes *bona fide* purchasers take a valid title as against the principal when the agent has been entrusted with the possession of the goods and the documents of title, such as a bill of lading or warehouse receipt. But the person undertaking to sell must be a factor or agent[8] entrusted either with the

11 C. B. N. S. 730; 103 E. C. L. 730; Tucker *v.* Wilson, 1 P. Wms. 261.

1. Shelton *v.* French, 33 Conn. 489; Belden *v.* Perkins, 78 Ill. 449; Whitaker *v.* Sumner, 20 Pick. (Mass.) 399; 19 Am. Dec. 298; Bailey *v.* Colby, 34 N. H. 29; 66 Am. Dec. 752; McNeil *v.* Tenth Nat. Bank, 55 Barb. (N. Y.) 59; Ashton's Appeal, 73 Pa. St. 153; First Nat. Bank *v.* Boyce, 78 Ky. 42; 39 Am. Rep. 198; Lewis *v.* Mott, 36 N. Y. 395; Donald *v.* Suckling, L. R., 1 Q. B. 585.

2. Tiedeman on Sales, § 316. See Bulkeley *v.* Welch, 31 Conn. 339; Baltimore Marine Ins. Co. *v.* Dalrymple, 25 Md. 269; Lewis *v.* Mott, 36 N. Y. 395; Kidney *v.* Persons, 41 Vt. 386; 98 Am. Dec. 595; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321; Halliday *v.* Holgate, L. R., 3 Exch. 299. And see generally, PLEDGE AND COLLATERAL SECURITIES, vol. 18, p. 676.

3. Ezzard *v.* Frick, 76 Ga. 512; Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31; 58 Am. Rep. 382.

Where plaintiff's agent agreed with one who had purchased property through such agent, under a contract by which title was to remain in plaintiff until it was paid for, that such purchaser might sell the property and pay for the same out of the proceeds, plaintiff cannot recover such property from one who purchases without notice of their claim. Ezzard *v.* Frick, 76 Ga. 512.

4. Gray *v.* Agnew, 95 Ill. 315; Rodick *v.* Coburn, 68 Me. 170; Parsons *v.* Webb, 8 Me. 38.

A, who was indebted to B, agreed to sell lumber to B, the proceeds to go toward the debt. Before the lumber was delivered to B he was notified by A that it did not belong to him, but to persons whose agent he was. It was held that B, having accepted the lumber with this knowledge, could not hold the proceeds as against the true owners. McLachlin *v.* Brett, 105 N. Y. 391.

5. Tiedeman on Sales, § 317; Wing *v.* Neal (Me. 1888), 2 Atl. Rep. 881; Hass *v.* Damon, 9 Iowa 589; Trudo *v.* Anderson, 10 Mich. 357; 81 Am. Dec. 795.

6. See Bott *v.* McCoy, 20 Ala. 578; 56 Am. Dec. 223; Green *v.* Campbell, 52 Cal. 586; Whisp *v.* Hazard, 66 Cal. 459; Ullman *v.* Barnard, 7 Gray (Mass.) 554; DeWolf *v.* Gardner, 12 Cush. (Mass.) 19; 59 Am. Dec. 169; Michigan State Bank *v.* Gardner, 15 Gray (Mass.) 362; Jennings *v.* Merrill, 20 Wend. (N. Y.) 9.

7. See Nevulshaw *v.* Brownrigg, 2 De G. M. & G. 441; Johnson *v.* Credit Lyonnais, 2 C. P. Div. 224; Cole *v.* Northwestern Bank, L. R., 9 C. P. 470; L. R., 10 C. P. 354; Kaltenbach *v.* Lewis, 24 Ch. Div. 54; Todd *v.* Liverpool, etc., Ins. Co., 20 U. C. C. P. 523; *In re* Coleman, 36 U. C. C. P. 559; Cockburn *v.* Sylvester, 27 U. C. C. P. 34.

8. Thatcher *v.* Moors, 134 Mass. 156; Stollenwerck *v.* Thatcher, 115

possession of the goods or with the *indicia* of title, in order to come within the provisions of these statutes.[1] Brokers,[2] warehousemen, wharfingers,[3] or agents who do not make it their regular business to sell goods for others do not come within the operation of the statutes.[4]

6. Bona Fide Purchasers of Stock Certificates.—(See STOCK AND STOCKHOLDERS.)

7. Warehouse Receipts.—(See WAREHOUSE RECEIPTS.)

8. Bills of Lading.—The general rule that property in chattels cannot be transferred except by one having the title or an authority from its true owner applies to bills of lading.[5] Possession of the bill of lading without authority of the owner and vendor of the goods will not authorize a transfer so as to defeat the title of the original owner or affect his right to rescind the sale.[6] A person who has stolen a bill of lading cannot assign it so as to pass

Mass. 224; Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40; First Nat. Bank *v.* Shaw, 61 N. Y. 299; Dows *v.* National Exchange Bank, 91 U. S. 618.

1. Cartwright *v.* Wilmerding, 24 N. Y. 521; Howland *v.* Woodruff, 60 N. Y. 73; Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401; Neckerson *v.* Darrow, 5 Allen (Mass.) 419; Pegram *v.* Carson, 10 Bosw. (N. Y.) 505; Baines *v.* Swainson, 4 B. & S. 270; 116 E. C. L. 269; Jenkyns *v.* Usborne, 7 M. & G. 678; 49 E. C. L. 678; Johnson *v.* Credit Lyonnais, 3 C. P. Div. 32; Tuentes *v.* Montis, L. R., 3 C. P. 268.

In Kinsey *v.* Leggett, 71 N. Y. 395, Miller, J., applying the *New York* statute in the case of an innocent purchaser from an agent, said: "It is the consent of the owner in intrusting his goods to, and allowing a bill of lading in the name of, another, thus conferring ostensible ownership and a right of control in the person named, which shields parties entirely innocent, who, on the faith of the evidence furnished, to which the owner has consented, and of which he has knowledge, have made advances on the property shipped. The act was not intended to deprive actual owners who had not parted with their title, or who by fraud and without any fault on their part had lost control over it. This act has nothing to do with a case where property has been wrongfully taken from the possession of one, and then is fraudulently appropriated."

2. Stollenwerck *v.* Thatcher, 115 Mass. 224. See Johnson *v.* Credit Lyonnais, 3 C. P. Div. 32.

3. Cole *v.* North Western Bank, L. R., 9 C. P. 470; L. R., 10 C. P. 354; Monk *v.* Whittenbury, 2 B. & Ad. 484; 22 E. C. L. 127. *Compare* Baines *v.* Swainson, 4 B. & S. 270; 116 E. C. L. 269.

4. Loeschman *v.* Machin, 2 Stark. 311; Cooper *v.* Willomatt, 1 C. B. 622; 50 E. C. L. 670; Wood *v.* Rowcliffe, 6 Hare 183. *Compare* Heyman *v.* Flewker, 13 C. B. N. S. 519; 106 E. C. L. 518.

5. Barnard *v.* Campbell, 55 N. Y. 462. In Dows *v.* Perrin, 16 N. Y. 333, Denio, C. J., said: "Subsequent cases down to a certain period have been collected and examined by the American editor of Smith's Leading Cases. His conclusion I understand to be, that a bill of lading is not negotiable in a commercial sense, and that, in the absence of a right of property in the consignee, and of a power to sell, he cannot by any indorsement to the bill of lading confer a title to the goods as against the true owner."

There are statutes in some of the States making bills of lading negotiable instruments in the same sense as bills of exchange and promissory notes. Tiedeman *v.* Knox, 53 Md. 614.

Statutes making bills of lading negotiable mean that they may be transferred by indorsement and delivery so as to give to the indorsee a right to sue on them in his own name. Shaw *v.* Merchants' Nat. Bank, 101 U. S. 557.

6. Shaw *v.* Merchants' Nat. Bank, 101 U. S. 557; Moore *v.* Robinson, 62 Ala. 537; Dows *v.* Perrin, 16 N. Y. 333; Barnard *v.* Campbell, 55 N. Y. 462; Saltus *v.* Everett, 20 Wend. (N. Y.)

the property any more than a person can give title to stolen property or property tortiously taken.[1] But where a bill of lading has been transferred by the real owner and actually delivered to a fraudulent vendee, the fraudulent vendee may sell it to a *bona fide* purchaser and pass a good title thereto.[2] The real owner may, however, rescind the contract and reclaim the property or stop it *in transitu*, if he exercises the right before the bill of lading has been transferred. After the bill has been transferred by the fraudulent vendee this right of the original owner is divested.[3]

9. Who Are Bona Fide Purchasers.—Several things must concur to constitute one a *bona fide* purchaser. The purchaser must exercise ordinary care and discretion;[4] must give a valuable consideration;[5]

267; 32 Am. Dec. 541; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360; Brower *v.* Peabody, 13 N. Y. 126; Gurney *v.* Behrend, 3 E. & B. 622; 77 E. C. L. 622; 23 L. J., Q. B. 265.

1. Dows *v.* Greene, 24 N. Y. 644.

2. Pease *v.* Gloabec, L. R., 1 P. C. A. 219; Dows *v.* Greene, 24 N. Y. 644.

There is some dispute as to whether a *bona fide* transferee of a bill of lading given by a common carrier may be protected, as where an agent of a railroad company, authorized to issue bills of lading, issues certain bills to a shipper for a number of cars of wheat, when in fact a less number of cars of wheat is shipped, and drafts are drawn by the shipper against the bills and attached thereto, and delivered to a bank, which in good faith discounts the same and forwards them for payment. In case the shipper absconds and leaves no property the question is whether the bills of lading are good as against the bank. A number of authorities hold that a railroad company in such case would be estopped from denying that it had received the wheat. Sioux City, etc., R. Co. *v.* First Nat. Bank, 10 Neb. 556; 35 Am. Rep. 488; Wichita Sav. Bank *v.* Atchison, etc., R. Co., 20 Kan. 519; Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111; 22 Am. Rep. 603. But the weight of authority holds that a common carrier may set up the defense that the goods have never been received by him even against the *bona fide* transferee of the bill of lading. Robinson *v.* Memphis, etc., R. Co., 9 Fed. Rep. 129; Pollard *v.* Vinton, 105 U. S. 70; Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182; Union R., etc., Co. *v.* Yeager, 34 Ind. 1; Fellows *v.* Steamer R. W. Powell, 16 La. Ann. 316; 79 Am. Dec. 581; Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 449; Sears *v.* Wingate, 3 Allen (Mass.) 105; Hall *v.* Mayo, 7 Allen (Mass.) 454; Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11; 22 Am. Rep. 26; Second Nat. Bank *v.* Waltridge, 19 Ohio St. 419; 2 Am. Rep. 408; Dean *v.* King, 22 Ohio St. 136; Louisiana Nat. Bank *v.* Laveille, 52 Mo. 380; Coleman *v.* Riches, 29 Eng. L. & Eq. 322; McLean *v.* Fleming, L. R., 2 H. L. Sc. 128; Hubbersty *v.* Ward, 18 Eng. L. & Eq. 551; Grant *v.* Norway, 20 L. J., C. P. 93; 10 C. B. 669.

Where the goods have been received by the carrier, the bill of lading is conclusive evidence against the master of the vessel in favor of the consignee not a party to the contract, who has advanced money upon the good faith of his statements as to the amount and condition of the property of which it acknowledges the receipt. Sears *v.* Wingate, 3 Allen (Mass.) 103; Bissell *v.* Campbell, 54 N. Y. 353.

3. Dows *v.* Greene, 24 N. Y. 644; Becker *v.* Hallgarten, 86 N. Y. 167; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360. See Gurney *v.* Behrend, 3 E. & B. 622; 77 E. C. L. 622; Kemp *v.* Falk, L. R., 7 App. Cas. 573; 52 L. J., Ch. 167; Sewell *v.* Burdick, L. R., 10 App. Cas. 74; Newhall *v.* Central Pac. R. Co., 51 Cal. 345; 21 Am. Rep. 713.

The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assigns the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. Lickbarrow *v.* Mason, 2 T. R. 63.

See generally BILL OF LADING, vol. 2, p. 223.

4. Kyle *v.* Ward, 81 Ala. 120.

5. Mears *v.* Waples, 3 Houst. (Del.) 581; Chicago Dock Co. *v.* Foster, 48

Ill. 507; Ohio, etc., R. Co. *v.* Kerr, 49 Ill. 458; Hall *v.* Hinks, 21 Md. 406; Hoffman *v.* Noble, 6 Met. (Mass.) 68; 39 Am. Dec. 711; Dows *v.* Rush, 28 Barb. (N. Y.) 157; McGraw *v.* Solomon, 83 Mich. 442; Attenborough *v.* London, etc., Dock Co., 3 C. P. Div. 450.

Anyone who in the ordinary course of business makes advances or incurs a legal liability on the faith of the fraudulent possessor being the true owner is entitled to the protection which the law extends to a *bona fide* purchaser. Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Barnard *v.* Campbell, 58 N. Y. 73; 17 Am. Rep. 208; Le Page *v.* Slade, 79 Tex. 473.

One who has only given his notes must show that he had made payment thereon before notice of the defect in his grantor's title. Matson *v.* Melchor, 42 Mich. 477.

One who purchases at a voluntary sale from his debtor and pays no money, but credits the amount of the consideration on the pre-existing debt, is not a *bona fide* purchaser for value. Sargent *v.* Sturm, 23 Cal. 359; 83 Am. Dec. 118; Nelson *v.* Rockwell, 14 Ill. 375; Pope *v.* Pope, 40 Miss. 516; Fletcher *v.* Drath, 66 Mo. 126; Hyde *v.* Ellery, 18 Md. 496; Farley *v.* Lincoln, 51 N. H. 577; 12 Am. Rep. 182; Root *v.* French, 13 Wend. (N. Y.) 570; 28 Am. Dec. 482; Adams *v.* Smith, 5 Cow. (N. Y.) 280; Piper *v.* Elwood, 4 Den. (N. Y.) 165; Devoe *v.* Brandt, 53 N. Y. 462; Barnard *v.* Campbell, 58 N. Y. 73; 17 Am. Rep. 208; Stevens *v.* Brennan, 79 N. Y. 254; Weaver *v.* Barden, 49 N. Y. 286; Overstreet *v.* Manning, 67 Tex. 657; Poor *v.* Woodburn, 25 Vt. 235. There are a few cases, however, which maintain that a creditor who receives goods in payment of his debt is a purchaser in good faith. Feder *v.* Abrahams, 28 Mo. App. 454; Redpath *v.* Lawrence, 42 Mo. App. 101; Lawrence *v.* Owens, 39 Mo. App. 318; Button *v.* Rathbone, 118 N. Y. 666; Farwell *v.* Prescott (Supreme Ct.), 11 N.Y. Supp. 833; Butters *v.* Haughwoot, 42 Ill. 18; 39 Am. Dec. 401; Rice *v.* Cutler, 17 Wis. 351; 84 Am. Dec. 747; Shufeldt *v.* Pease, 16 Wis. 659. See Titcomb *v.* Wood, 38 Me. 563; Pease *v.* Gloabec, L. R., 1 P. C. 220.

A *bona fide* creditor who takes a stock of goods from his debtor in absolute payment of his debt, which exceeds the value of his goods, also surrendering independent securities, is a purchaser for value. Robinson *v.* Fairbanks, 81 Ala. 132; Robinson *v.* Levi, 81 Ala. 134.

A received goods from B in payment of B's indebtedness to him and of certain other debts which A assumed, there being still other debts of which A had notice—*held*, that A was a *bona fide* purchaser. Keith *v.* Heffelfinger, 12 Neb. 497.

An attaching creditor is not a *bona fide* purchaser. Sargent *v.* Sturm, 23 Cal. 359; 83 Am. Dec. 118; Thompson *v.* Rose, 16 Conn. 71; 41 Am. Dec. 121; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573; 42 Am. Rep. 53; American Merchants' Union Express Co. *v.* Willsie, 79 Ill. 92; Jordan *v.* Parker, 56 Me. 557; Thaxter *v.* Foster, 153 Mass. 151; Atwood *v.* Dearborn, 1 Allen (Mass.) 483; 79 Am. Dec. 755; Whitman *v.* Merrill, 125 Mass. 127; Buffington *v.* Gerrish, 15 Mass. 158; 8 Am. Dec. 97; Wiggin *v.* Day, 9 Gray (Mass.) 97; Naugatuck Cutler Co. *v.* Babcock, 22 Hun (N. Y.) 481; Mowrey *v.* Walsh, 8 Cow. (N. Y.) 245; Devoe *v.* Brandt, 53 N. Y. 462; Bradley *v.* Olear, 10 N. H. 477; Poor *v.* Woodburn, 25 Vt. 234; Field *v.* Stearns, 42 Vt. 106; Hackett *v.* Calender, 32 Vt. 97; Fitzsimmons *v.* Joslin, 21 Vt. 129; 52 Am. Dec. 46.

Where one buys goods and afterwards assigns them for the benefit of creditors, such assignees are not *bona fide* purchasers. Wailes *v.* Couch, 75 Ala. 134; Belding *v.* Frankland, 8 Lea (Tenn.) 67; Farley *v.* Lincoln, 51 N. H. 579; 12 Am. Rep. 182; Ratcliffe *v.* Sangston, 18 Md. 383; Bussing *v.* Rice, 2 Cush. (Mass.) 48. *Compare* Barrett *v.* Warren, 3 Hill (N. Y.) 350; Gibson *v.* Moore, 7 B. Mon. (Ky.) 92.

Where a creditor, to whom a chose in action has been assigned as collateral, executes, on the compromise of a suit upon such chose, a release of his claims against his debtor, who is insolvent, and also two reassignments of collateral security held by him—one of the chose in action, which, by reason of the compromise and settlement, is now of no value, and the other of a certain claim which is also worthless—he does not part with any valuable consideration such as will make him a *bona fide* purchaser of non-negotiable bonds received from the defendant in settlement of the suit. Fairbanks *v.* Sargent, 104 N. Y. 108; 56 Am. Rep. 490.

If the consideration paid by a pur-

and must take the goods in good faith and without notice of the defects in the seller's title.[1]

VIII. BREACH OF CONTRACT—1. Seller's Rights and Remedies—*a.* PERSONAL ACTION AGAINST BUYER—(1) *Where Contract Is Executory.*—Where the contract is executory,[2] that is, where the property in the goods has not been transferred to the buyer, the breach of the contract by the latter may consist of a refusal to accept or a refusal to pay. In either case the seller may maintain an action for breach of the contract,[3] and if he has parted with

chaser is entire and indivisible, and usury enters into it, he is not, in *Alabama*, a *bona fide* purchaser. LeGrand *v.* Eufaula Nat. Bank, 81 Ala. 123; 60 Am. Rep. 140.

1. Rateau *v.* Bernard, 3 Blatchf. (U. S.) 244; Traywick *v.* Keeble, 93 Ala. 498; Lynch *v.* Beecher, 30 Conn. 490; Stearns *v.* Gage, 79 N. Y. 102; Allison *v.* Matthieu, 3 Johns. (N. Y.) 235; Meacham *v.* Collignon, 7 Daly (N. Y.) 402. See Bates *v.* Smith, 83 Mich. 347.

If, from the circumstances, the purchaser has reason to believe that everything is not right, and makes no inquiry, but rashly purchases, he cannot be said to have bought in good faith. Green *v.* Humphry, 50 Pa. St. 212. See Cochran *v.* Stewart, 21 Minn. 435; Loeb *v.* Flash, 65 Ala. 526; Kern *v.* Thurber, 57 Ga. 175; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 353; Devoe *v.* Brandt, 53 N. Y. 462.

One who claims the protection of a *bona fide* purchaser has the burden of showing that he had no knowledge of the plaintiff's ownership. Lynch *v.* Beecher, 38 Conn. 490; McLeod *v.* First Nat. Bank, 42 Miss. 99; Redewill *v.* Gillen, 4 N. Mex. 78; Porter *v.* Parks, 49 N. Y. 564; Devoe *v.* Brandt, 53 N. Y. 462. *Compare* Mears *v.* Wapples, 3 Houst. (Del.) 581.

Where the proof of the fact of good faith rests solely upon the testimony of him on whom is the burden of proof, the question should be submitted to the jury. Benedict *v.* Williams, 48 Hun (N. Y.) 123. See also FRAUDULENT SALES, vol. 8, p. 840.

2. The difference between executory and executed contracts of sale must be borne in mind. The contract may be executory though the delivery has been made; so it may be executed though performance is by no means complete. This distinction is sometimes lost sight of to the apparent confusion of the subject. See *supra*, this title, *Effect of Contract* (*in Passing Title*); also *Delivery*.

3. Benj. on Sales (6th Am. ed.), § 758; Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 716; Hosmer *v.* Wilson, 7 Mich. 294; 74 Am. Dec. 716; Gammage *v.* Alexander, 14 Tex. 414; Rider *v.* Kelley, 32 Vt. 268; 76 Am. Dec. 176; Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Stearns *v.* Washburn, 7 Gray (Mass.) 187. Thus in Crawford *v.* Avery, 35 Miss. 205, a party had purchased goods to be paid for on delivery at a future day by his note on time, and it was held that upon refusal by him to accept, the seller might immediately sue for the breach of the agreement, and this without demanding the note. And see cases in next note. See also Elliott *v.* Heginbotham, 2 C. & K. 545; 61 E. C. L. 543; Perdicaris *v.* Trenton Bridge Co., 29 N. J. L. 367; Outwater *v.* Dodge, 7 Cow. (N. Y.) 87; Messer *v.* Woodman, 22 N. H. 172; 53 Am. Dec. 241.

In Hurlbut *v.* Simpson, 3 Ired. (N. Car.) 233, it was said that a party may recover damages for a non-compliance with a parol contract for the purchase of an article, though no earnest was paid, nor any actual delivery made, nor any special time appointed for the delivery of the article or the payment of the purchase money. It is sufficient if the seller tender the article, or is ready to deliver it when the buyer refuses it; and if no particular time is fixed for the delivery or for the payment of the price, it must be done immediately or within a reasonable time.

In Morris *v.* Cohn, 55 Ark. 401, the following facts appeared: The plaintiffs and defendant made a contract by which the latter gave his note and the former agreed to sell and deliver to him within a certain time a number of cattle at a specified price, the title to remain in seller until the note should be paid. The defendant gave notice afterwards that he would not accept the cattle,

whereupon, without any offer to deliver or notice that the cattle were held for the defendant, the plaintiffs sued him for the contract price and expenses in keeping the cattle. It was held that they could not maintain the action but should have sued for the actual damages sustained by reason of the non-acceptance.

Marvin Safe Co. *v.* Emanuel, 21 Abb. N. Cas. (N. Y.) 181, arose out of a contract for the sale of a safe. The price was to be paid in instalments, after delivery, and there was a separate stipulation that the title should remain in the seller until free payment. Itwas held that the agreement to pay being unqualified the seller was not restricted to an action for damages for the buyer's refusal to accept, but could maintain an action for the contract price. See *infra*, this title, *Conditional Sales—(Payment by Instalments)*.

Tender.—If the buyer has refused to accept the goods, no special tender or offer to deliver is necessary; but the seller may immediately bring his special action for the breach, and in case of articles to be manufactured, if he refuse to accept before the completion of such articles, completion is not necessary before bringing such action. Bowdell *v.* Parsons, 10 East 359; Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 79 E. C. L. 126; Ripley *v.* McClure, 4 Exch. 345; Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157; Girard *v.* Taggart, 5 S. & R. (Pa.) 19; 9 Am. Dec. 327; McCormick *v.* Basal, 46 Iowa 235; James *v.* Adams, 16 W. Va. 267, where it was said: "As the contract for the sale of the property is an entire thing, the refusal of the buyer to take the goods at all, or to make the cash payment, was a repudiation and breach of the entire contract, and the plaintiffs had at once a cause of action for such breach without waiting till the deferred payments would have become due under the contract, and without proving any formal tender of the balance of the term of the lease of the store, for such refusal was a waiver by the buyer of such tender, and the jury would have the right to infer that the seller was prepared and ready to deliver to him the store room as well as the goods but for his refusal." See Hosmer *v.* Wilson, 7 Mich. 294; 74 Am. Dec. 716. But the plaintiff must aver and prove readiness and willingness to perform what was incumbent upon him by the terms of the contract. Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 79 E. C. L. 126; Cole *v.* Swanston, 1 Cal. 54; 52 Am. Dec. 288; Greenup *v.* Stoker, 8 Ill. 213; Pope *v.* Terre Haute Car, etc., Co., 107 N. Y. 61; Hungate *v.* Rankin, 20 Ill. 642; Johnson *v.* Powell, 9 Ind. 566.

As to proof of sufficient tender of delivery, see Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Christy *v.* Stafford, 22 Ill. App. 430; Catlin *v.* Tobias, 26 N. Y. 217; 84 Am. Dec. 183. In a sale of grain mere proof of the seller's attendance then and there in the purchaser's absence for the purpose of tendering warehouse receipts for the grain, is not sufficient for a recovery of damages; to establish a tender, it must also be proved that the receipts were genuine and the grain not subject to charges. McPherson *v.* Hall, 44 Ill. 264. So in an action of assumpsit for the price of goods sold the seller must show an offer to deliver and an ability on his part to complete his part of the contract. Lassen *v.* Mitchell, 41 Ill. 101.

A mere notice that the seller is ready to deliver is not of itself sufficient; it may prove that he is willing but not that he had the goods on hand so that he was able to deliver. Lassen *v.* Mitchell, 41 Ill. 101.

In Newberry *v.* Furnival, 46 How. Pr. (N. Y.) 139, it was said that in order to entitle the plaintiffs to recover in an action for alleged breach of contract by the defendants in refusing to receive and pay for certain goods which the plaintiffs contracted to sell them, subsequently to arrive in a designated vessel, the latter must show a delivery or a readiness and offer to deliver the whole quantity of goods; but when a part arrives, if the defendants, knowing this, accept it, this probably will be a waiver; or if they make no objections to a delivery of the whole at that time, but affirmatively refuse to receive them on some other ground, this probably would be a waiver of delivery of the whole. See *infra*, this title, *Mutual or Concurrent Conditions*. ACTION, vol. 1, p. 80.

Delay in Acceptance.—If a buyer of goods to be delivered unreasonably neglects or refuses to receive them when ready for delivery to him, he is liable in damages for the delay even where he afterwards accepts the goods. Dibble *v.* Corbett, 5 Bosw. (N. Y.) 202 (sale of goods "to arrive").

Thus where by custom of the trade a buyer of goods on shipboard is bound

the possession of the goods may reclaim them, or recover them by an action of replevin, or maintain trover for their conversion.[1]

The measure of his recovery is not the full value of the goods, but the loss that he has actually sustained by reason of the breach, and this generally is the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery.[2] The fact that before delivery the buyer gives notice

to unload within a definite time, if by reason of his failure to take goods within that time the owner is obliged to pay lighterage and storage fees, the buyer is liable for such payments. Dayton *v.* Rowland, 1 Daly (N. Y.) 446. See *supra*, this title, *Buyer's Duties—Acceptance.*

The Complaint.—Where the complaint in an action for refusal to accept averred substantial performance on the part of the plaintiff, failure to receive on the part of the defendant, and the subsequent sale, and the difference between the contract and the market price, and prayed recovery of that difference as damages for the non-acceptance, such complaint is sufficient. Colorado Springs Live Stock Co. *v.* Godding (Cal. 1892), 29 Pac. Rep. 529. See House *v.* Babcock (Supreme Ct.), 17 N. Y. Supp. 640.

Where the complaint in an action by the seller for the buyer's refusal to accept, alleges that the plaintiff entered into a contract with the defendant to sell and deliver to him a certain quantity of goods, but does not allege that the defendant bought or agreed to pay for them, it is bad on general demurrer, as it only states a unilateral contract. Robinson Consolidated Min. Co. *v.* Johnson, 13 Colo. 258.

1. Story on Sales (4th ed.), § 440.

If the sale be made on condition that unless the goods are paid for, or unless some act be performed by the buyer by a certain day, no property therein shall pass; upon the lapse of the time the seller can reclaim the goods and maintain an action of trover for the conversion of them, or he may obtain the goods themselves in an action of replevin. Story on Sales (4th ed.), § 440. See *infra*, this title, *Conditional Sales.*

Where it appeared that the goods were sold on condition that the buyer should give a note for the price, which he neglected to do, and the giving of the note was not waived by the seller, these facts, in an action of replevin, will warrant the conclusion that the purchaser never acquired any title in the goods, and no demand for a return thereof is necessary in such case. Salomon *v.* Hathaway, 126 Mass. 482.

Where chattels were sold on credit, the property to remain in the seller until payment, the latter could not maintain replevin, upon a refusal to accept and pay, until he had made a demand. Kimball *v.* Farnum, 61 N. H. 348. See REPLEVIN, vol. 20, p. 1041.

2. Hopkins *v.* Lee, 6 Wheat. (U. S.) 109; McNaughter *v.* Cassally, 4 McLean (U. S.) 530; Gibbons *v.* U. S., 8 Wall. (U. S.) 269; Hughes *v.* U. S., 4 Ct. of Cl. 64; Barnard *v.* Conger, 6 McLean (U. S.) 497; Pope *v.* Filley, 9 Fed. Rep. 65; Knowlton *v.* Oliver, 28 Fed. Rep. 516; Hayden *v.* Demets, 53 N. Y. 426; Cahen *v.* Platt, 69 N. Y. 348; 25 Am. Rep. 203; Dana *v.* Fielder, 12 N. Y. 40; 62 Am. Dec. 130; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Canda *v.* Wick, 100 N. Y. 127; Windmuller *v.* Pope, 107 N. Y. 676; Hewitt *v.* Miller, 61 Barb. (N. Y.) 567; Whitney *v.* Thacher, 117 Mass. 523; Collins *v.* Delaporte, 115 Mass. 159; Hanover *v.* Weare, 2 N. H. 131; Rand *v.* White Mountains R. Co., 40 N. H. 79; Gordon *v.* Norris, 49 N. H. 376; Haines *v.* Tucker, 50 N. H. 307; Van Vleet *v.* Adair, 1 Blackf. (Ind.) 346; Gatling *v.* Newell, 12 Ind. 125; Beard *v.* Sloan, 38 Ind. 128; Fell *v.* Muller, 78 Ind. 507; McComas *v.* Haas, 107 Ind. 512; Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 303; Cannon *v.* Folsom, 2 Iowa 101; 63 Am. Dec. 474; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Clark *v.* Moore, 3 Mich. 55; Brownlee *v.* Bolton, 44 Mich. 218; Neuberger *v.* Rountree, 18 Ill. App. 610; Smith *v.* Dunlap, 12 Ill. 184; Phelps *v.* McGee, 18 Ill. 158; Sanborn *v.* Benedict, 78 Ill. 510; McNaught *v.* Dodson, 49 Ill. 446; Randon *v.* Barton, 4 Tex. 289; Northup *v.* Cook, 39 Mo. 208; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Converse *v.* Burrows, 2 Minn. 229; Nixon *v.* Nixon, 21 Ohio St. 114; Cullen *v.* Bimm, 37 Ohio St. 236; Williams *v.* Jones, 1 Bush (Ky.) 621; Smith *v.*

Snyder, 77 Va. 432; Hall *v.* Pierce, 4 W. Va. 107; Haskell *v.* McHenry, 4 Cal. 411; Schnebly *v.* Shirtcliff, 7 Phila. (Pa.) 236; Girard *v.* Taggart, 5 S. & R. (Pa.) 19; 9 Am. Dec. 327; Laubach *v.* Laubach, 73 Pa. St. 392; Ganson *v.* Madigan, 13 Mo. 75; Chapman *v.* Ingram, 30 Wis. 290; Danforth *v.* Walker, 37 Vt. 239; Laird *v.* Pim, 7 M. & W. 478; Barrow *v.* Arnaud, 8 Q. B. 604; 55 E. C. L. 604; Phillpots *v.* Evans, 5 M. & W. 475; Boorman *v.* Nash, 9 B. & C. 145; 17 E. C. L. 344; Gainsford *v.* Carroll, 2 B. & C. 624; 9 E. C. L. 204; Hickman *v.* Haines, L. R., 10 C. P. 598.

The reason of the rule is well stated by Tindal, C. J., in Barrow *v.* Arnaud, 8 Q. B. 609; 55 E. C. L. 609: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

In Pope *v.* Filley, 3 McCrary (U. S.) 190, iron contracted for was tendered to the buyer and he refused to accept. The sellers thereupon had it sold by a broker and sued for damages. They were allowed to recover the difference between the contract price, with interest thereon from the date of tender, and the price for which the iron was sold, less the ordinary and usual charges of the broker.

In Sanborn *v.* Benedict, 78 Ill. 309, the seller agreed to deliver certain goods upon ten days' notice by the buyer. It was held that if the buyer failed to give notice within a reasonable time the seller might tender a delivery, and, if it was not accepted, recover as damages the difference between the contract price and market value.

In Foos *v.* Sabin, 84 Ill. 564, the buyer was sued for failure to accept certain cattle according to the contract of sale. The evidence showed that the market price of the cattle was as high, or nearly so, at the time and place of delivery as the price named in the contract, and therefore it was held that the sellers were not damaged by the refusal to accept and a verdict for nominal damages would not be disturbed. McNaught *v.* Dobson, 49 Ill. 446; Whitmore *v.* Coates, 14 Mo. 9; Orr *v.* Bigelow, 14 N. Y. 556; Ballentine *v.* Robinson, 46 Pa. St. 179.

The rule of the text has been applied to a case where a carrier unreasonably delayed to transport and deliver goods intrusted to it for carriage; and this although there was no contract to deliver them within any certain time, and they were not intended to be used for any special purpose, and the carrier delivered them in the exact state in which they were received by it. Cutting *v.* Grand Trunk R. Co., 13 Allen (Mass.) 381; Deming *v.* Grand Trunk R. Co., 48 N. H. 455; 2 Am. Rep. 267; East Tenn., etc., R. Co. *v.* Hale, 85 Tenn. 69; CARRIERS OF GOODS, vol. 2, pp. 841 *et seq.*

See Collins *v.* Delaporte, 115 Mass. 159, where, in an action for damages for non-acceptance of lumber tendered, evidence was admitted to prove that the tender was not of the quality contracted for, in reduction of damages.

What Is the Market Value.—The market value is to be determined with reference to the time and place of delivery; if the market is subject to undue fluctuations due to artificial causes, these must be taken into account by the jury in determining what is the actual market value. Kountz *v.* Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 687. See DAMAGES, vol. 5, p. 31; MARKET VALUE, vol. 14, p. 468.

Where glass was sold to be shipped to New York from Antwerp, the seller could not recover as damages the difference between the contract price and the market price at the place to which he intended to ship it, viz. New York, but the market price at Antwerp should have been taken. Cahen *v.* Platt, 69 N. Y. 348; 25 Am. Rep. 203.

The value must be the market value at the time and place of delivery. The value at another place or at another time would not be material unless it tended to prove the value at that time and place. A reasonable range of time is sometimes allowed in which to average the price, so that sudden, unnatural and spasmodic values not indicating the real state of the market may not prevail. Smith *v.* Griffith, 3 Hill (N. Y.) 333; 88 Am. Dec. 639; Durst *v.* Burton, 47 N. Y. 175; 7 Am. Rep. 428. So the price at other places may be shown, under certain circumstances, for the purpose of proving the value at the designated place. Wem-

ple *v.* Stewart, 22 Barb. (N. Y.) 154. Where the evidence is clear and explicit at the place of delivery the value at other places is not strictly competent. Gregory *v.* McDowel, 8 Wend. (N. Y.) 435.

A seller upon failure of the buyer to take the goods cannot keep them to await a rise in the market, and charge the buyer with the expense of such keeping, if at the time of delivery there is a market price and sale for the commodity. Thurman *v.* Wilson, 7 Ill. App. 312.

A leading case on this subject in regard to contracts generally is Masterton *v.* Mayor, etc., of Brooklyn, 7 Hill (N. Y.) 61; 42 Am. Dec. 38, where it was held that the measure of damages for breach of executory contract includes loss of profits growing immediately out of the contract, which would have been realized from its full performance, but not loss of profits or other damages arising out of collateral undertakings entered into on the faith of the contract; and in this case, which arose out of a contract to procure and prepare certain building materials, the measure was held to be the difference between the contract price and the cost of procuring and preparing the materials, such cost to be estimated according to the state of the market at the date of the breach, and not at the time of full performance or at any intermediate time, though the action is brought after the full time has elapsed.

An exception to this general rule is mentioned by Benjamin (6th Am. ed.), § 762, as when the seller says to the buyer: "'I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether or not you are ready to accept the goods,' and if these terms be accepted the vendor may recover the whole price of the goods, the property of which remains vested in himself. In such a case the buyer would be driven to his cross action if the vendor after receiving the price should refuse delivery of the goods."

Contract for the Sale of Articles to be Manufactured.—If the contract is for the sale of articles to be manufactured and the title has not been transferred to the buyer, the same rule generally applies in regard to the damages the seller may recover for refusal of the buyer to accept, viz., the actual damages which he has suffered by reason of such refusal. Thus in Hosmer *v.* Wilson, 7 Mich. 294; 74 Am. Dec. 716, there was an agreement to construct an engine for an agreed price. Work was done and some materials used towards its construction, but before completion the order was countermanded. The manufacturer brought suit to recover damages. It was held—

First, that he could not recover on the common counts the value of such labor and materials, but should sue on the special contract, claiming damages for the breach of it. *Second*, that the law will not compel the seller after such countermand to go on and complete the article before he can recover for what he has already done. He has no right to so increase his damages, but he may treat the countermand and refusal as a prevention of performance and sue on that ground. *Third*, that the value of the labor spent on the materials in such case is not the proper criterion of damages. Such labor may have enhanced the value of materials, in which case the plaintiff still owning them is compensated to the extent of such enhanced value; or it may have diminished such value, then payment for the labor will not be an adequate compensation. Whether the labor has enhanced or diminished the value of the materials, and the exact amount of damages, are necessarily questions of fact for the jury.

A similar state of facts existed in Allen *v.* Jarvis, 20 Conn. 38, and the same conclusions were reached.

The same views were taken in Cort *v.* Ambergate R. Co., 17 Q. B. 127; 79 E. C. L. 126. The instruction as to the measure of damages was that the seller "ought to be put in the same position as if he had been permitted to complete the contract."

This rule is also supported by Eckenrode *v.* Chemical Co., 55 Md. 51; Muskegon Curtain Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132; Geiss *v.* Wyeth Hardware, etc., Co., 37 Kan. 130; Tufts *v.* Grewer, 83 Me. 407; Knowlton *v.* Oliver, 28 Fed. Rep. 516; Rider *v.* Kelley, 32 Vt. 268; 76 Am. Dec. 176.

In Unexcelled Fire Works Co. *v.* Polites, 130 Pa. St. 536; 17 Am. St. Rep. 788, the plaintiffs had accepted an order for certain fire works to be shipped to the buyer. Before they were separated from the bulk and set apart to the buyer he notified the seller not to ship them. It was held that

to the seller that he will not receive the goods does not alter the rule.[1]

There is authority for the doctrine that, whether the contract is executed or executory, the seller has still another remedy at his election: viz., to treat the goods as the property of the buyer notwithstanding his distinct refusal to accept them, and to recover the whole of the contract price. But the weight of authority is otherwise.[2]

such notice was a revocation of the carrier's agency to receive the goods and a subsequent delivery of them to the carrier would not charge the buyer with their price, his only liability being for damages for refusing to accept them. Clark, J., in delivering the opinion, said: "Whilst the manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract of sale of goods not specific, the rule undoubtedly is that the measure of damages for refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery."

Since the title does not pass until the completion and delivery of the manufactured article, any loss occurring from the destruction of the material must fall on the seller. And this is true even where the default of the buyer prevented the completion of the contract. McConihe *v.* New York, etc., R. Co., 20 N. Y. 495; 75 Am. Dec. 420; Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 216; *supra*, this title, *Sale of Goods to be Manufactured.* In such case the seller's remedy, it seems, is an action for damages. As is said in Butler *v.* Butler, 77 N. Y. 475; 33 Am. Rep. 650: "Doubtless the plaintiff may in this case, as in other cases where the performance of a contract has been prevented by the act or omission of the other party, recover what he has lost thereby, if anything, or the damages sustained, if any." *Citing* Hosmer *v.* Wilson, 7 Mich. 294; 74 Am. Dec. 716. This holding seems in line with the principle that a party to a contract who prevents its performance is guilty of a breach of the contract which gives the other party an immediate right of action. See CONTRACTS, vol. 3, pp. 903 *et seq.*

1. In some cases of executory contracts for the future delivery of goods it has been attempted to maintain that where the buyer gave notice of refusal to accept the goods a rescission of the contract took place then, and the measure of damages recovered by the seller was the difference between the contract price and the market value at the time of the notice; but it is well settled by both American and English cases that such notice by the buyer is of no effect whatever unless the seller acts on it and rescinds the contract, and therefore does not change the rule as to the measure of damages. The buyer cannot of his own motion create a breach of the contract upon which the seller is bound to act. Kadish *v.* Young, 108 Ill. 177; 43 Am. Rep. 548. In this connection it is said in 2 Sedgwick on Damages, § 758: "An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance, by giving notice that he would not be ready to complete the agreement; and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts, justly denying the right of either party to rescind the agreement, have adhered to the day of the breach as the period for estimating the damages." To support this rule the following cases may be cited: Fox *v.* Kitton, 19 Ill. 519; Cummings *v.* Tilton, 44 Ill. 173; McPherson *v.* Walker, 40 Ill. 371; Danforth *v.* Walker, 37 Vt. 239; Crist *v.* Armour, 34 Barb. (N. Y.) 378; Baney *v.* Killmer, 1 Pa. St. 30; 44 Am. Dec. 109; Leigh *v.* Paterson, 8 Taunt. 540; 4 E. C. L. 204; Phillpots *v.* Evans, 5 M. & W. 475; Hochster *v.* DeLa-Tour, 2 E. & B. 678; 75 E. C. L. 678; Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 79 E. C. L. 126; Frost *v.* Knight, L. R., 5 Exch. 322. See Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 109 E. C. L. 711.

2. See Dustan *v.* McAndrew, 44 N. Y. 78; Bagley *v.* Findlay, 82 Ill. 524; Tiedeman on Sales, § 333. There is a

strong tendency, however, to the application of the rule only when the contract calls for an article to be manufactured especially for the buyer. See Gordon *v.* Norris, 49 N. H. 376; Ballantine *v.* Robinson, 46 Pa. St. 177; Shawhan *v* Van Nest, 25 Ohio St. 490; 18 Am. Rep. 313; Bookwalter *v.* Clark, 11 Biss. (U. S.) 126; Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Ganson *v.* Madigan, 13 Wis. 75.

Existence of This Remedy Questioned. —It has been seen that the title to the goods does not pass until there has been an acceptance by the buyer, though this acceptance may take place before delivery; indeed, it takes place by virtue of the mutual assent of the parties when the sale is of specific ascertained chattels. See *supra*, this title, *Effect of Contract* (*in Passing Title*). Until the transfer of the property in the goods they belong to the seller and are at his risk, and manifestly he cannot force the buyer to accept, nor can he recover the contract price until there has been a transfer of title. See *infra*, this title, *Where the Contract Is Executed*, where a number of cases are cited to the point that until the title has been transferred there cannot be an action to recover the full contract price of the chattels. The first and leading case in this country, usually cited to sustain this special rule of damages, is Bement *v.* Smith, 15 Wend. (N. Y.) 493. The seller contracted to make and deliver a sulky. He made it and on tendering it the buyer refused to accept. The seller then left it with a third person for the buyer and brought his action on the special contract, and was allowed to recover, not the price, but damages, the measure of which was the price agreed on. It was expressly said to be "true that the plaintiff does not recover directly as for goods sold." In this case there were special counts, setting out the contract and alleging delivery, and also a general count for work and labor done and goods sold; and while the court held that the tender amounted to a delivery, and therefore that the title had passed, the plaintiff was allowed to recover on the special count and not on the general count for goods sold. The judge appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order and tendered to a customer refusing to receive it. In a note to Shawhan *v.* Van Nest, 15 Am. L. Reg. 163, it is said, "The case is not an exception to the principle that property must have passed in order to recover the price, because the court held that the property had passed. Whether tender does amount to delivery might be open to doubt."

This case was cited and depended on to support the decision in Shawhan *v.* Van Nest, 25 Ohio St. 490; 18 Am. Rep. 313, where the facts were precisely similar, but the court said, after quoting the distinction drawn in the cases cited *supra* between sales of ordinary goods and of goods to be made to order: "We are not called upon now to determine whether the distinction is sound in principle or not, but be that as it may, we recognize the law applicable to the case before us as being correctly stated." In this case the contract provided that the shop of the plaintiff where the carriage was made was to be the place of delivery, and it might well be argued that the completion of the carriage at the time and place fixed amounted to delivery, and for that reason the plaintiff could recover as for goods sold and delivered. See Hadly *v.* Pugh, Wright (Ohio) 554.

Ballentine *v.* Robinson, 46 Pa. St. 177, is also cited to support this view, but it is clear that there the property was held to have passed to the buyer, and such being the case, the decision is not an exception to the general rule. "It must be admitted that Ballentine *v.* Robinson, Bement *v.* Smith, and Shawhan *v.* Van Nest, can only be reconciled with what appears to be the general line of authorities, by saying that in them, tender by the seller, or conduct on the part of the buyer amounting to an acceptance, was considered to have passed the property in the goods to the latter. But the unqualified position laid down in the rule that where the buyer refuses to accept the goods upon tender, the seller may store or retain them and sue for the contract price . . . does not seem borne out by the authorities." 15 Am. L. Reg., N. S. 164. See also Sedgwick on Damages (7th ed.), vol. 1, p. 596, *n.*, where it is said: "We do not think the distinction taken in Shawhan *v.* Van Nest can be supported. . . . This [the doctrine in the text] is held to be the proper rule only where the title has passed."

In Bookwalter *v.* Clark, 11 Biss. (U. S.) 126, the defendant had ordered from the plaintiffs a water wheel of peculiar make, being unusually large and of a character that they did not keep in stock. After the wheel had been completed and tendered, the defendants refused to accept. Bunn, J., in delivering the opinion of the court, after laying down the general rule in regard to the recovery in such case, said: "But where a person orders an article to be manufactured according to a certain measure, patent, or style, as a suit of clothes or a carriage, or a steam engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he has completed his contract and tendered the article, is entitled to recover the contract price. The reason for the distinction is that in such a case there is presumably no certain market value for goods made according to such a specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot with any certainty have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action he might be compelled to wait until the buyer should become irresponsible and the article might have no market value, or no appreciable value at all for any other person except the one ordering. In such a case, it seems more just and equitable that the loss and inconvenience of having a cumberous article like the one in suit on hand for sale and taking the chances in finding a purchaser, should fall upon the party who is in fault in not fulfilling his contract rather than upon the party who is in no fault and is claiming nothing but just what the other has agreed to do." Further, he said: "And the case does not turn, in my judgment, upon the question as to whether the title to the goods has passed from plaintiffs to defendants. If the plaintiffs have fulfilled their contract and delivered or tendered delivery, this is all they can do, and if the defendants refuse to accept the goods, and being made to order they are presumably not marketable, I think the plaintiffs are entitled to recover as their true measure of damages for non-fulfillment of the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases would pass upon the rendition of judgment." Again, in Allen *v.* Jarvis, 20 Conn. 38, the plaintiffs, at the special instance and request of the defendant, made for him twelve surgical adjusters, which the defendant refused to accept and pay for. It was held that in such case, where the property in question was utterly worthless in the hands of the plaintiff, the whole price agreed on should be recovered, since the injury to the plaintiff in consequence of the non-acceptance of the work would amount to its full value. The same principle is recognized in Gordon *v.* Norris, 49 N. H. 376, and the same reasoning used, though the case lays down the general rule in regard to the measure of damages in ordinary cases of the sale of goods. In regard to these last three cases, they cannot really be said to support the special rule and are not exceptions to the general principle that where the contract is executory the seller only recovers his actual damage resulting from the buyer's refusal to accept, for it can be readily seen that the less the goods are worth in the market the more the seller recovers, and if they are worth nothing at all, then he recovers as damages the full contract price from the buyer, since he is unable to obtain any part of it by means of a resale. Such a result, however, maybe attained by applying the general as well as by any special rule.

As to other cases cited to support this special remedy, Donnell *v.* Hearn, 12 Daly (N. Y.) 230; and Higgins *v.* Murray, 73 N. Y. 254, were both cases of contracts for work and labor, not of sale. Again, in Wade *v.* Moffett, 21 Ill. 110; 74 Am. Dec. 79, the contract was not an executory one; the seller retained possession by virtue of his lien. Chicago *v.* Greer, 9 Wall. (U. S.) 726, was an action for damages, and the point under discussion was not involved. In Nichols *v.* Morse, 100 Mass. 523, the contract was not executory; delivery by the seller at the time and place agreed on and of the proper quantity and quality was sufficient to sustain an action for goods sold and delivered. So of Rodman *v.* Guilford, 112 Mass. 406; Pearson *v.* Mason, 120 Mass. 53; Frazier *v.* Simmons, 139 Mass. 531; Bell *v.* Offutt, 10 Bush. (Ky.) 632. See also Brewer *v.* Hoosatonic R. Co., 104 Mass. 593; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Hadly *v.* Gano, Wright (Ohio) 554.

Thompson *v.* Alger, 12 Met. (Mass.) 428, was the case of a sale of shares of stock, which the seller repudiated after

(2) *Where Contract Is Executed.*—If the property in the goods has been transferred to the buyer, even though he has not acquired the possession, the seller may pursue his legal remedies against the goods[1] or maintain a personal action against the buyer, in case of his refusal to accept or pay.[2] Where, however, the possession has been transferred, as well as the property, the seller's

the stock had been transferred upon the books of the Company, and it was held that such transfer passed the title and therefore the plaintiff was allowed to recover the full contract price.

In *New York*, where such a remedy is said to be strongly upheld, an examination of the cases cited to support it shows that many of them were cases of executed and not executory contracts; so of Hayden *v.* Demets, 53 N. Y. 426; Mason *v.* Decker, 72 N. Y. 596; 28 Am. Rep. 190 (where it was expressly said that the remedy was based upon the theory that the title to the property by the contract and tender and assent of the seller had become vested in the buyer); Quick *v.* Wheeler, 78 N. Y. 305; Hunter *v.* Wetsell, 84 N. Y. 549; 38 Am. Rep. 544; Dustan *v.* McAndrew, 44 N. Y. 72, generally cited as the leading case, was the case of a resale, and called for no such classification as the judge formulated. So also of Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Pollen *v.* LeRoy, 30 N. Y. 549.

1. See *infra*, this title, *Remedies Against the Goods.*

2. Story on Sales (4th ed.), § 436; Maclean *v.* Dunn, 4 Bing. 722; 15 E. C. L. 129; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; 4 Am. Dec. 374; Nicholson *v.* Paston, 11 N. Y. Supp. 567. See Bullock *v.* Finley, 28 Fed. Rep. 514.

In this case the action must be for goods bargained and sold, not sold and delivered, as there has been no delivery. New Market Iron Foundry *v.* Harvey, 23 N. H. 395.

Where goods have been bargained and sold by a valid contract, so that the right of property has thereby passed to the purchaser and the latter has failed to accept and pay for them, the seller may proceed for goods bargained and sold to recover the price. McClure *v.* Williams, 4 Sneed (Tenn.) 718.

In this connection it is said in 2 Schouler's Per. Prop., § 528: "Of the seller's damages in the intermediate case, where the right of property with risks of ownership has passed to the buyer by the completion of the bargain, and yet the goods remain on the seller's hands with delivery of possession unsurrendered, the books make little or no special mention; yet here the title to the goods has passed, not in its fullest, but only in a partial, sense. The proper count here would be that of goods bargained and sold; and the rule of damages appears not unlike that where goods are sold and delivered, viz., that the seller shall recover the contract price of the goods."

"The principle, concisely stated," said Tindal, C. J., in Elliott *v.* Pybus, 10 Bing. 512; 25 E. C. L. 222, "is this—that a count for goods bargained and sold can only be maintained where the property has passed" from the seller to the buyer. See Atkinson *v.* Bell, 8 B. & C. 277; 15 E. C. L. 216; Moody *v.* Brown, 34 Me. 107; 56 Am. Dec. 640; Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 303; Indianapolis, etc., R. Co. *v.* Maguire, 62 Ind. 140, where it was said that if anything remains to be done necessary to transfer the title to personal property, an action on the contract for the value cannot be maintained; Perdicaris *v.* Trenton City Bridge Co., 29 N. S. L. 367; Ganson *v.* Madigan, 13 Wis. 67.

Hunter *v.* Wetsell, 84 N. Y. 554; 38 Am. Rep. 544, arose out of a contract for the sale of some hops. The purchaser was informed after the hops were weighed and baled that they were ready for delivery at the place to be designated by him. The seller was ready to perform and had done all that he could do until the place of delivery was named by the purchaser, and it was held that there was sufficient offer of performance to pass the title and enable the seller to maintain his action for the price, that the case was not one of a merely executory contract in which the title had not passed, and the seller stood in the position of such complete performance as entitled him to recover the contract price as his measure of damages. See Pollen *v.* Le Roy, 30 N. Y. 556; Wade *v.* Moffett, 21 Ill. 110; 74 Am. Dec. 79; Armstrong *v.* Turner, 49 Md. 589. See also cases cited in last note to preceding section.

position is that of creditors generally, and his remedy is by a personal action for the price.[1] If the sale is on credit, this action is

In Thompson *v.* Alger, 12 Met. (Mass.) 428, it was held in the case of a sale of certain shares of stock that the property therein vested in the buyer upon the transfer to him of the stock upon the books of the company, and the seller was therefore allowed to recover the contract price. See Pearson *v.* Mason, 120 Mass. 53; Thorndike *v.* Locke, 98 Mass. 340.

Where the seller has his election between his remedy by resale or by a personal action against the buyer, he cannot, after making such election, abandon it and pursue another. Thus where the seller brings an action to recover the contract price of goods sold, he thereby affirms the contract and cannot thereafter resell the goods or disaffirm the contract and reclaim them. Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Dreyfuss *v.* Foster, 3 N. Y. Supp. 54.

1. Martindale *v.* Smith, 1 Q. B. 395; 41 E. C. L. 595; Moore *v.* Perrot, 2 Wash. 1.

The rule is that assumpsit for goods sold and delivered, or for goods bargained and sold, will not lie unless the title has passed from the seller. Hanson *v.* Meyer, 6 East 614; Simmons *v.* Swift, 5 B. & C. 857; 12 E. C. L. 388; Fuller *v.* Bean, 34 N. H. 290; Messer *v.* Woodman, 22 N. H. 172; 53 Am. Dec. 241; Warren *v.* Buckminster, 24 N. H. 336; Shepherd *v.* Pressey, 32 N. H. 49; Bailey *v.* Smith, 43 N. H. 141; Scatten *v.* Sutter, 37 Mich. 526; Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Scott *v.* Wood, 41 Miss. 661; Doremus *v.* Howard, 23 N. J. L. 390.

In an action for the price the warranty of the goods is not a matter altogether collateral, but forms an essential portion of the consideration for the buyer's undertaking to pay; a breach of the warranty may therefore be shown in reduction of the stipulated price. Allen *v.* Hooker, 25 Vt. 137; Hall *v.* Clark, 21 Mo. 415. See for this general subject, WARRANTY; SET-OFF.

But unless there is a warranty or fraud in the sale the buyer is entitled to no reduction in the price, even though the goods were unsound and unmerchantable at the time of the sale. Gihon *v.* Levy, 2 Duer (N. Y.) 176. Particularly if, after discovery of the defects, he retains the goods. U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75.

In Martindale *v.* Smith, 1 Q. B. 389; 41 E. C. L. 592, it appeared that A sold to B stacks of oats then on A's ground under a written agreement by which B was to have the liberty to leave the stacks on the ground for four months and was to pay for them in twelve weeks from the agreement. At the end of twelve weeks A demanded payment, which was not made; afterwards B tendered payment, which A refused to accept, and after that A sold the stacks. It was held that the contract being executed, A's only remedy was an action for the price, and that, while he might retain the goods by virtue of his lien until payment, he was bound to deliver them up upon offer of payment if made while the goods still remained in his possession.

Where no intention is shown that the title shall not pass until the goods are paid for, a sale at auction for cash is a completed sale and the seller may recover the purchase money though the goods are not delivered if he is ready to deliver them. Clark *v.* Greeley, 62 N. H. 394. See AUCTIONS AND AUCTIONEERS, vol. 1, p. 977.

No action by a mortgagor lies to recover the price of mortgaged personal property sold in violation of law to a third party and returned after the sale by the purchaser. Bryant *v.* Pollard, 10 Allen (Mass.) 81. See Schneider *v.* Oregon Pac. R. Co., 20 Oregon 172.

Goods were sold and delivered in a State where such sale was legal, and nothing remained to be done by the seller to complete the transaction, and he was not in any way to be farther connected with it. It was held that an action brought to recover the price for such goods could be maintained in a State where such a sale would be illegal. Smith *v.* Godfrey, 28 N. H. 379; 61 Am. Dec. 617.

Where one takes goods by virtue of a sale made by a person who has no authority to sell, the owner may affirm the contract and support an action for goods sold. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120; 22 Am. Dec. 410.

Where one bought goods upon a guaranty that the freight should not exceed a certain amount, and upon dis-

covering an excess merely notified the seller and left the goods in the depot, not declining to take them if the seller reduced the original price so as to cover freight, the buyer is liable to an action for the final price. Fobes *v.* Branson, 81 N. Car. 256.

Where the purchaser of goods transfers to the seller the notes of a third person and guarantees payment thereof, if it be not paid when due the seller may recover in an action for goods sold. Butler *v.* Haight, 8 Wend. (N. Y.) 535.

Upon a contract to manufacture a given quantity of lumber by a certain time at a fixed price, payable monthly, on the purchaser's refusing to pay for the lumber sawed and received and declaring the contract at an end, the seller, without waiting for the time of performance to elapse, may, if not himself in fault, treat the contract as wholly broken and recover the contract price for the lumber delivered and damages for the breach. Hale *v.* Trout, 35 Cal. 229.

Where timber was sold upon the land where it was cut, resold by the buyer and removed to adjoining land, also belonging to the first seller, measured, and a portion of it carried away by the second buyer, the first becoming insolvent, the seller forbade him to carry away the rest of the timber unless he would promise to pay for it, which he did, it was held that he could recover its value of the second buyer. Haskell *v.* Rice, 11 Gray (Mass.) 240.

The sellers of a safe, after sale and delivery to the purchaser, removed therefrom an account book and some warrants. In a suit by them for the price agreed upon it was held that they could recover as they had performed their agreement. Kevill *v.* Soldani, 34 Mo. 149.

For other cases where the seller has been allowed to maintain his action for the price, see Brown *v.* Slee, 103 N. S. 828; Atlantic Phosphate Co. *v.* Grafflin, 114 N. S. 492; Williamson *v.* Hill, 154 Mass. 117; Pineville Lumber Co. *v.* Thompson, 46 Minn. 502.

If partial delivery only has been made, the seller, after a breach by failure to deliver, may recover the value or price of the part actually delivered subject to an offset of the damages caused to the buyer by his failure to deliver. Goodwin *v.* Merrill, 13 Wis. 658; Gage *v.* Meyers, 59 Mich. 300; Begole *v.* McKenzie, 26 Mich. 470; Mitchell *v.* Scott, 41 Mich. 108; Moon *v.* Harder, 38 Mich. 566; McQueen *v.* Gamble, 33 Mich. 344; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Vaughan *v.* Howe, 20 Wis. 497; Moulton *v.* Trask, 9 Met. (Mass.) 577; Flanders *v.* Putney, 58 N. H. 358; Horn *v.* Batchelder, 41 N. H. 86. See Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567; Partridge *v.* Gildermeister, 3 Abb. App. Dec. (N. Y.) 461.

But if payment is made to depend upon a complete performance of the contract by the seller, the principle is that such complete performance is a condition precedent to his right of action against a buyer for the price of any part of the property delivered under the contract. McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) 165; 7 Am. Dec. 299; Jennings *v.* Camp, 13 Johns. (N. Y.) 94; 7 Am. Dec. 673; Champlin *v.* Rowley, 13 Wend. (N. Y.) 288; Pratt *v.* Gulick, 13 Barb. (N. Y.) 300.

Such condition, however, may be waived by the buyer if he made payment on the contract after failure by the seller to deliver all the property. Rochester Printing Co. *v.* Kellogg (Supreme Ct.), 17 N. Y. Supp. 279.

Completing the Right of Action.— Where goods were sold and delivered, and the seller afterwards agreed to receive and indorse the note of a third person in payment, and the buyer delivered a note with a forged indorsement, the seller cannot have an action for goods sold and delivered until he has rescinded the agreement and returned or offered to return the note. Coolidge *v.* Brigham, 1 Metc. (Mass.) 547; Baker *v.* Robbins, 2 Den. (N. Y.) 136. See Fisher *v.* Fredenhall, 21 Barb. (N. Y.) 82.

If there be an agreement between two parties on the one side to take the leasehold premises at a certain rent, and the stock and material therein at certain agreed prices, and on the other to assign the lease by an instrument in writing, and the purchaser voluntarily enters upon the premises without such assignment and holds the same without interruption or disturbance, the making of such written assignment cannot then be insisted on as a condition precedent, the performance of which is necessary to entitle the seller to recover payment for the goods.

not maintainable until the expiration of the time for which the credit was given,[1] unless the buyer's fraudulent representations

Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271.

Where goods were sold, in this case wire, to be delivered weekly, at a certain place, and after delivery of a part the buyer refused to receive any more, and he plaintiff thereupon sued for the price, considering the contract as still subsisting, it was held that he could maintain his action without being ready and able to perform his part, should the defendant demand it, by having the requisite quantity of wire at the place named. Roebling's Sons Co. *v.* Lock Stitch Fence Co., 130 Ill. 660.

Where a machine was sold for which the notes of two parties were taken in payment, a demand must be made upon both for the note before suit can be brought for the price of the machine. Osborne *v.* Bell, 62 Mich. 214.

In Nightingale *v.* Eiseman, 50 Hun (N. Y.) 189, it appeared that goods had been ordered from the plaintiffs to be delivered at different times in certain quantities, and to be paid for ten days after the delivery. It was held that there could be no recovery of price until one complete delivery had been made. *Aff'd* in 121 N. Y. 288.

Amount of Recovery.—In an action for the price the seller can recover only the price alleged in his complaint or declaration, though the defendant in setting up a breach of warranty alleges that he bought for a higher price. Boston Tea Co. *v.* Brubaker, 26 Neb. 409.

Evidence that the goods were not worth the price paid is not admissible in the absence of fraud. Shirley *v.* Keagy, 126 Pa. St. 282.

In an action for the price of an article sold and delivered under an express contract where no price was agreed on, the defendant can only show what was the market price generally of the article at the time of the sale. He will not be entitled to reduce the amount below the market price at the time by showing what was the real or actual value of the article sold. Dickson *v.* Jordan, 12 Ired. (N. Car.) 79.

If a part of the price has been paid, the seller's recovery is limited to the amount unpaid. See Rose *v.* Story, 1 Pa. St. 190; 44 Am. Dec. 121.

A contracted to sell and deliver to B within a certain time a machine, part of which he delivered before the expiration of the time, but the other part was not delivered for several weeks after the time agreed on, whereupon B refused to accept it. A then offered to take back the machine and return that part of the purchase price which had been paid, which offer B refused and kept the machine. It did not appear what amount of damages, if any, B had sustained by the failure to deliver part of the machine within the time stipulated, and it was held that a verdict in favor of A for the unpaid value of the machine would not be disturbed. Vanausdeln *v.* Crenshaw, 16 Kan. 234.

Where plaintiff delivered part of the goods sold and accepted the defendants' notes for the price thereof, some of which were paid, but on the subsequent failure of the defendants to pay one of the notes, the plaintiff refused to carry out the contract, and brought an action for the value of the goods delivered, it was held that the recovery could not be for more than the contract price. Kokomo Straw Board Co. *v.* Inman (Supreme Ct.), 11 N. Y. Supp. 329.

1. Dellone *v.* Hull, 47 Md. 112; Crawford *v.* Avery, 35 Miss. 205; Yale *v.* Coddington, 21 Wend. (N. Y.) 175; Brady *v.* Isler, 9 Lea (Tenn.) 356; Auger *v.* Thompson, 3 Ont. App. 19. See Sheriff *v.* McCoy, 27 U. C., Q. B. 597.

In an action for goods sold and delivered, where the accounts were introduced in evidence, the heading of which contained the words: "Terms, thirty days, discount 5 per cent.; cash, ten days, discount, 6 per cent.," it was held that these words did not mean that the purchaser was to have thirty days' credit, but that while the terms of sale were cash, and the money due immediately, yet if the money were paid in thirty days a discount of 5 per cent. would have been allowed. Moss *v.* Katz, 69 Tex. 411.

In Keller *v.* Strasburger, 23 Hun (N. Y.) 625, *aff'd* in 90 N. Y. 379, an action to recover the price of goods sold and delivered, the defense was that they were sold upon credit which had not expired. The plaintiff replied that the sale was procured by fraud and that the credit had been waived. The only evidence of waiver was the avowed insolvency of the defendant within the time for which the credit

induced the credit[1]; but if, by the terms of the contract, the note or other security for the price is to be given at once, payable at the expiration of the time for which the credit is given, in case of a default in giving the note or security, the seller may bring suit at once just as if the contract required an absolute payment in cash.[2] In case of the buyer's fraud, the seller may rescind the contract, return the notes or securities, and reclaim the goods, or maintain trover for their value, or he may have his action for

was given, followed by a notice to the plaintiffs of his inability to pay the debt. There was no proof of fraud. It was held that there was no waiver of credit and that the action could not be maintained until the expiration of the time of credit.

In Girard *v.* Taggart, 5 S. & R. (Pa.) 19; 9 Am. Dec. 327, there was an auction sale. On tender the buyer refused to accept the goods, and the owner was allowed to maintain an action for damages immediately, but it was admitted that he could not sue for the price until the time of credit had expired.

In an action by an administrator for goods sold and delivered, to which non-assumpsit and payment were pleaded, it is no defense that the plaintiff, at the time of the delivery, told the defendant he would give him credit for the amount on a judgment due from the plaintiff's intestate to the defendant for the amount, there being no evidence that the defendant assented to the arrangement. McKee *v.* Baden, 3 Gill. (Md.) 237.

The plaintiff and defendant were joint owners of a machine, and the latter bought the former's half interest therein, giving his note, in which he promised to pay a certain amount by a specified time or forfeit the half which he had bought. When the note fell due, he refused to pay the money, and gave the plaintiff a bill of sale of half the machine but refused to let him have or even see it. It was held that the plaintiff was entitled to maintain an action on the note. Tuckerman *v.* Floyd, 106 Mass. 72.

In an action for goods sold and delivered the defendant testified that the plaintiff allowed him one year's time in which to pay for the goods, and that the credit had not expired. It was held, upon this evidence being uncontradicted, that the court erred in withdrawing from the jury the question of whether such credit existed and directing a verdict for the plaintiff. Zimmern *v.* Heinecke, 17 N. Y. Supp. 728.

Where the sale of hotel furniture, partly on credit, was part of an arrangement by which the purchaser was bound to rent the hotel, and he failed to perform the agreement to pay rent and abandoned the premises, it was held that he could not object that the credit allowed him on the furniture protected him from immediate suit for the unpaid purchase money. Wineman *v.* Walters, 53 Mich. 470.

1. Kayser *v.* Sichel, 34 Barb. (N. Y.) 84; Eppens *v.* McGrath, 3 N. Y. S. 213; Hervey *v.* Harvey, 15 Me. 357; Barrett *v.* Koella, 5 Biss. (U. S.) 40.

In case of a sale on credit, if the security agreed on by the parties turns out to be worthless and different from ther repesentations of the buyer, or if there be other fraud on his part which avoids the special contract, an action will lie immediately for the price. Manufacturers', etc., Bank *v.* Gore, 15 Mass. 79; 8 Am. Dec. 83; Willson *v.* Foree, 6 Johns. (N. Y.) 110; 5 Am. Dec. 195; see also Pope *v.* Nance, 1 Stew. (Ala.) 354; 18 Am. Dec. 60. See Montgomery *v.* Forbes, 148 Mass. 249.

So where a buyer, in consideration of his agreement to do certain things, is given credit for goods purchased by him, and he fails to carry out his agreement, he may be sued for the price of the goods, as though no credit had been given. Wineman *v.* Walters, 53 Mich. 470.

2. Manton *v.* Gammon, 7 Ill. App. 201; Campbell *v.* Buller, 32 Mo. App. 646; Hays *v.* Weatherman, 14 Ind. 341; McCormick *v.* Basal, 46 Iowa 235; Barron *v.* Mullin, 21 Minn. 374; Crawford *v.* Avery, 35 Miss. 305; Young *v.* Garrett, 83 Tex. 497; Hanna *v.* Mills, 21 Wend. N. Y. 90; 34 Am. Dec. 216; Yale *v.* Coddington, 21 Wend. (N. Y.) 175; Wheeler *v.* Harrah, 14 Oregon 325; Stephenson *v.* Repp, 47 Ohio St. 551; Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157; Rice *v.* Andrews, 32 Vt. 691; Hale *v.* Jones, 48 Vt. 227; Foster

breach of contract and recover their value.[1] It has been held, where the buyer, after accepting part of goods sold on credit, re-

v. Adams, 60 Vt. 392; 6 Am. St. Rep. 120; Mussen *v.* Price, 4 East 147; Dutton *v.* Solomonson, 3 B. & P. 582.

Compare Allen *v.* Ford, 19 Pick. (Mass.) 217 (breach of condition as to security promised).

In Clarke *v.* Dill (Pa. 1887), 11 Atl. Rep. 82, it was held that where a contract of sale stipulated for payment by instalments which were to be secured by promissory notes, and the buyer, after delivery of the property, refuses to give the notes, the seller may either consider the contract broken and sue for damages, or as still subsisting, and sue for each instalment upon its becoming due.

The purchaser of goods was given an option to pay in thirty days, or give a four months note. He did neither and it was held that at the expiration of the thirty days an action could be brought for the price. Matthews *v.* McGrath, 2 N. Y. Supp. 659.

In 3 Parsons on Contracts (7th ed.), *211, it is said: "If the goods are sold on credit, that is, if it is a part of the contract of sale that payment shall be made at a future day, there can, of course, be no suit for the price until that day. But if it is also a part of the contract that a note or bill of exchange shall be given immediately, which is to be payable on that future day, if this be not given, an action can at once be maintained for it; not only because it is a separate promise, but because, by the practice of merchants, this note or bill might be made, by the seller's getting it discounted, the means of present payment." *Quoted* and *approved* in Hays *v.* Weatherman, 14 Ind. 341.

And the seller may recover the residue if, after part payment of the note given, the buyer by means of fraudulent representations induces him to surrender the note. Blodgett *v.* Webster, 24 N. H. 91.

In such case he may recover as damages the whole value or price of the goods, allowing a rebate of interest during the stipulated credit. Hanna *v.* Mills, 21 Wend. (N. Y.) 90; 34 Am. Dec. 216; Carnahan *v.* Hughes, 108 Ind. 225; Bicknell *v.* Buck, 58 Ind. 354 (only the price may be recovered and evidence as to the value of the property is inadmissible).

In Carnahan *v.* Hughes, 108 Ind. 225, the agreement was that both buyers should execute the notes for the price. The seller received and retained notes executed by one buyer alone. In an action by the seller against the other for damages for refusing to sign the notes it was held that he could not maintain the action without offering to return the notes already received.

Compare, in this general connection, Dodge *v.* Waterman, 36 N. H. 186; Scott *v.* Montague, 16 Vt. 164, holding that where goods are agreed to be sold on credit, and the buyer is to give his note for the price, if the goods are delivered without the note or any request for it, the stipulation for the note is waived, and no action can be maintained for the price of the goods until the agreed term of credit has expired.

In Kokomo Straw Board Co. *v.* Inman (Supreme Ct.), 11 N. Y. Supp. 329, it appeared that the plaintiff had contracted to furnish defendants with a specified quantity of goods manufactured by them, to be shipped the next year, and for which the defendants were to give their acceptances. Some goods were shipped and acceptances given, until upon one of the notes falling due and not being paid, the plaintiffs refused to send more goods, whereupon the defendants refused to give notes for shipments already made or to pay the notes as they afterwards matured. It was held that in the absence of default on the plaintiff's part, the latter could maintain an action against them for the goods delivered.

1. Moriarty *v.* Stofferan, 89 Ill. 528 (replevin allowed); Doane *v.* Lockwood, 115 Ill. 490; Farwell *v.* Hanchett, 120 Ill. 573, where it was held that the seller cannot maintain replevin as against an innocent subsequent purchaser; Dietz *v.* Sutcliffe, 80 Ky. 650; Dellone *v.* Hull, 47 Md. 112; Baker *v.* Robbins, 2 Den. (N. Y.) 136; Bank of Beloit *v.* Beale, 34 N. Y. 473. See also Clark *v.* Young, 1 Cranch (U. S.) 181, where it was held that a promissory note given as conditional payment, need not be returned in order for the seller to maintain his action for goods sold and delivered. See RESCISSION, vol. 21, p. 24.

In Lentz *v.* Flint, etc., R. Co., 53 Mich. 444, goods sold for cash were in the hands of a carrier to be conveyed to the buyer, who, becoming insolvent, made an assignment. The seller, think-

fused to accept the rest, that the seller might treat the contract as rescinded and recover the value of the goods actually delivered.[1]

In actions against the buyer for the price of goods sold, where the contract is executed, the declaration or complaint must contain the common counts, either for goods bargained and sold where there has been no delivery, or, if there has been delivery, for goods sold and delivered.[2] In defense to the action the buyer

ing the goods had been delivered, made an affidavit as a creditor under the assignment. It appeared later that the carrier had not delivered the goods. In an action of replevin by the seller against the carrier it was held that the seller might recover the goods, the buyer having neither received nor accepted them; that the affidavit did not estop him to maintain the action.

The note or security given must be returned. Coolidge *v.* Brigham, 1 Met. (Mass.) 547. But where the seller received in payment the note of a third person, falsely and fraudulently represented by the buyer to be solvent, together with an order on a third person for goods, which order was duly paid, and the seller returned the note to the buyer on discovering the fraud, he was allowed to maintain an action of assumpsit to recover the price of the article sold, deducting therefrom the amount of the order without returning the latter. Martin *v.* Roberts, 5 Cush. (Mass.) 126. And where the note given was to be void upon a certain contingency, which afterwards occurred, the seller was allowed to recover the property delivered without returning or offering to return the note. Volking *v.* Huckabay, 67 Miss. 206.

1. Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 109 E. C. L. 711. See also Hochster *v.* De La Tour, 2 E. & B. 678; 75 E. C. L. 678; Avery *v.* Bowden, 5 E. & B. 714; 85 E. C. L. 714; 6 E. & B. 593; 88 E. C. L. 593; Reid *v.* Hoskins, 5 E. & B. 729; 85 E. C. L. 729; Wayne, etc., Steam Co. *v.* Morewood, 47 L. J., Q. B. Div. 746.

A contract for sale and delivery of bricks was partly complied with, but delay arising from the weather, the buyer gave notice that he would not take the remainder. It was held that in the absence of unreasonable delay, the seller might tender the remainder and sue for the whole, or recover the market price for those delivered. Terwilliger *v.* Knapp, 2 E. D. Smith (N. Y.) 86.

2. Chitty on Contracts (ed. 1881), p. 408; Benj. on Sales (6th ed.), § 765. See Freeborn *v.* Glazer, 10 Cal. 337; Eggleston *v.* Buck, 24 Ill. 262; Hill *v.* Hill, 1 N. J. L. 261; 1 Am. Dec. 206; Gibbs *v.* Blanchard, 15 Mich. 292; Love *v.* Doak, 5 Tex. 343; Atwood *v.* Lucas, 53 Me. 308; 89 Am. Dec. 713; Evans *v.* Harris, 19 Barb. (N. Y.) 416; Hagar *v.* King, 38 Barb. (N. Y.) 200; Allman *v.* Davis, 2 Ired. (N. Car.) 12; Millard *v.* Morse, 32 Pa. St. 506; Gammage *v.* Alexander, 14 Tex. 414; Morse *v.* Sherman, 106 Mass. 430; Sentell *v.* Mitchell, 28 Ga. 196; Boynton *v.* Wicker, 45 Ill. 137.

The complaint must allege a full and complete performance. Moses *v.* Banker, 2 Sweeny (N. Y.) 267.

The complaint need not allege that the defendant has not paid the price, or that it remains due and unpaid. Salisbury *v.* Stinson, 10 Hun (N. Y.) 242.

In an action by the vendor upon a contract for the sale and delivery of a commodity at buyer's option, if a readiness to deliver and perform is averred in the declaration and proved, a tender need not be alleged or proved. McPherson *v.* Nelson, 44 Ill. 124.

A declaration alleging that the defendant received the plaintiff's goods for sale and agreed to render, as the amount brought by said goods, $500, and assigning as the breach of the contract a neglect to render an account or pay the $500, is bad for want of an averment of the sale of the goods. Wolfe *v.* Luyster, 1 Hall (N. Y.) 146. But a complaint is not uncertain or ambiguous because it fails to state where the goods were sold. Behlow *v.* Shorb, 91 Cal. 141.

Where the complaint alleged that between specified days the plaintiffs sold and delivered to defendant, at his special instance and request, a large quantity of coats and shoes of a specified value, and that there was due and unpaid therefor a certain sum, which he promised to pay, but, though often requested, had wholly refused, such complaint is sufficient on demurrer.

may set up breach of warranty[1] or any defect in the goods, or default on the part of the seller which may have been ground for a rescission of the contract,[2] or he may show in mitigation of damages that the goods were of a quality inferior to what they were represented to be at the sale.[3] The usual rules of

Phillips *v.* Bartlett, 9 Bosw. (N. Y.) 678.

When the sale is stated to have been made directly to the defendant, the words "sold and delivered" imply a contract between the parties, and it is not necessary to allege that the goods were sold and delivered at the request of the defendant. Acorne *v.* American Mineral Co., 11 How. Pr. (N. Y.) 24.

An averment in a complaint that the defendant is indebted to the plaintiff for certain goods, upon which he paid a part of the price, leaving a balance due, implies that the goods were delivered to the defendant and is not objectionable as failing to take the contract out of the statute of frauds. Winslow *v.* Bradley, 15 Wis. 394.

Variance.—It is not a material variance to declare on a sale note and bill of parcels in which were these words, "Sold A 1,000 gallons prime quality winter oil," as an undertaking that the oil was of a good and superior quality, to-wit, "prime quality winter oil." Hastings *v.* Lovering, 2 Pick. (Mass.) 214; 13 Am. Dec. 420.

Proof, in an action for the price of goods, that the price was less than that alleged in the complaint, is not a material variance. Iverson *v.* Dubay, 39 Minn. 325.

If, in an action for the price, the plaintiff alleges the sale of a horse, such allegation implies an absolute sale; and proof of a sale under which title is not to pass until payment of a note for the purchase money is a fatal variance. Hadley *v.* Bordo, 62 Vt. 285.

Form of Action.—Questions arising in this connection are discussed under other titles. See ACTIONS, vol. 1, p. 178; ASSUMPSIT, vol. 1, p. 882; DEBT, vol. 5, p. 163; ELECTION, vol. 6, p. 247; TRESPASS ON THE CASE; TROVER.

Where goods are contracted for at a stipulated price, to be paid for on delivery, and the agent of the seller delivers the goods without requiring payment, the seller may bring trover or assumpsit; and, in the latter case, the stipulated price regulates the amount of the recovery. Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423. See also Clark *v.* Edgell, 26 Vt. 108.

If the contract is fraudulent, the seller may affirm it and sue upon it, or repudiate it and maintain an action of tort. Bank of Beloit *v.* Beale, 34 N. Y. 473; Roth *v.* Palmer, 27 Barb. (N. Y.) 652; ELECTION, vol. 6, pp. 247–48.

Parties to the Action—Seller.—One who sells goods, a part of which are his own, and a part belong to another whose lawfully authorized agent he was, may sue alone for the price of the whole. Harris *v.* Johnston, 3 Cranch (U. S.) 311; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 650; 15 Am. Dec. 309.

In general the right of action for the price is in the party who had the legal title to the property sold. Heald *v.* Warren, 22 Vt. 409; PARTIES TO ACTIONS, vol. 17, p. 505.

1. See WARRANTY.

2. See RESCISSION, vol. 21, p. 24; ILLEGAL SALES, vol. 9, p. 923; INADEQUATE CONSIDERATION, vol. 10, p. 325; FRAUDULENT SALES, vol. 8, p. 786; MISTAKE, vol. 15, p. 625.

3. Dailey *v.* Green, 15 Pa. St. 118; Falconer *v.* Smith, 18 Pa. St. 130; 55 Am. Dec. 611; Renaud *v.* Peck, 2 Hilt. (N. Y.) 137; Miller *v.* Smith, 1 Mason (U. S.) 437; Westcott *v.* Nims, 4 Cush. (Mass.) 215; Culver *v.* Blake, 6 B. Mon. (Ky.) 528; Howie *v.* Rea, 70 N. Car. 559.

In an action on a promissory note for goods sold, etc., the defendant may reduce the agreed price of the articles sold by proving what the difference was at the time of delivery between the articles as they actually were and what they ought to have been according to the contract, but the damages which may have arisen from the defect of the articles must be recovered, if recoverable at all, by a separate suit. Kelly *v.* Case, 2 Ind. 231.

Defenses Generally.—But it is no defense that the price as agreed on was above the market price. Miller *v.* Tiffany, 1 Wall. (U. S.) 298.

A purchaser of personal property, while retaining possession thereof,

evidence apply,[1] and the burden of proof is upon the plaintiff

cannot resist the recovery of the purchase money by the seller on the ground of ownership in a third person at the time of sale. Ogburn *v.* Ogburn, 3 Port. (Ala.) 126. See Ware *v.* Houghton, 41 Miss. 370; 93 Am. Dec. 258; Budd *v.* Power, 9 Mont. 99; Case *v.* Hall, 24 Wend. (N. Y.) 102; 35 Am. Dec. 605; Johnson *v.* Oehmig (Ala. 1892), 10 So. Rep. 430; McKenzie *v.* Wimberly, 86 Ala. 195.

And in an action against the buyer of personal property to recover the purchase money by the seller, it is no defense that he has delivered the property to one claiming to have a superior title, unless such title be proved, although the seller had refused to indemnify the buyer in defending the title. Carghill *v.* Walker, 1 Stew. & P. (Ala.) 223.

Where there has been no fraud, a buyer cannot set up a defect of title in the seller and a notice of claim by a third person, as defense to an action for the purchase money, unless the property has been returned, or his possession has been interfered with, or the claimant has had a recovery against him, or the claimant has been paid for the property. McGiffin *v.* Baird, 62 N. Y. 329.

Where a purchaser of goods voluntarily pays the price of them to a third person, who claims them, he cannot afterwards, in a suit against him by the seller for the price, set up as a defense the want of title in the seller, and that he has paid the price to the true owner. Vibbard *v.* Johnson, 19 Johns. (N. Y.) 77.

It is no defense to an action by a corporation for the price of goods sold, that the goods were such as the corporation had no authority under their charter to purchase or hold. Rutland, etc., R. Co. *v.* Proctor, 29 Vt. 93.

In Nonotuck Silk Co. *v.* Fair, 112 Mass. 354, it was held that the defendant in an action for the price of goods could not avail himself of a custom of trade which was unknown to him at the time of the sale.

Where a husband as agent for his wife sold some of her property, and the purchaser thereof, failing to disclose the fact that he owed the debt to the wife, after paying part of the purchase price, is garnished by a creditor of the husband, such garnishment is no defense to an action by the wife to recover the balance of the purchase money. Hosley *v.* Scott, 59 Mich. 420.

In an action to recover the contract price of goods sold to the defendant and received and used by him, he cannot set up the damaged character of the goods as a defense. Cazelar *v.* Walker, 17 La. Ann. 236; so the acceptance of lumber purchased under contract at an agreed price precludes the purchaser from setting up as a defense to an action for the price its unmerchantable character. Williams *v.* Miller, 1 Wash. Tex. 88. See Lapona Iron Co. *v.* Holt, 64 N. Car. 335; McFadden *v.* Wetherbee, 63 Mich. 390; Preston *v.* Dunham, 52 Ala. 217; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Ziegler *v.* Studebaker Mfg. Co., 28 Ill. App. 226; Lascelles *v.* Miller (Supreme Ct.), 7 N. Y. Supp. 447.

In actions for the price of goods the defendant cannot prove by way of defense anything he has not specially pleaded. Thus he cannot show that instead of buying goods he held them as consignee to sell on account of the plaintiff, or that after purchasing and receiving goods he rejected them because of their inferior quality, unless such defenses were specially pleaded. Wallace *v.* Blake, 128 N. Y. 676. But where an action was not on an account stated, but to recover the balance of the alleged purchase price, and an invoice of the goods was introduced in evidence, the defendant may show that it contained an error as to the price without having specially pleaded it. Edwards, etc., Lumber Co. *v.* Baker (N. Dak. 1891), 50 N. W. Rep. 718.

1. **Evidence.**—A bill of sale is the best evidence of a sale and its terms. And if it appears that there is such a paper and its absence is not accounted for, parol evidence on those points is admissible. Nancy *v.* Snell, 6 Dana (Ky.) 148. See Warner *v.* Feige, 65 Mich. 92. See also of way bills of a railroad company. Sullivan *v.* Boley, 24 Fla. 501; bill of lading, Richmond *v.* Sundburg, 77 Iowa 255.

In an action to recover the price of railroad stock alleged to have been sold by the plaintiff to the defendant, or damages for the failure of the defendant to fulfill the contract for the purchase thereof, the certificate of a proper railroad officer setting forth in the usual form that the defendant was the owner of the shares, is *prima facie* evidence

of the transfer of those shares to the defendant. Thompson *v.* Alger, 12 Met. (Mass.) 428.

In an action to recover the price of goods sold by a third person alleged by the plaintiff to be his agent, letters and invoices of that person and copies of letters sent to him by the defendants are admissible against the plaintiff to show that his agent contracted. Merrifield *v.* Robbins, 8 Gray (Mass.) 150.

Proof that the plaintiff had consigned goods to the defendant for sale, and part of them had been sold by the defendant, does not support a count for goods sold and delivered. Colman *v.* Price, 1 Blackf. (Ind.) 303; Lindley *v.* Downing, 2 Ind. 418; Ayers *v.* Sleeper, 7 Met. (Mass.) 45; Young *v.* Woodward, 44 N. H. 250. See Brown *v.* Holbrook, 4 Gray (Mass.) 102.

In an action for goods sold and delivered, evidence that the goods were not the property of the plaintiff but belonged to a third person is admissible. Wright *v.* Sharp, 1 Browne (Pa.) 344.

Upon a question of sale and delivery of goods, the testimony of a witness that he had selected the goods and then called them off to an entry clerk, who entered them on the sales-book, and that the witness then took the book and, as he delivered the goods to the packer, he himself checked the several items on the book, is primary evidence and may be introduced without calling the entry clerk. Webster *v.* Clark, 30 N. H. 245.

In an action to recover the price of goods sold and delivered, a witness testified that he knew of the sale and was present thereat; that the goods were sent to another store to be packed for the defendant, and their receipt acknowledged; and that they were sold at the market prices. It was held that the evidence was sufficient to authorize a verdict for the plaintiff. Stern *v.* Filene, 14 Allen (Mass.) 9.

Where a contract is made in one place to deliver merchantable goods in another, and it does not appear that what is merchantable at the place of contract is not merchantable at the place of delivery, testimony to show that the goods delivered were merchantable at the place of contract is admissible. Stockwell *v.* Craig, 20 Me. 378.

A bill of hardware was sold to the defendant for building purposes. In an action for the price it was error to admit evidence as to how much of such material was necessary for the building. Gibson *v.* Snow Hardware Co. (Ala. 1891), 10 So. Rep. 304.

In Hight *v.* Bacon, 126 Mass. 10, it was held, in an action for goods sold and delivered, that evidence of a usage of trade allowing the buyer to revoke a contract of sale when the subject thereof, which appears to be good, turns out to be worthless, cannot be admitted under an answer which does not aver that the sale has been revoked.

In an action for the price of logs, letters in regard to the sale and purchase of logs, although they name another mark than that on the logs which were actually received, are admissible in evidence, where there is other evidence tending to show that they related to the logs in controversy. Lee *v.* Campbell, 77 Wis. 340.

Evidence of payments made upon an ore crusher after it begins work tends to show that it was satisfactory for a time at least, and should be considered in determining the merits of the action. Chateaugay, etc., Co. *v.* Blake, 144 U. S. 476.

In an action for the price of goods sold which the defendants had refused to accept, the sole issue was that the goods did not conform to the sample by which the sale was made. In such case, evidence as to what the defendant paid for other goods of a like kind at the same time, and evidence of how much less the goods shipped were worth than the sample, is immaterial, and the admission of evidence as to the manner in which the shipment was made is not prejudicial to the defendant. Doyle *v.* Beaupre (Supreme Ct.), 17 N. Y. Supp. 289.

Story *v.* Carter, 27 Ill. App. 287, was an action for the price of lumber delivered on a written order in which nothing was said in regard to the method of inspection, and it was held that a conversation, during which a method of inspection was agreed upon, was admissible in evidence.

In an action for goods sold, where the defendant alleged that they were delivered under an agreement that they were to be applied to the payment of a debt due from the seller's husband to the buyer, it was improper to include evidence tending to prove such agreement. Ruppel *v.* Donohue, 10 N. Y. Supp. 100.

As to admissibility of accounts and

account books as evidence, see M'Coul *v.* Lakamp, 2 Wheat. (U. S.) 111; Boykin *v.* Dohlonde, 37 Ala. 577; Arnold *v.* Skaggs, 35 Cal. 684; Davis *v.* Franklin, 25 Ind. 407; Richards *v.* Burroughs, 62 Mich. 117; Mitchell *v.* Belknap, 23 Me. 475; Jackson *v.* West, 22 Md. 71; New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302. See Stubbings *v.* Dockery, 80 Wis. 618; Rosenthal *v.* Miller, 79 Iowa 130. As to the admissibility of letters in particular cases, see Muskegon Curtain Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132; Graham *v.* Eiszner, 28 Ill. App. 269; Richmond *v.* Sundburg, 77 Iowa 255.

Evidence of Price.—Proof of price which goods bring at auction is admissible but not conclusive evidence of their real value. Renaud *v.* Peck, 2 Hilt. (N. Y.) 137.

If there is no proof of the price at which sales were made at a certain place, evidence of general price when the property arrived is proper. Beaty *v.* Scrivener, 3 T. B. Mon. (Ky.) 138.

When the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property at the time of sale as tending to show what the real contract was. Kidder *v.* Smith, 34 Vt. 294.

Evidence of the price paid for wines purchased in New York from the agent of the manufacturers is not admissible as evidence of their market value at the place of production. U. S. *v.* 3109 Cases of Champagne, 1 Ben. (U. S.) 241.

Evidence of the price stipulated to be paid for an article by the terms of the contract of sale deliberately and in good faith entered into, and so far completed that nothing remained to be done to pass the property but the payment of the purchase money, is competent to be considered on the question of the value of such article. Ferguson *v.* Clifford, 37 N. H. 86.

Evidence of the value for special use of goods sold and retained by the purchaser is admissible in an action for the price. Bouton *v.* Reed, 13 Gray (Mass.) 530.

Evidence of what a machine sold to the defendant cost the plaintiff is inadmissible in an action for goods sold. Locke *v.* Priestly Express Wagon Co., 71 Mich. 263.

See *supra*, this title, *Consideration or Price.*

Evidence of Credit.—In an action for goods sold, evidence that upon several other sales between the same parties a certain credit had been allowed is competent to prove that the sale in question was made on the same credit. Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166. See Lelar *v.* Brown, 15 Pa. St. 215.

Where it is an important question whether credit for an article sold was given to the defendant or to another, evidence of the excellence of the defendant's credit at the time of the sale is admissible as showing that the credit was given to him. Moore *v.* Meacham, 10 N. Y. 207.

In an action against S to recover the price of goods alleged to have been sold to him by the plaintiff, it was held that the mere fact that bills of the goods were made out in the name of one F and the goods delivered to him is not conclusive that the credit was given to F, but that the question of credit was for the jury upon all the evidence. Voltz *v.* Stephani, 46 Ill. 54; Lyons *v.* Thompson, 16 Iowa 62.

Upon the sale of property the taking by the seller of a promissory note of a third person made at the time, payable to the seller, is at least *prima facie* evidence that the credit was given to that person. Brady *v.* McKee, 30 Ga. 748. See Lawrence *v.* Cowles, 13 Ill. 577.

In an action for the price of goods delivered to a third person on the alleged credit of the defendant, the plaintiff cannot give in evidence his previous direction to his agent to refuse a further credit to that person. Welch *v.* Merrill, 10 Gray (Mass.) 91.

Where goods are in fact sold and delivered to any person, the declaration of the seller that he did not or would not credit that person on his own responsibility is not sufficient to discharge from liability the person to whom the goods were sold and delivered. Hicks *v.* Bailey, 16 Tex. 229.

In an action to recover from an alleged promisor the price of goods sold to another party, the fact that they were charged to the buyer is presumptive though strong proof that the credit was given to him. Ruggles *v.* Gatton, 50 Ill. 412.

In such case the jury are the proper judges as to whom the credit was given; and such presumption is one of fact, not of law, and subject to be explained or rebutted by other facts. Burkhalter *v.* Farmer, 5 Kan. 477. See Green *v.*

to show that there was a completed sale[1] and that the goods sold complied with the terms of the contract.[2] So, where no price is fixed by the contract, he must show what was the value of the goods.[3] The burden of showing the truth of any defense which may be set up is on the defendant.[4]

b. REMEDIES AGAINST THE GOODS—(1) *Resale*—(a) **In General.**—In the *United States* the rule in regard to resale by the seller of the goods, where they are still in his possession, is that without any breach of the contract, and therefore without any of the consequences of such breach, he may, if the buyer, without cause, refuses to accept and pay for the goods sold within a

Ford, 35 Md. 82; Neaffie *v.* Hart, 4 Lans. (N. Y.) 4.

Instructions.—In an action upon a contract for the sale of goods it appeared that the price had been fixed, but there was a conflict of evidence as to what that price was. In such case an instruction leaving the jury to allow the plaintiff what the evidence showed the goods to be reasonably worth was erroneous. Illinois Linen Co. *v.* Hough, 91 Ill. 63.

1. Proof of a mere agreement to sell and deliver is not sufficient. Brink *v.* Chicago, etc., R. Co., 23 Iowa 473; Edmunds *v.* Wiggin, 24 Me. 505; Sackett *v.* Lowell, 32 Me. 164; Russell *v.* Wisconsin, etc., R. Co., 39 Minn. 145; Schutz *v.* Jordan, 141 U. S. 213.

In an action for corn sold and delivered, the sale and delivery having been proved, the plaintiff is entitled to a verdict without proving exactly the quantity. Dickerson *v.* Sparks, 17 Ill. 178.

If in an action for the price of goods the buyer proves the property in another, the plaintiff must show an authority from the owner to sell. Dougherty *v.* Holloway, 5 T. B. Mon. (Ky.) 314.

2. Thus in an action to recover on a contract to deliver a certain quantity of sound rice, the plaintiffs must show that the rice was sound. Ruiz *v.* Norton, 4 Cal. 355; 40 Am. Dec. 618.

In an action upon a contract for the sale and delivery of 5000 barrels of oil to be paid for cash on delivery in lots as gauged and delivered, it was necessary for the seller to show that he had on hand the goods of the kind and quantity called for in the contract. Byers *v.* Bonsall, 3 Pittsb. (Pa.) 482.

3. Lambert *v.* Seely, 2 Hilt. (N. Y.) 429. See *supra*, this title, *Consideration or Price.*

Miscellaneous Matters.—In an action upon a lost note given in payment for goods the plaintiff may recover on the count for goods sold and delivered without the necessity of proving the contents of the note, proof of the loss standing in place of the surrender of the note. McMillan *v.* Bethold, 35 Ill. 250.

In an action for the price of goods alleged to have been sold on the credit of the defendant, and delivered to a third person at his request, but the books of the plaintiff show that the credit was given to such third person, the burden of proving that credit was given to the defendant is upon the plaintiff. Drummond *v.* Huyssen, 46 Wis. 188.

4. Briggs *v.* Humphrey, 5 Allen (Mass.) 314; King *v.* Eagle Mills, 10 Allen (Mass.) 548. See Myers *v.* M'Farlane, 2 Treadw. (S. Car.) 686; Whitlock *v.* Bueno, 1 Hilt. (N. Y.) 72; Lathrop *v.* Otis, 7 Allen (Mass.) 435; Caruthers *v.* Cherry (Tex. 1890), 16 S. W. Rep. 867. And see BURDEN OF PROOF, vol. 2, p. 649.

Where the buyers agreed to pay for an estimated quantity of merchandise, and undertook to weigh and keep an account of it, any uncertainty in the proof of the deficiency must be taken most strongly against them. Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83.

In an action for goods furnished, the defendant pleaded that they were not such as he had contracted for, but were of less value. It was held that he was bound to sustain his pleas by proof, and if he failed to show by evidence how much less the goods sued for were worth than the price charged, and could not show the damage sustained by him, the jury could not indulge in conjecture as to his loss. Moulton *v.* Baer, 78 Ga. 215.

reasonable time, resell the same,[1] after notice of his intention

1. This rule has had frequent application in the courts of this country and no distinction is drawn, in laying it down, between cases where the title has passed and not the possession, and cases of executory contract where the seller tenders performance. Sands *v.* Taylor, 5 Johns. (N. Y.) 395; 4 Am. Dec. 374; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Dustan *v.* McAndrew, 44 N. Y. 72; Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495; Sherwood *v.* Ribbon, 6 N. Y. Wkly. Dig. 231; Fisher *v.* Libby, 2 Thomp. & C. (N. Y.) 672; Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590; Whitney *v.* Boardman, 118 Mass. 242; Girard *v.* Taggart, 5 S. & R. (Pa.) 19; 9 Am. Dec. 327; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340; Patten's Appeal, 45 Pa. St. 151; 84 Am. Dec. 479; Diem *v.* Koblitz (Ohio 1892), 29 N. E. Rep. 1124; Cullen *v.* Bimm, 37 Ohio St. 236; Haines *v.* Tucker, 50 N. H. 313; Jones *v.* Marsh, 22 Vt. 144; Phelps *v.* Hubbard, 51 Vt. 489; Hickock *v.* Hoyt, 33 Conn. 553; Van Horn *v.* Rucker, 33 Mo. 391; 84 Am. Dec. 52; Holland *v.* Rea, 48 Mich. 218; Cook *v.* Brandeis, 3 Metc. (Ky.) 555; Bell *v.* Offutt, 10 Bush (Ky.) 632; Young *v.* Mertens, 27 Md. 114; Gilly *v.* Henry, 8 Martin (La.) 402; 13 Am. Dec. 291; Bartley *v.* New Orleans, 30 La. Ann. 264; West *v.* Cunningham, 9 Port. (Ala.) 104; 33 Am. Dec. 300; Ullmann *v.* Kent, 60 Ill. 271; Roebling's Sons Co. *v.* Lock Stitch Fence Co., 130 Ill. 661; Redmond *v.* Smock, 28 Ind. 365; Johnson *v.* Powell, 9 Ind. 566; Barnett *v.* Terry, 42 Ga. 283; McCord *v.* Laidley, 87 Ga. 221; Williams *v.* Godwin, 4 Sneed (Tenn.) 557; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785; 98 Am. Dec. 737; Hurlbut *v.* Simpson, 3 Ired. (N. Car.) 233; Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Barr *v.* Logan, 5 Harr. (Del.) 52; Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 754; Waples *v.* Overaker, 77 Tex. 7; 19 Am. St. Rep. 727; Hughes *v.* U. S., 4 Ct. of Cl. 64; Walker *v.* Gooch, 10 Biss. (U. S.) 159; McCulloh *v.* Smith, 44 Fed. Rep. 12. And see cases in subsequent notes to this and the succeeding section.

In O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67, after quoting the rule as laid down in 2 Kent's Com. 504, Russell, J., said: "It is common to insert a provision for resale in the terms of sale. But I think it may be stated as the settled rule of law in the United States, though not perhaps in England, that where the price remains unpaid, the right to resell exists even in the absence of any express stipulation, and the purchaser is responsible for any loss that may occur, although he did not consent to the resale."

"The law in such case constitutes the seller in possession of the goods the agent of the buyer for the purpose of such sale. As such agent he must act in good faith and take proper measures to secure as fair and favorable a sale as possible." Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Smith *v.* Pettee, 70 N. Y. 13.

Where hops were sold to be packed in bales, each containing from 180 to 200 pounds, and the buyer refused to receive them on the sole ground that they were not merchantable, whereupon the seller resold them, it was held, in an action to recover the difference in price, that the defendant could not object that some of the bales contained less than 180 pounds. Knox *v.* Schoenthal (Supreme Ct.), 13 N. Y. Supp. 7.

Although in cases of executory contracts a resale of the goods, where the buyer refuses to accept and pay for them, is usually classified as a remedy, it would seem that it cannot be strictly so called, since the title to the goods is still in the seller, and they are his to do with as he sees fit. His *remedy* is an action to recover damages for the breach of contract on the part of the buyer, *supra*, this title, *Where Contract Is Executory;* but since these damages are measured by the difference between the contract price and the market value, a resale is usually effected as a safer means of determining what that market value is. See cases *supra*, this title, *Where Contract Is Executory*, note 4; though of course it is not necessary to resell. "As the computation of damages is tested by the market value, the result would be the same whether the seller resold the goods or retained them, as he might do at a market valuation." 2 Schouler's Pers. Prop., § 519.

The theory that a resale of the goods in case of the breach of an executory contract is only a means of taking advantage of the seller's real remedy, viz. the recovery of the actual damage that he has sustained, is borne

to the buyer,[1] and hold the latter responsible for any loss

out by the uniform holding of the courts that when the resale occurs at a time, place, or in a manner which indicates that the price obtained is not fair evidence of the market value at the time and place when the delivery should have been made, the seller is not allowed to recover the entire difference between such retail price and the contract price. See Chapman *v.* Ingram, 30 Wis. 290; Rickey *v.* Tenbroeck, 63 Mo. 563; Andrews *v.* Hoover, 8 Watts (Pa.) 239.

In Rickey *v.* Tenbroeck, 63 Mo. 567, the court by Norton, J., said: "The authorities sustaining the right of the vendor to recover the difference between the contract price and the amount obtained on a resale, proceed upon the theory that a resale of the property on notice to the vendee is a proper method of ascertaining the market value, and that when this method is adopted the resale should be made at the time of the breach or within a reasonable time thereafter."

See also Girard *v.* Taggart, 5 S. & R. (Pa.) 33; 9 Am. Dec. 335, where Gibson, J., said: "The damages recovered are not the price of the goods sold, but a compensation for the disaffirmance of the contract, and the difference on the resale is merely the measure of damages actually suffered."

1. Notice of Intention to Resell Must be Given.—It is essential that the seller give notice to the buyer of his intention to resell. A mere delay by the buyer to call for the goods sold, or his refusal to pay the price on demand, does not of itself authorize the seller to make an immediate sale. He must wait a reasonable time. Hickock *v.* Hoyt, 33 Conn. 553; Mallory *v.* Lord, 29 Barb. (N. Y.) 454; Lewis *v.* Greider, 49 Barb. (N. Y.) 606. The object of the notice of the intention to sell where the buyer is in default is to hold him for a deficiency. What is reasonable notice to the buyer depends upon the circumstances of each particular case. O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67. And if he proceed to deal with the goods as his own by selling them, or if he fail to give notice to the buyer of his intention to resell, he will be regarded as himself rescinding the contract and will not be allowed to recover any difference between the price at the resale and the contract price. McClure *v.* Williams, 5 Sneed (Tenn.) 718; Neuberger *v.* Rountree, 18 Ill. App. 610; Brady *v.* Isler, 9 Lea (Tenn.) 356 (premature resale); Leonard *v.* Portier (Tex. 1890), 15 S. W. Rep. 414; Redmond *v.* Smock, 28 Ind. 370; Saladin *v.* Mitchell, 45 Ill. 79; Case *v.* Simonds (Supreme Ct.), 7 N. Y. Supp. 253; Fancher *v.* Goodman, 29 Barb. (N. Y.) 316; *aff'd* 14 N. Y. 492; McEachron *v.* Randles, 34 Barb. (N. Y.) 301; Schultz *v.* Bradley, 4 Daly (N. Y.) 29; Long *v.* Preston, 2 M. & P. 262; 17 E. C. L. 205. Thus in Healy *v.* Utley, 1 Cow. (N. Y.) 345, the buyer, after delivery of the articles sold, returned them to the seller, saying he could not pay for them and that he "must do the best he could with them." The latter sold them for less than the original price, and it was held that acceptance of the articles by the seller was a complete rescission of the sale, and he could not be deemed the agent of the buyer in making the resale or hold him responsible for the difference.

In Saladin *v.* Mitchell, 45 Ill. 79, it was held that where the buyer failed to take the goods and the seller brought an action against him for a breach of the contract, and afterwards resold the property, the commencement of such suit by the seller was sufficient notice to the buyer of his intention to resell. In Crooks *v.* Moore, 1 Sandf. (N. Y.) 297, notice of intention to resell was held sufficient when given the day before the sale was to take place.

In Waples *v.* Overaker, 77 Tex. 7; 19 Am. St. Rep. 727, it was said to be enough if the defaulting buyer has notice of the facts which give to the wronged seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale. See Ullmann *v.* Kent, 60 Ill. 273; 2 Schouler's Pers. Prop., § 551.

By the terms of a contract for the sale of cattle it was provided that they should be delivered by the 25th of November and yarded by the seller twelve hours before delivery. The day of delivery came on Sunday. On Monday the seller sent a telegram to the buyer, which was received the next day, in which he notified him that the cattle were ready to be delivered, and informed him that if he failed to receive them the seller would take steps to protect himself. This was held sufficient notice to authorize a resale by the seller and to charge the buyer with the loss, upon a refusal of the latter to

sustained.[1] In *England* the rule is different and not so simple.[2] There the right of resale may be exercised, strictly speaking, as a remedy only in the case of executed sales where the property is in the buyer but the possession remains in the seller, and where the right of resale is expressly reserved to the seller by the terms of the contract.[3] In the absence of such reservation while the

receive the cattle. The notice need not state how the seller intends to protect himself. Ingram *v.* Wackernagel (Iowa 1891), 48 N. W. Rep. 998.

1. **Recovery of Damages.**—After the resale the seller may recover in an appropriate action the difference between the amount of the contract price and that obtained at the resale after expenses of the sale have been deducted. Gordon *v.* Norris, 49 N. H. 376; McCombs *v.* McKennan, 2 W. & S. (Pa.) 217; 37 Am. Dec. 507; Phelps *v.* Hubbard, 51 Vt. 489; McCord *v.* Laidley, 87 Ga. 221; DAMAGES, vol. 5, p. 30. The seller cannot recover in damages the expense of keeping the property while he awaited a rise in the market, if at the time the delivery was to have been made there was a market price and sale for the commodity. Thurman *v.* Wilson, 7 Ill. App. 312. Nor the cost of transportation to a distant market, unless he can show that such was necessary. Ingram *v.* Matthien, 3 Mo. 209. Nor his own expenses in making a trip to make the resale. Penn *v.* Smith, 93 Ala. 476.

In McLean *v.* Richardson, 127 Mass. 339, the seller delivered a portion of the goods to the buyer, and on a subsequent delivery of the remainder acceptance was refused on the ground that none of the goods were of the proper quality. The seller then received the first lot from the buyer, repaid to him the freight on it, and resold the whole lot at a loss. It appearing that the goods were of a quality provided by the contract, the seller could maintain an action against the buyer for the difference between the contract price and the price received on the resale.

The rule of damages in a case of resale is nothing but an application of the old doctrine that the seller may recover the difference between the contract price and the market value of the goods at the time and place of delivery. See DAMAGES, vol. 5, p. 30. But a resale is not absolutely necessary in order to determine the market value of the goods, nor is the price obtained at such resale conclusive to show the amount the seller may recover. West *v.* Cunningham, 9 Port. (Ala.) 104; 33 Am. Dec. 300; White *v.* Kearney, 9 Rob. (La.) 501; Andrews *v.* Hoover, 8 Watts (Pa.) 239; Girard *v.* Taggart, 5 L. R. (Pa.) 19; 9 Am. Dec. 327; Coffman *v.* Hampton, 2 W. & S. (Pa.) 377; 37 Am. Dec. 511.

It was held by the city court of New York in Dreyfuss *v.* Foster, 3 N. Y. S. 54, that the seller could not, in his action for damages, recover the cost of storing the goods. But in Woods *v.* Cramer, 34 S. Car. 508, the court held otherwise.

In an action to recover the difference between the contract price and the price on the resale, where the contract provided for the refusal of all goods which did not reach a certain standard, the plaintiff cannot recover the expense of boxing and selling that portion which did not reach such standard. La Rue *v.* Groezinger, 84 Cal. 281; 18 Am. St. Rep. 179.

2. 2 Schouler's Pers. Prop., § 549, where it is said: "The judicial disposition manifested in so many States to treat a sale with respect to passing property in the goods as conditional upon payment of the price, simplifies the situation and in every way strengthens the unpaid seller's means of enforcing his legal right so long as he holds possession."

3. The seller "may, by having expressly reserved the right to resell in the original contract, stand with his remedy complete." 2 Schouler's Pers. Prop., § 547. In such case the seller may have his action against the buyer to recover any loss he may have sustained by reason of the difference between the contract price and the price obtained at the resale, but the buyer cannot recover any excess obtained over the contract price. Lamond *v.* Davall, 9 Q. B. 1030; 58 E. C. L. 1029; *overruling* Mertens *v.* Adcock, 4 Esp. 251. See Hagedorn *v.* Laing, 6 Taunt. 162; Sugden on Vendors (ed. of 1862), p. 39.

This right of resale, where it is ex-

remedy is still available, it is nevertheless technically a breach of contract, for which the buyer may have an action for damages and recover the difference between the contract price and the price obtained on the resale, if the latter should exceed the former, or nominal damages if there be no difference, or if the price obtained at resale is less than the contract price.[1] And the resale does not deprive the seller of his right to sue for the full contract price (though in such case the buyer could have his cross action), or to sue for his loss on the resale.[2]

(b) **Manner, Time and Place of Resale.**—The authorities lay down no particular rule as to the manner in which a resale must be made; but, since the measure of damages is to be ascertained by this means, it is essential that the seller act in good faith and under such circumstances as will be best calculated to produce the fair value of the property.[3] He must sell within a reasonable

pressly reserved in the contract, seems to be in effect no more than a rescission of the contract by mutual consent. See RESCISSION; also *supra*, this title, *Reservation of the Jus Disponendi; infra*, this title, *Conditional Sales*.

1. In regard to the seller's rights where the title has passed but not the possession of the goods, it is said in Blackburn on Sales, p. 325: "The better opinion seems to be that in no case do they amount to a complete resumption of the right of property, or in other words to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common law rights. At all events, it seems that a resale by the seller, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price or to resist paying any balance of it still due; nor yet so tortious as to destroy the seller's right to retain and so entitle the purchaser to sue in trover." Benj. on Sales (6th ed.), p. 775; Valpy *v.* Oakeley, 16 Q. B. 941; Griffiths *v.* Perry, 1 E. & E. 680; 102 E. C. L. 680.

Since default of the buyer in accepting and paying for the goods does not give the seller the right to rescind the contract, a resale by the latter is not a rescission. Martindale *v.* Smith, 1 Q. B. 395; 41 E. C. L. 595. Therefore the buyer cannot recover any part of the price paid, or refuse to pay the remainder even if he is not in default; his sole remedy being a cross-action for damages. Stephens *v.* Wilkinson, 2 B. & Ad. 320; 22 E. C. L. 86; Page *v.* Cowasjee Eduljee, L. R., 1 P. C. 127. Nor can he, if in default, maintain trover against the seller. Milgate *v.* Kebble, 3 M. & G. 100; 42 E. C. L. 61; Lord *v.* Price, L. R., 9 Exch. 54; but if not in default he may maintain trover against the seller who has tortiously resold the goods. Gillard *v.* Brittan, 8 M. & W. 575; see Chinery *v.* Viall, 5 H. & N. 288.

In summarizing the law as deduced from these cases Mr. Benjamin, in his work on Sales (6th ed.), p. 775, lays down the following: "An unpaid vendor, with the goods in his possession, has more than a mere lien upon them; he has a special property analogous to that of a pawnee. But it is a breach of his contract to resell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damages suffered, that is, the difference between the contract price and the market value on the resale; and if there be no proof of such difference the recovery will be for nominal damages only."

2. Maclean *v.* Dunn, 4 Bing. 722; 51 E. C. L. 129.

And this is so even though the seller tortiously retakes the goods from the buyer. Page *v.* Cowasjee Eduljee, L. R., 1 P. C. 127; Stephens *v.* Wilkinson, 2 B. & Ad. 320; 22 E. C. L. 86.

3. Brownlee *v.* Bolton, 44 Mich. 221; Smith *v.* Pettie, 70 N. Y. 13 (seller must exercise good faith and reasonable diligence to secure a good price); Saladin *v.* Mitchell, 45 Ill. 85; Camp *v.* Hamlin, 55 Ga. 259; Bagley *v.* Findlay, 82 Ill. 526. See Applegate *v.* Hogan, 9 B. Mon. (Ky.) 69.

time,[1] and while it is not absolutely necessary that he should give notice to the buyer of the time, place and manner of the sale,[2] it is safer and better that he should do so where practicable. While

"The only requisites to such a sale as a measure of the rights and injury of the party is good faith, including the proper observance of the usages of the particular trade." Pollen *v.* Le Roy, 30 N. Y. 553; Austin *v.* Hartwig, 49 N. Y. Super. Ct. 256.

Manner of Resale.—The resale is generally an auction, though it is not necessary that it should be so, provided the price obtained at the private sale is not unreasonably low. That mode of sale should be adopted which is best calculated to secure a favorable price. Crooks *v.* Moore, 1 Sandf. (N. Y.) 297; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; Lewis *v.* Greider, 49 Barb. (N. Y.) 606; *aff'd* 51 N. Y. 231; Smith *v.* Pettee, 70 N. Y. 13; Brownlee *v.* Bolton, 44 Mich. 221; Rickey *v.* Tenbroeck, 63 Mo. 567; Roebling's Sons Co. *v.* Lock Stitch Fence Co., 130 Ill. 670.

The buyer cannot complain that the seller became the purchaser of most of the goods at the resale, where it appears that the price obtained was the full market price. Lindon *v.* Eldred, 49 Wis. 305. But if the seller becomes the purchaser and a fair price is not obtained, or if by any arrangement competition at the sale is prevented, he (the seller) forfeits his right to recover the difference of prices as damages. Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352.

1. Time of Resale.—The sale must be made within a reasonable time from the default of the buyer. Lewis *v.* Greider, 49 Barb. (N. Y.) 606. What is such reasonable time depends on the circumstances. Alny *v.* Simonson, 52 Hun (N. Y.) 535. See REASONABLE TIME, vol. 19, p. 1089; QUESTIONS OF LAW AND FACT, vol. 19, p. 640. In Smith *v.* Pettee, 70 N. Y. 13, in an action for a refusal to accept iron contracted for, the referee found that after the refusal to accept, the seller sold the iron within a reasonable time. The evidence showed that the seller, immediately on the buyer's default, gave notice to him that he would resell; after several unsuccessful efforts to sell, he finally effected a sale five months after the buyer's default. It was held that the evidence justified the finding of the referee. So in the leading case of Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785; 98 Am. Dec. 737, the seller did not sell until two months after the refusal to accept, although the market was constantly falling. It was held that the sale was made within a reasonable time, it appearing that it was postponed in the hope that the exercise of the remedy might not be necessary. Exactly the same facts arose in Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 20. See also Lindon *v.* Eldred, 49 Wis. 305 (twenty-seven days after default); Saladin *v.* Mitchell, 45 Ill. 85 (five months not unreasonable); Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

The better rule seems to be that intimated by the English cases—*i. e.*, at a time reasonably near the time when delivery was to have been made according to the contract. Phillpots *v.* Evans, 5 M. & W. 475; Stewart *v.* Cauty, 8 M. & W. 160; Pickering *v.* Bardwell, 21 Wis. 565 (fifteen months after default held to be unreasonable). See also, as to necessity of immediate resale of stock not accepted, Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143; Dykers *v.* Townsend, 24 N. Y. 57.

If the sale is made within a reasonable time, that is all that can be required, and it cannot be invalidated by showing that it might have been made sooner than it was. Smith *v.* Pettee, 70 N. Y. 13.

In Guy *v.* U. S., 25 Ct. of Cl. 61, the defendant purchased a quantity of oats but refused to accept them. The plaintiffs kept them for three months and then, without notice, sold them at a private sale on account of the defendants, and it was held that such retention by the plaintiff was at his own risk and the defendants were not liable for the loss resulting therefrom.

2. Notice of Time and Place of Resale.—In Crooks *v.* Moore, 1 Sandf. (N. Y.) 297, notice was given but the sale did not take place until several days after that named in the notice. It was held that the sale was not improperly made for that reason. The same was held in Rosenbaum *v.* Weedon, 18 Gratt. (Va.) 785; 98 Am. Dec. 737. The opinion in this latter case considers the question at length.

a resale is generally made at or near the place of delivery fixed by the contract, still it is not necessarily at such place, though if made elsewhere it might tend to show that it was unfair and therefore not a real test of the market value of the goods.[1]

(2) *Lien*—(a) **Existence.**—Generally speaking, in all cases, where a sale is effected, and nothing is specified as to delivery or payment, the seller has a lien on the goods sold, that is, a right to

See also, as holding that such notice to the buyer is not necessary though it ought always to be made to avoid intimations of bad faith, West *v.* Cunningham, 9 Port. (Ala.) 104; 33 Am. Dec. 300; Hickock *v.* Hoyt, 33 Conn. 553; Ullmann *v.* Kent, 60 Ill. 271; Holland *v.* Rea, 48 Mich. 218; Pollen *v.* LeRoy, 30 N. Y. 549; *aff'g* 10 Cosw. (N. Y.) 38; Gaskell *v.* Morris, 7 W. & S. (Pa.) 32; Lindon *v.* Eldred, 49 Wis. 305 (no personal notice requisite).

In McEachron *v.* Randalls, 34 Barb. (N. Y.) 301, it was laid down that the right to resell can only be exercised after due notice to the purchaser of the time and place where the sale will be made. But this has been expressly overruled in later cases. McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Pollen *v.* Leroy, 30 N. Y. 549, where Emott, J., said: "The law regards him [the seller], as it has been said in some cases, if in possession of the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold or exposed for sale. Indeed, in a majority of cases, such a notice would be entirely impracticable. Unless the sale is to be public and at auction, no notice of the time and place can be given." See also Lewis *v.* Greider, 49 Barb. (N. Y.) 606.

1. **Place of Resale.**—The place should be near that provided in the contract as the place at which delivery should be made. Rickey *v.* Tenbroeck, 63 Mo. 567; Chapman *v.* Ingram, 30 Wis. 290. In this latter case the court, by Cole, J., said: "Selling the lumber at any place is only a convenient method of ascertaining the difference between the contract price and the value of the lumber where it ought to have been accepted, but it is not the only means. The plaintiff might show by other evidence what lumber was worth at Eau Claire (place of delivery) without resorting to a sale even there, to test its value; but to move the lumber away for two or three hundred miles and to charge the defendant with the increased risk and expense of a resale in a foreign market is imposing on the defendant a loss which the law does not authorize."

It is not always necessary, however, that the place should be that of delivery. McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225.

The seller is not restricted, as respects the place of sale, to the place of delivery named in the contract; but if the property cannot readily be sold at such place or a better or more advantageous sale can be effected elsewhere, it is the duty of the seller to go where he can get the best price and readiest sale, not out of the usual course and channels of trade in marketing such property. Lewis *v.* Greider, 49 Barb. (N. Y.) 606; *aff'd* in 51 N. Y. 231. See Waples *v.* Overaker, 77 Tex. 7; 19 Am. St. Rep. 727, where it was also held that if the buyer desires to select the market for resale, he must receive the goods and send them to that market.

Where the price of the property depends on the market at a place other than the place of delivery, the seller may ship the property to such place and sell there on the buyer's refusal to accept at the specified time. Ingram *v.* Wackernagel (Iowa 1891), 48 N. W. Rep. 998.

Anderson *v.* Frank, 45 Mo. App. 482, was an action for breach of contract for the purchase of wool. The wool was to be delivered at a town where it appeared there was no local market for it. Kansas City was the nearest, though a limited, market, and St. Louis was the controlling market, and the wool was sent to the latter place for sale on the buyer's account. It was held that the sale was properly made at this place and the price obtained there controlled the measure of damages for the breach. *Distinguishing* Rickey *v.* Tenbroeck, 63 Mo. 563.

retain them until the price is paid.[1] This rule, however, is subject to some modifications and restrictions. Thus, in the first place, a lien extends only to the price, not to any other claims which the seller may have against the buyer, as, for example, charges for storage, etc., where the former acts as bailee or warehouseman.[2] Again, the lien exists only when the property in the

1. Miles *v.* Gorton, 2 C. & M. 504; Arnold *v.* Delano, 4 Cush. (Mass.) 33; 50 Am. Dec. 754; Haskins *v.* Warren, 115 Mass. 533; Ware River R. Co. *v.* Vibbard, 114 Mass. 447; Napa Valley Wine Co. *v.* Rinehart, 41 Mo. App. 171; Straus *v.* Rothan, 41 Mo. App. 602; Creanor *v.* Creanor, 36 Ark. 91; Bradley *v.* Michael, 1 Ind. 552; Bradun *v.* Brooks, 22 Me. 470; Mulliken *v.* Warren, 57 Me. 46; Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363; Cornwall *v.* Haight, 8 Barb. (N. Y.) 328; Palmer *v.* Hand, 13 Johns. (N. Y.) 434; 7 Am. Dec. 392; Gay *v.* Hardeman, 31 Tex. 250; White *v.* Welsh, 38 Pa. St. 420; Bowen *v.* Burk, 13 Pa. St. 146; Moore *v.* Newbury, 6 McLean (U. S.) 472; Nevins *v.* Scofield, 2 R. & B. (N. Bruns.) 435.

A lien in general is defined as "a right of retaining property until a debt due to the person retaining it has been satisfied." Benj. on Sales (6th ed.), § 796; Smith's Mer. Law (Pomeroy's ed.), § 648; (3d Am. ed.), p. 688; Bradeen *v.* Brooks, 22 Me. 471; LIENS, vol. 13, p. 574.

"A vendor's lien is in no sense a right of rescission. On the contrary, it proceeds in affirmation of the contract and as a means of its enforcement. It is in the nature of a pledge raised or created by the law upon the happening of the insolvency of the vendee to procure the unpaid purchase money to the vendor. It is a mere right of detention and sale to satisfy the unpaid purchase money." Thompson, J., in Conrad *v.* Fisher, 37 Mo. App. 382. In the same case it was said further that "where the right of stoppage *in transitu* exists, the vendor's lien *a fortiori* exists. In other words, if there has been such a delivery, before the goods are started on their voyage, as cuts off the vendor's lien, there is no *transitus* in the sense which supports the right of stoppage *in transitu*." See STOPPAGE IN TRANSITU.

The rule of law as stated by Mr. Benjamin is, that "in a sale of goods where nothing is specified as to delivery or payment, the vendor has a right to retain the goods until payment of the price; he has in all cases a lien unless he has waived it." Benj. on Sales (6th Am. ed.), § 796.

When a thing has been exchanged for another thing and a sum of money, the transaction is a sale to the extent of the money consideration and the creditor is entitled to a seller's lien. Succession of Furniss, 34 La. Ann. 1013.

If it appear that the sale made embraced both real and personal property, unless it can be shown that a particular price was agreed on for the land as distinct from the aggregate amount allowed for both the land and the personalty, the seller's lien must be regarded as waived and abandoned. Alexander *v.* Hooks, 84 Ala. 605; Stringfellow *v.* Ivie, 73 Ala. 209; Wilkinson *v.* Parmer, 82 Ala. 367; Betts *v.* Sykes, 82 Ala. 378; McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

So where goods, on which a seller's privilege is claimed, have been sold in block, and for a lumping price, and when the proof sustains the privilege on a part and fails to sustain it on the rest of the goods, the impossibility of separating the price is fatal to the allowance of the privilege. Newman *v.* Cannon (La. 1892), 10 So. Rep. 933.

As to the waiver of a lien where the sale is on credit, see *infra*, this title, *Waiver*.

2. Benj. on Sales (4th Am. ed.), § 796; Tiedeman on Sales, § 119.

This point has sometimes arisen in cases where one who had expended labor on certain articles and, having retained them for some time by virtue of his lien, claimed also charges for storage while so holding it. But such charges are not allowed; the holding is for the holder's own benefit and against the will of the owner. Crommelin *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 77; 1 Abb. App. Dec. (N. Y.) 472; 4 Keyes (N. Y.) 90, where a carrier held goods until freight should be paid. British Empire Shipping Co. *v.* Somes, E. B. & E. 353; 96

goods has passed to the buyer,[1] while the goods themselves are still in the actual or constructive possession of the seller,[2] and it is confined to the subject-matter of the sale, not extending to goods which have been mingled with those sold.[3] This lien of the seller exists at common law without any express agreement, being impliedly a part of every contract of sale, and though, as will be seen hereafter, it may be divested by delivery or otherwise, there is nothing to prevent a new and different lien from

E. C. L. 353; E. B. & E. (Exch. Chamber) 366; 96 E. C. L. 366; 8 H. L. Cas. 388, where a shipwright claimed compensation for use of his dock during the time he held a vessel there by virtue of his lien. Angell on Carriers (5th ed.), § 383; FREIGHT, vol. 8, p. 976.

1. Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363. See also Tiedeman on Sales, § 119.

It has been seen that the transfer of title without delivery is confined almost exclusively to cases arising between the parties to the sale. And it will readily appear that the matter of seller's lien arises almost wholly between the parties. See *supra*, this title, *Effect of Contract* (*in Passing Title*). See also language of Park, J., in Dixon *v.* Yates, 5 B. & Ad. 340; 27 E. C. L. 86.

"The existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that a vendor might have a lien on his own goods." Thompson, J., in Conrad *v.* Fisher, 37 Mo. App. 382.

2. Thus in Parks *v.* Hall, 2 Pick. (Mass.) 212, the court by Wilde, J., said: "The right of lien depends on the possession, and to maintain it a vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer according to the terms of the contract the lien is extinguished and the goods cannot be reclaimed on the buyer's becoming insolvent." See also opinion of Shaw, C. J., in Arnold *v.* Delano, 4 Cush. (Mass.) 33; 50 Am. Dec. 754; Pickett *v.* Bullock, 52 N. H. 354; Sawyer *v.* Fisher, 32 Me. 28; Russell *v.* McCormick, 45 Ala. 587; 6 Am. Rep. 707; Stringfellow *v.* Ivie, 73 Ala. 209; *Ex parte* Foster, 2 Story (U. S.) 131; Jordan *v.* James, 5 Ohio 88. See Curtin *v.* Isaacson (W. Va. 1892), 15 S. E. Rep. 171.

"As to the right of lien for the price of the goods, that is a legal right, founded in possession; and it cannot exist after the seller has parted with his possession. Newson *v.* Thornton, 6 East 21." Boyd *v.* Mosely, 2 Swan (Tenn.) 663. See also *infra*, this title, *By Delivery*, where the effect of delivery, as destroying the lien, is considered.

Therefore, a seller cannot seize goods sold by him, for the purchase-money, where they are held by a sheriff under an execution levied before any claim of lien was asserted. Bryan, etc., Shoe Co. *v.* Block, 52 Ark. 458.

If the agreement is that the goods shall be paid for on delivery, and upon delivery being made the buyer refuses to pay, the seller, by virtue of his lien, may resume possession. And if delivery is partially completed and the buyer sells or pledges the goods received to a third person, but without notice to the seller, the latter's lien is not affected, and he may recover from such subsequent purchasers. Palmer *v.* Hand, 13 Johns. (N. Y.) 434; 7 Am. Dec. 392; Cornwall *v.* Haight, 8 Barb. (N. Y.) 327.

In Haskell *v.* Rice, 11 Gray (Mass.) 240, it appeared that timber had been sold upon the land where it was cut, then resold by the buyer and removed to land adjoining, which also belonged to the first seller, where it was measured and a portion of it carried away by the second buyer. Upon the first buyer becoming insolvent, the seller forbade the second to carry away the rest of the timber unless he would promise to pay for it, which he did. It was held that the seller had not lost his lien on the timber thus remaining on his land.

3. If the goods sold have been mixed with others of the buyer, the seller claiming a lien must show clearly that they remain capable of complete identification; and must identify them with reasonable certainty. Newman *v.* Can-

arising by contract, which does not necessarily possess the same properties or become subject to the same limitations as the common-law lien, but which depends entirely on the agreement of the parties creating it.[1] This contractual or equitable lien, to which possession of the property by the seller is not essential, cannot, it seems, be enforced against subsequent *bona fide* purchasers, in the absence of statutory provision, but the statutes generally provide for the enforcement of such liens, when the proper notice has been given.[2] The common-law lien must

non (La. 1891), 9 So. Rep. 439. See Scannell *v.* Beauvais, 38 La. Ann. 217; Shakespeare *v.* Ware, 38 La. Ann. 570.

1. Lien Created by Contract.—Gregory *v.* Morris, 96 U. S. 740; Gay *v.* Hardeman, 31 Tex. 245; Bunn *v.* Valley Lumber Co., 51 Wis. 376; Alexander *v.* Heriot, 1 Bailey Eq. (S. Car.) 223. See LIENS, vol. 13, pp. 608 *et seq.*

The main difference between a common law lien and one arising by contract is, that in case of the latter possession of the thing to be charged is not essential, while in the former it is. Peck *v.* Jenness, 7 How. (U. S.) 620.

When the common law itself raises a lien, possession must be continued; the law though it raises the lien does not continue it. But there is nothing in the law to prohibit parties from making a lien by contract, and stipulating the mode of retaining or rescinding it. Sawyer *v.* Fisher, 32 Me. 28.

In Grant *v.* Whitwell, 9 Iowa 157, it is said that "the same virtue exists in these statute liens, in which the possession does not pass, that existed in those at common law when they were accompanied by possession. They hold the property in the same degree and force."

Under the contract lien possession by the seller may or may not be essential; it is not so unless the agreement requires it. Burnham *v.* Marshall, 56 Vt. 365 (sales of hives of bees); Sawyer *v.* Fisher, 32 Me. 28.

This lien is not destroyed by any possession taken by the buyer if authorized by the contract, and in the usual course of such business. Bradeen *v.* Brooks, 22 Me. 463.

In Cooper *v.* Cleghorn, 50 Wis. 113, there was a sale of machinery on condition that it should remain the property of the seller until paid for. The machinery was so affixed to the buyer's mill that it could not be removed without material injury to the realty. It was held that the seller might enforce a lien on the building containing the machinery for the amount remaining due on the contract.

It is competent for the parties to agree that the seller shall retain a lien upon the property sold as well as upon the article into which it shall be manufactured. And in such case the lien will attach upon the new article as fast as it comes into existence. Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

This contract lien may be created by a verbal as well as a written agreement. Burnham *v.* Marshall, 56 Vt. 365, where it was also held that when given by an intestate it must be renewed by his administrator.

Compare, as to this last proposition, Gay *v.* Hardeman, 31 Tex. 245, holding that a parol reservation in the sale of a personal chattel is neither by common law nor by statute a lien upon the thing sold. Possession by the seller is absolutely essential.

An agreement by the buyer that the chattel shall not be sold by him until after he has paid the purchase money does not create a lien on the chattel in favor of the seller; it is a mere personal obligation. Welsh *v.* Parish, 1 Hill (S. Car.) 155.

2. Lien as Against Subsequent Purchasers.—See as to the rule of the text, M'Clenney *v.* M'Clenney, 3 Tex. 197; 49 Am. Dec. 741; Bugbee *v.* Stevens, 53 Vt. 389; Howard *v.* Witters, 60 Vt. 578; Cadle *v.* McLean, 48 Wis. 630, where it was held that a recording instrument is not sufficient as notice of lien on logs sold. Bunn *v.* Valley Lumber Co., 51 Wis. 376.

See also LOGS AND LUMBER, vol. 13, pp. 1042 *et seq.*; Tiedeman on Sales, § 121; 13 Cent. L. J., p. 133.

In Barber *v.* Richardson, 57 Vt. 408, it appeared that A and B were tenants in common of a horse. A sold his half to B, taking a lien on the whole horse

also be distinguished from the equitable lien allowed to vendors of land.[1]

(b) **How Divested**— (1) BY PAYMENT.—Since the lien of the seller is solely for the purpose of securing the price of the goods sold, it is manifest that it is destroyed when full payment is made or tendered.[2] Part payment, however, does not divest the lien as

for security, which lien was duly recorded. B afterward sold the horse to H, who purchased without notice of A's lien, and who subsequently sold to Z, Z having notice of A's lien. In replevin by A against Z, it was held that the notice which Z had of the lien did not affect his rights, since he derived his title from a *bona fide* purchaser; also that A could not maintain replevin since he and Z were tenants in common.

Establishing the Lien.—By *Mississippi* act of March 11, 1884, it is provided that if the seller of personal property wishes to establish a lien upon it while in the possession of his buyer he must file an affidavit of the sale describing the property, etc., whereupon a writ of seizure will be issued. Under this act a bill by the seller to subject the property sold by him, to which there is no such affidavit, and under which no writ is sued out, establishes no lien. Graham *v.* Thornton (Miss. 1891), 9 So. Rep. 292.

Notice.—Where a water company transferred all its shares of stock either directly to another company, or to its employés, and put itself into absolute control of such other company, its officers being their servants, and where such other company purchased machinery making it subject to a lien, placing it in the works of such water company, and some of the directors had actual notice of the lien, it was held that the company itself had notice of the lien; that the retention of open control by the seller's employé over machinery placed in the works of the company which were being fitted up by the buyer, is notice to such company of the existence of the lien. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879.

The record of a memorandum of sale which witnesses a lien on the goods sold, under *Vermont* acts 1870, No. 63, and 1872, No. 51, which was made more than thirty days after delivery of the property, is not sufficient to charge a subsequent buyer with actual or constructive notice. Bugbee *v.* Stevens, 53 Vt. 389.

See also NOTICE, vol. 16, p. 787.

Enforcement.—In case of this contractual lien of the seller to secure unpaid purchase money, the proper means of enforcing it is by a bill in equity. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879.

In Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171, it was held that the statutory right, under Rev. St. *Missouri* 1889, § 4914, to subject property sold by him to the payment of the purchase price may, under such circumstances as justify a suit by attachment against the buyer, be enforced by attachment.

In sequestration of movable property, based on a seller's privilege, an affidavit to the debt, to the privilege and to the fear that "defendant will conceal, part with or dispose of the movables in his possession during the pendency of the suit," fills all the requirements of the law; and the party is not bound to swear to or to prove any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts to which he swears he fears he may do. Lowden *v.* Robertson, 40 La. Ann. 825.

1. See VENDOR'S LIEN.

2. Martindale *v.* Smith, 1 Q. B. 394; 41 E. C. L. 595, holding that after tender of payment the lien is destroyed, and seller cannot claim to rescind the contract after such tender on the ground that it was made after the appointed time. See TENDER.

In Cory *v.* Barnes (Vt. 1891), 21 Atl. Rep. 384, the seller reserved a lien, and a note was given for the price. The buyer afterwards paid the amount of the note and the seller agreed to indorse such payment on the note but did not do so. Afterwards the parties agreed to apply the payment to another note. It was held that in the interval between the payment and the agreement to apply it to the other note the seller had no lien on the property.

to any portion of the goods, since it exists over the entire mass and is only removed by a payment in full.[1]

(2) By Waiver.—As the lien is a personal privilege belonging to the seller, it may, of course, be waived expressly.[2] It may also be waived by implication at the time of the formation of the contract;[3] as where the goods are sold on credit,[4] or where the seller takes some other security for the payment of the price.[5] Merely giving a promissory note payable on demand for the

1. Thus it is said in Story on Sales (4th ed.), § 282, in speaking of the lien: "It is a right to retain goods sold until the whole price is paid. A partial payment, therefore, will not operate to destroy the lien of the vendor upon all the goods, but only to diminish it in value; every single portion of the property sold being covered by a lien for the smallest fraction of the price." Hodgson *v.* Loy, 7 T. R. 445.

2. Benj. on Sales (6th ed.), § 797.

3. "The right of lien is to be deemed to be waived when the party enters into a special agreement inconsistent with the existence of the lien or from which a waiver of it may be fairly inferred." Pickett *v.* Bullock, 52 N. H. 354. See also Spartali *v.* Benecke, 10 C. B. 212; 70 E. C. L. 212.

In Neff *v.* Baker (Va. 1887), 4 S. E. Rep. 620, the plaintiff sold timber to A, and under the contract claimed a lien thereon. The timber was to be sold before plaintiff was to be paid, and was actually sold to purchasers without notice of his claim, and without objection on his part. It was held that the lien, if it ever existed, was waived by his action. See also Parks *v.* O'Connor, 70 Tex. 337, where permission to buyer to sell the portion of the chattels delivered was held not a waiver of the lien on the remainder.

It may also be waived by implication at the time of the formation of the contract, when the terms show that it was not contemplated that the vendor should retain possession until payment. Benj. on Sales (6th Am. ed.), § 797.

4. **When Credit Is Given.**—Leonard *v.* Davis, 1 Black (U. S.) 476; Thompson *v.* Wedge, 50 Wis. 642; Arnold *v.* Delano, 4 Cush. (Mass.) 39; 50 Am. Dec. 756; McNail *v.* Ziegler, 68 Ill. 224; Spartali *v.* Benecke, 10 C. B. 212; 70 E. C. L. 212; Crawshaw *v.* Homfray, 4 B. & Ald. 50; 6 E. C. L. 386; Chambers *v.* Davidson, L. R., 1 P. C. 296; Troop *v.* Hart, 7 Can. Sup. Ct. 512. Lockett *v.* Nicklin, 2 Exch. 93 (evidence to show whether or not credit was given—usage of trade).

It is competent, however, for the parties to agree expressly that though the goods are sold on credit, yet the seller may retain possession until payment. And where this is the case, the sale on credit, of course, does not destroy the lien. But in the absence of such express agreement, or clear proof of a well-established usage, a sale on credit means, *ex vi terminorum*, a relinquishment of the lien. Benj. on Sales (6th Am. ed.), § 797; Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 754; Tuthill *v.* Skidmore (Supreme Ct.), 1 N. Y. Supp. 445.

That a well-established usage in such cases may be admitted in evidence, see Field *v.* Lelean, 6 H. & N. 617; 30 L. J., Exch. 168, *overruling* Spartali *v.* Benecke, 10 C. B. 212; 70 E. C. L. 212, in so far as it asserts a contrary doctrine. See these cases reviewed in Benj. on Sales (6th ed.), § 797–8.

5. Des Arts *v.* Leggetts, 16 N. Y. 582; Benj. on Sales (4th Am. ed.), § 798; Horncastle *v.* Farran, 3 B. & Ald. 497; 5 E. C. L. 356, in which case the lien was held to be waived by seller's taking a bill of exchange in payment of charges, which he afterwards negotiated. Hewison *v.* Guthrie, 2 Hodges 51; 3 Scott 298; 2 Bing. N. C. 755; 29 E. C. L. 477; Parker *v.* Byrnes, 1 Low (U. S.) 539; Musson *v.* Elliott, 30 La. Ann. 147.

See also Pooley *v.* Great Eastern R. Co., 34 L. T. N. S. 537; Benedict *v.* Field, 16 N. Y. 595 (note of third party).

In Chambers *v.* Davidson, L. R., 1 C. P. 296; 4 Moore P. C. N. S. 158, it is said: "The lien is not the result of an express contract. It is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by express contract, and a security given for the result of the dealings in that relation, the express stipulation and agreement of the par-

amount of the price, will not operate to destroy the lien,[1] but the rule is otherwise where a note is made payable at a fixed future time.[2] If, however, at the time when the note is due, or the credit has expired, the seller still retains possession of the property, his lien revives and continues until payment.[3] And so, also, if before payment the buyer becomes insolvent, the lien is revived, the seller being still in possession.[4]

ties for security exclude the lien and limit their rights by the extent of the express contract that they have made."

In Page *v.* Edwards (Vt. 1892), 23 Atl. Rep. 917, it was held that where the seller of certain machinery to be placed in a mill, afterwards took a mortgage on it together with other property, he did not thereby waive his lien reserved on the machinery in favor of a prior mortgagee of the mill, where such mortgage expressly stated that it was taken as a further security.

1. It is a general rule that a check, draft, or promissory note, either of the debtor or of the third person, if not itself paid, does not constitute a payment unless accepted as payment by the creditor. Clark *v.* Draper, 19 N. H. 419; Arnold *v.* Carpenter (R. I. 1889), 18 Atl. Rep. 174; Farneloe *v.* Bain, 1 C. P. Div. 445; 17 Moak's Rep. 349 (giving delivery orders or "undertakings" does not discharge the lien); Campbell Mfg. Co. *v.* Powell, 78 Tex. 53; Bristol *v.* Pearson, 107 N. Car. 562.

Note of Third Person.—But where goods are sold upon a specific agreement that the note of a third person is to be taken in payment, and the note is duly tendered, such a tender constitutes a proper payment. Des Arts *v.* Leggett, 16 N. Y. 582; *affirming* 5 Duer (N. Y.) 156; *In re* Seymour, 83 Mich. 496.

The rule is otherwise, however, if before delivery the seller has discovered that the maker of such note was insolvent. Benedict *v.* Field, 16 N. Y. 595.

In Jeckell *v.* Fried, 18 La. Ann. 192, S sold a machine to F, and being indebted to B, procured F to execute his note for the purchase money to B. Subsequently B transferred the note to A. It was held that the seller's privilege passed to A with the note.

As to payment by note, bill, or check, see PAYMENT, vol. 18, p. 167.

2. Thompson *v.* Wedge, 50 Wis. 642; Bunney *v.* Poyntz, 4 B. & Ad. 568; 24 E. C. L. 118. See also *In re* Batchelder, 2 Low. (U. S.) 245.

The acceptance of a note payable at a future time is nothing more than the giving of credit, and its acting as a waiver of the lien rests on the same principle.

3. Owens *v.* Weedman, 82 Ill. 409; Tuthill *v.* Skidmore (Supreme Ct.), 1 N. Y. Supp. 445; Wilmshurst *v.* Bowker, 5 Bing. N. Cas. 541; 35 E. C. L. 218; New *v.* Swain, 1 Daus. & L. 193; Bunney *v.* Poyntz, 4 B. & Ad. 568; Benj. on Sales (6th Am. ed.), § 825.

4. Thus, in Milliken *v.* Warren, 57 Me. 50, the court, by Dickerson, J., said: "A vendor of goods has a lien upon them at common law so long as they remain in his possession, and the vendee neglects to pay the price according to the conditions of the sale; and if the vendee becomes insolvent while the goods are left in the hands of the vendor, the latter may retain them until the price is paid. This rule of law is applicable, though a negotiable promissory note has been given for the purchase money if it remains in the hands of the vendor and has not been negotiated so that it may be delivered up on discharge of the lien." The same doctrine is sustained in Arnold *v.* Delano, 4 Cush. (Mass.) 41; 50 Am. Dec. 754 (opinion by Shaw, C. J.).

And there are numerous cases holding that if the seller still retains possession of the goods, his lien is revived by the insolvency of the buyer or of the maker of a note or security which he has accepted in payment of the price. Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396; Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 757; Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 84; 100 Am. Dec. 255; affirmed in Southwestern Freight, etc., Co. *v.* Plant, 45 Mo. 517; Roget *v.* Merritt, 2 Cai. (N. Y.) 117; Benedict *v.* Field, 16 N. Y. 595; White *v.* Welsh, 38 Pa. St. 420; Grice *v.* Richardson, L. R., 3 App. Cas. 319; 24 Moak's Rep. 214; 2 Kent's Com. (13th ed.), *493–4; Reader *v.* Knatchbull, 5 T. R. 281, note.

The waiver of lien by giving credit or taking a bill or note for payment is

(3) By Delivery.—As the possession of the property, actual or constructive, by the seller is essential to the existence of the lien, it follows that whenever there has been a delivery in performance or execution of the contract of sale the lien is divested.[1] The

said to take place on the implied condition that the buyer will keep his credit good until the term of credit shall have expired, and for this reason the lien at once revives, if he becomes insolvent before delivery. Conrad *v.* Fisher, 37 Mo. App. 383.

It seems that the buyer may be let into possession of the goods for a special purpose or in a different character than that of buyer without thereby divesting the seller of his lien. Thus, the seller may refuse to deliver the property sold, but might lend it to the buyer for a specified time. Tempest *v.* Fitzgerald, 3 B. & Ald. 680; 5 E. C. L. 419; Marvin *v.* Wallace, 6 E. & B. 726.

So where a watch was transferred by the master of a vessel to the owners as pledgees and they then lent the watch to the pawner, it was held that he had possession as agent of the pawnees and that they could recover the watch in trover against a third person to whom he had pledged it a second time. Reeves *v.* Capper, 5 Bing. N. Cas. 136; 35 E. C. L. 54.

1. Gregory *v.* Morris, 96 U. S. 619; Blackshear *v.* Burke, 74 Ala. 239; Obermier *v.* Core, 25 Ark. 564; Hewlett *v.* Flint, 7 Cal. 264; Loeb *v.* Blum, 25 La. Ann. 232; Elkin *v.* Harvey, 20 La. Ann. 545; Freeman *v.* Nichols, 116 Mass. 309; Haskins *v.* Warren, 115 Mass. 515; Chapman *v.* Searle, 3 Pick. (Mass.) 38; Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115; Frank *v.* Robinson, 65 Miss. 162; Lupin *v.* Marie, 6 Wend. (N. Y.) 77; 21 Am. Dec. 256; Beam *v.* Blanton, 3 Ired. Eq. (N. Car.) 59; Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121; 28 Am. Dec. 691; Lehigh Co. *v.* Field, 8 W. & S. (Pa.) 241; Bowen *v.* Burk, 13 Pa. St. 146; Welsh *v.* Bell, 32 Pa. St. 17; Boyd *v.* Mosely, 2 Swan (Tenn.) 661; James *v.* Bird, 8 Leigh (Va.) 510; 31 Am. Dec. 668; Williams *v.* Gillespie, 30 W. Va. 586; Lewis *v.* Steiner (Tex. 1892), 19 S. W. Rep. 516.

In Parks *v.* Hall, 2 Pick. (Mass.) 212, the court by Wilde, J., said: "The right of lien depends on the possession, and to maintain it a vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer according to the terms of the contract the lien is extinguished, and the goods cannot be reclaimed on the buyer's becoming insolvent. It has been doubted whether a constructive delivery is sufficient to take away the vendor's right of lien, and perhaps it would be going too far to say that in every possible case a constructive delivery will have this operation; but, generally, it is immaterial whether the delivery is actual or constructive. In many cases wherein it has been held that the vendor's right of lien had been defeated the delivery was constructive only. Brown on Sales 450."

In *Louisiana*, the doctrine is stated that a seller's lien on personalty continues as long as the buyer's possession, but is lost by a sale and actual delivery by the buyer to a third person; but this delivery must be undoubted, and the change of possession must be actual and continued. Flint *v.* Rawlings, 20 La. Ann. 557; Fetter *v.* Field, 1 La. Ann. 80.

The lien is not affected by the buyer's pledging or selling the property to a third party. Palmer *v.* Hand, 13 Johns. (N. Y.) 434; 7 Am. Dec. 392.

In Johnson *v.* Farnum, 56 Ga. 144, it was held that after a sale and delivery of the possession there is no lien, even though the purchaser was insolvent and knew of his inability to pay.

A contract for the sale of logs provided that the seller should drive them to the main stream to be taken in charge by a booming company when its drive went down, and if too late should follow and overtake them. The seller engaged another person, who was taking down a quantity of logs, to take these logs with him, which he agreed to do, but he missed the main drive, and as he could not separate the logs from his own and had engaged to take the others further, took these also, the seller apparently acquiescing. When he reached his destination, the main drive had not been overtaken, and as he was going no further the buyer, without objection from the seller, engaged the booming company to go back and collect the logs and carry them to

delivery which satisfies the statute of frauds is not such a delivery as divests the lien.[1] A constructive delivery is sufficient, unless, notwithstanding such delivery, the seller retains the actual possession;[2] for example, a delivery to a common carrier as the

a designated place. It was held that the course of the parties to the contract of sale amounted to a delivery which cut off any lien that the seller might have had. Muskegon Booming Co. *v.* Underhill, 43 Mich. 629.

In a bill of sale of a steamboat it was recited that the seller was to retain a lien on such boat until notes executed for the deferred payments should be paid. It was held that this recital or allegation amounted to a mere suggestion, was no stipulation, and was entirely nugatory, and that there was no lien, the possession of the boat having passed. Barnett *v.* Mason, 7 Ark. 253.

1. In Arnold *v.* Delano, 4 Cush. (Mass.) 38; 50 Am. Dec. 756, the court by Shaw, C. J., said: "There is manifestly a marked distinction between those acts which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and vest the property in the vendee, and of actual delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price."

In Smith's Mercantile Law (3d Am. ed.), p. 497, note, it was considered that if the same delivery required by the statute of frauds were made in respect of the whole of the goods, the lien would be destroyed. And this is true, says Mr. Benjamin, "so far as regards the ability of the vendor to maintain an action for goods sold and delivered." Benj. on Sales (4th Am. ed.), § 801. But, as will be seen, the existence would depend upon whether, under the constructive delivery, the seller retained actual possession. See next note, and cases.

The proposition that the test, whether there has been a delivery sufficient to satisfy the statute of frauds, is a safe test of the non-existence of the seller's lien, is denied by eminent authorities. Townsend *v.* Hargraves, 118 Mass. 333; Miller J., in Thompson *v.* Baltimore, etc., R. Co., 28 Md. 407; Robinson, C. J., in Wegg *v.* Drake, 16 U. C., Q. B. 252.

2. Conrad *v.* Fisher, 37 Mo. App. 352.

Thus, in Thompson *v.* Baltimore, etc., R. Co., 28 Md. 407, the court, by Miller, J., said: "The lien of the vendor always exists until he voluntarily and utterly resigns the possession of the goods sold and all right to retain them. So long as the vendor does not surrender the actual possession, his lien remains, although he may have performed acts which amount to a constructive delivery so as to pass the title or avoid the statute. In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such delivery is considered as sufficient to annul the lien of the vendor." Story on Sales (4th ed.), §§ 286, 290. The same rule is laid down in Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 71; Newhall *v.* Vargas, 15 Me. 314; 33 Am. Dec. 617.

In Townley *v.* Crump, 4 Ad. & E. 58; 31 E. C. L. 23, A having goods in his warehouse at Liverpool, sold them to B and gave him a delivery order. The goods remained in the warehouse unpaid for until the buyer became bankrupt. In an action of trover by the assignee, evidence was given that the invariable usage in Liverpool was that goods sold while in the warehouse were delivered by the seller by giving the buyer a delivery order, and that thenceforth the possession was considered that of the buyer. It was held that the seller's right of lien was not divested by the giving of such order. For a very similar case, see Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86; Boulter *v.* Arnott, 3 Tyr. 267; 1 C. & M. 333; Grice *v.* Richardson, L. R., 3 App. Cas. 319; 24 Moak's Rep. 214; See also Keeler *v.* Goodwin, 111 Mass. 490. *Compare* White *v.* Welsh, 38 Pa. St. 396.

Where one sells the timber on his land, and the buyer cuts, saws and stacks it on the land with the seller's permission, and conveys it by deed of trust to secure creditors, the seller's lien does not exist as against such creditors. The constructive delivery destroyed it. Williams *v.* Gillespie, 30 W. Va. 586. *Compare* Douglas *v.* Shumway, 13 Gray (Mass.) 502.

Where the goods are at the time of the sale in the buyer's possession, or in that of his bailee, there is plainly no lien. Nichols *v.* Patten, 18 Me. 231; 36 Am. Dec. 713. And when the parties agree that the seller's bailee shall become the bailee of the buyer, this is such constructive delivery as destroys the lien. Farina *v.* Home, 16 M. & W. 119; Bill *v.* Bament, 9 M. & W. 36; Bentall *v.* Burn, 3 B. & C. 423; 10 E. C. L. 138; Godts *v.* Rose, 17 C. B. 229; 84 E. C. L. 229.

Where the buyer is allowed to mark or to deal with the goods while lying in a public warehouse or on the premises of a third party not the seller's bailee, such license may be considered as a constructive delivery destroying the lien. Thus in Tansley *v.* Turner, 2 Bing. N. Cas. 251; 29 E. C. L. 288, A sold to B trees lying on land occupied by C, B being given power to remove them when he pleased. The trees having been marked by the purchaser, their cubical contents ascertained, and some of them actually taken away, it was held that, upon B's bankruptcy, A could not enforce any lien upon the trees, he having transferred both the title and possession. Cooper *v.* Bell, 3 H. & C. 722.

The transfer of a bill of lading or warehouse receipt, where seller does not retain actual possession, destroys the lien. Davis *v.* Russell, 52 Cal. 611; 28 Am. Rep. 647; Burton *v.* Curyea, 40 Ill. 325; 89 Am. Dec. 350; Newcomb *v.* Cabell, 10 Bush. (Ky.) 460; Merchants', etc., Bank *v.* Hibbard, 48 Mich. 119; 42 Am. Rep. 465; Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419; 2 Am. Rep. 408.

This rule may be altered when the bill of lading makes the seller himself the consignee. But in cases where delivery is made to a carrier, the seller's remedy is stoppage *in transitu* rather than the lien. Jones *v.* Jones, 8 M. & W. 431. See *supra*, this title, *Delivery*. See also BILL OF LADING, vol. 2, pp. 240–1; STOPPAGE IN TRANSITU.

Seller Acting as Warehouseman for Buyer.—There are some old cases to the effect that the seller's lien is discharged so that it will not revive on the insolvency of the buyer by his agreeing to hold the goods as a warehouseman for the buyer. Hurry *v.* Mangles, 1 Camp. 452; Barrett *v.* Goddard, 3 Mason (U. S.) 107; Chapman *v.* Searle, 3 Pick. (Mass.) 38. But the more recent and better view is that the seller's lien is not destroyed by such an agreement between him and the buyer subject to the payment of warehouse rent by the vendee. Grice *v.* Richardson, L. R., 3 App. Cas. 319; Miles *v.* Gorton, 2 C. & M. 504; Winks *v.* Hassall, 9 B. & C. 373; 17 E. C. L. 395; Conrad *v.* Fisher, 37 Mo. App. 352. Nor in such a case will the fact that the seller gives to the buyer a delivery order reciting that the seller holds the goods to the order of the buyer rent free until a date named, be such a delivery as to divest his lien. Townley *v.* Crump, 4 A. & E. 58; 31 E. C. L. 23.

Transfer of Warehouse Receipt, etc.—In Conrad *v.* Fisher, 37 Mo. App. 388, it was said that the delivery of a bill of lading, warehouse receipt, bought and sold note, delivery order, sale ticket, carrier's receipt, or any other writing intended by the parties or made by commercial usage a symbol of the goods themselves, passes constructive possession to the buyer, and yet nothing is more clear than that as between the seller and buyer themselves, and, in many cases, between the seller and a sub-buyer, the latter being a *bona fide* purchaser for a valuable consideration, such symbolical delivery does not divest the seller's lien, provided the seller remains in actual custody of the goods. See Allen *v.* Jones, 24 Fed. Rep. 11.

Thus where the goods, in a cash sale, have been set apart and identified in the storehouse of the seller, and although they have been sold by the buyer to a sub-buyer and a delivery order given to the latter on the seller, which has been presented to and accepted by him, yet if the original buyer become insolvent, leaving the purchase price unpaid before the original seller has parted with the goods, he may still exercise his right of lien upon them notwithstanding the rights of the sub-buyer. Southwestern Freight, etc., Co. *v.* Plant, 45 Mo. 517; see Miles *v.* Gorton, 2 C. & M. 504; Tanner *v.* Scovell, 14 M. & W. 28. See also *supra*, this title, *Delivery*.

Marking Packages with Buyer's Name. The seller's lien is not destroyed by marking the packages with the purchaser's name. So held where the goods consisted of barrels of whiskey distilled in a distillery, which by an arrangement between the contracting

agent of the buyer divests the lien.[1] This, however, is independent of the right of stoppage *in transitu* so far as that right may be said to rest on the theory of a lien.[2]

The delivery of a part of the goods sold divests the lien only as to such a part.[3] The mere marking of goods in the buyer's name and setting them aside or boxing them up under his order does not destroy the lien if the seller still retains the goods and has not agreed to give credit.[4]

The question whether the delivery is such as to divest the lien is a question of fact for the jury.[5]

(3) *Stoppage in Transitu* (see STOPPAGE IN TRANSITU).

parties, sanctioned by the agents of the government, was run in the name of the buyer as distiller and placed in the distillery warehouse. Conrad *v.* Fisher, 37 Mo. App. 352. See Dixon *v.* Yates, 5 B. & Ad. 313 ; 27 E. C. L. 86.

1. Delivery to a common carrier is, as has been seen, constructive delivery to the buyer, and since in such case the seller parts with the actual possession, it is sufficient to destroy the lien. *Supra*, this title, *General Character of the Duty;* Boyd *v.* Mosely, 2 Swan (Tenn.) 661; Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Exch. 1; Fragano *v.* Long, 4 B. & C. 219; 10 E. C. L. 313; Dunlap *v.* Lambert, 6 C. & F. 600; Smith *v.* Hudson, 6 B. & S. 431; 118 E. C. L. 429; Hart *v.* Bush, E. B. & E. 494; 96 E. C. L. 492; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; 75 E. C. L. 363.

2. See STOPPAGE IN TRANSITU.

3. **Delivery of Part.**—Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86, where it was held that delivery of a part, also of an invoice of the goods, the vendor taking acceptances for the price—did not destroy his lien on the goods still in his possession. Bunney *v.* Poyntz, 4 B. & Ad. 568; 24 E. C. L. 118; Simmons *v.* Swift, 5 B. & Cr. 857; 12 E. C. L. 388; Miles *v.* Gorton, 2 C. & M. 504; Parks *v.* Hall, 2 Pick. (Mass.) 206; Hamburger *v.* Rodman, 9 Daly (N. Y.) 93.

See also Moeller *v.* Young, 5 E. & B. 7; 85 E. C. L. 7. See STOPPAGE IN TRANSITU. Most of the cases cited in this connection by the text-books involve not the right of lien, but of stoppage *in transitu.*

In Tansley *v.* Turner, 2 Bing. N. Cas. 251; 29 E. C. L. 288, the buyer had taken actual possession of a part of the trees sold; and the decision was that the seller's lien was destroyed. But the ground of the holding was expressly that the buyer had constructive possession of the whole.

In Slubey *v.* Heyward, 2 H. Bl. 504, and Hammond *v.* Anderson, 4 B. & P. 69, the buyer took actual possession of a part only, but the seller's lien was held to have been destroyed entirely, but on the ground that there had been constructive delivery of the whole, that there had been what Lord Ellenborough termed "an unequivocal act of possession and ownership as to the whole quantity on the part of the buyer." See these cases cited with approval in Buckley *v.* Furniss, 17 Wend. (N. Y.) 505.

It is said in Benj. on Sales (6th ed.) 805, that "there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as delivery of the whole and puts an end to the vendor's possession, and consequently to his lien." The rule, however, is only supported by *dicta* of Parke, J., in Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86, and Taunton, J., in Betts *v.* Gibbons, 2 A. & E. 57; 29 E. C. L. 29; and see remarks of Pollock, C. B., to the contrary in Tanner *v.* Scovell, 14 M. & W. 28, also of Lord Ellenborough in Payne *v.* Shedbolt, 1 Camp. 427.

4. Boulter *v.* Arnott, 1 C. & M. 333; Simmons *v.* Swift, 5 B. & C. 857; 12 E. C. L. 388; Goodall *v.* Skelton, 2 H. Bl. 316; Dixon *v.* Yates, 5 B. & Ad. 313; 27 E. C. L. 86; Procter *v.* Jones, 2 C. & P. 532; 12 E. C. L. 248; Townley *v.* Crump, 4 A. & E. 58; 31 E. C. L. 23; Conrad *v.* Fisher, 37 Mo. App. 352.

5. Conrad *v.* Fisher, 37 Mo. App. 352; Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

2. Buyer's Rights and Remedies—*a.* IN GENERAL.—The seller's breach of contract may arise from his default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of the collateral contract of warranty either of quality or title.[1]

The subject divides itself naturally into the buyer's remedies before and after taking possession; and his remedies before taking possession may be subdivided into cases where the contract is executory and those where the property has passed.[2]

b. BEFORE OBTAINING POSSESSION—(1) *Where Contract is Executory*—(a) **Where Price Has Not Been Paid—Damages.**—Where the property has not passed to the buyer, his remedy for the breach of the seller's promise is the remedy applicable in cases of breach of contracts generally; he has no special remedy growing out of the relation of buyer and seller.[3] If the price has not been paid,

1. Benj. on Sales (6th Am. ed.), § 869. See, as to breach of warranty, IMPLIED WARRANTY, vol. 10, p. 85; WARRANTY.

2. Benj. on Sales (6th Am. ed.), § 869.

3. Benj. on Sales (6th Am. ed.), § 870.

In a case of a mere executory sale, an action for possession cannot be maintained, the remedy being an action for damages arising out of the breach of the contract. Boutell *v.* Warne, 62 Mo. 350.

In Stephenson *v.* Cady, 117 Mass. 6, it appeared that there were two executory contracts for the sale of goods to be paid for on delivery. By the terms of the second contract, the delivery thereunder was to begin when the full quantity required by the first had been shipped. It was held that the purchaser, after refusing to pay for the goods delivered under the first contract, unless the sellers gave security for the entire fulfillment of the second, could not maintain an action for non-delivery under the second.

In a contract for the sale of specific personal property, if before the title has vested in the purchaser the property is destroyed, without the fault of the seller, and therefore delivery is impossible, the purchaser may not recover damages for the breach of contract in such a case. There is an implied condition to relieve the party when performance has become impossible without his default. Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415.

Complaint.—In order to recover for failure to deliver goods sold, the plaintiff must show a valid sale. Bacon *v.* Eccles, 43 Wis. 227.

A complaint which merely alleged that the defendant was indebted to the plaintiff in a certain sum, by reason of his failure to deliver specified goods, was held insufficient, since it did not state a consideration for the agreement, nor a promise on the part of the defendant, nor performance or tender of performance on the part of the plaintiff. Thomas *v.* Greenwood, 69 Mich. 215.

In an action to recover for the non-delivery of goods, the plaintiff must allege and prove that he was ready and willing to receive and pay for them as delivered, although the making of the contract is denied. Simmons *v.* Green, 35 Ohio St. 104.

In an action to recover damages for failure to deliver specified goods sold, the plaintiff must allege the agreed price and market price at the time of delivery. Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572.

In an action on a contract for the sale of goods, to be delivered at a certain time and place, the complaint should show an obligation on the part of the plaintiff to receive and pay for the goods, and aver that he was ready to pay the price, according to his promise, upon delivery of the goods as contracted. Beard *v.* Sloan, 30 Ind. 279.

Variance.—If a contract is stated in the declaration as on a part consideration for the delivery of goods, without mentioning the place of delivery, and in the alternative as to time, while the contract proved is on an executory consideration to deliver goods at a particular time and place mentioned, the variance is fatal. Robertson *v.* Lynch,

the damages recoverable are, in general, the difference between the contract price and the market value of the goods at the time

18 Johns. (N. Y.) 451. So where the plaintiff alleges a sale at an agreed price and the proof shows there was no agreement as to price. Trunkey *v.* Hedstrom (Ill.), 23 N. E. Rep. 587.

But a verdict in an action for a breach of contract for the delivery of goods will not be set aside for a variance between the declaration and the proof in regard to the quantity of the goods. Potter *v.* Hopkins, 25 Wend. (N. Y.) 417.

Parties. — Where the purchaser of goods, holding a sold note, orders delivery made to a third person, who in good faith pays the value to such buyer, the order being accepted by the seller, such third person may recover of the seller for failure to deliver, and this though the notes of the original buyer are unpaid in consequence of his subsequent insolvency. Anderson *v.* Reed, 51 N. Y. Super. Ct. 326.

Defenses.—Where, in a broker's memorandum, the terms of sale advantageous to the buyer were omitted, the seller could not object to the memorandum in an action for non-delivery. Davis *v.* Shields, 24 Wend. (N. Y.) 322.

Where the buyer at the time of the demand says he is ready to pay, and can show that he had the money, though none was produced, but the seller refused to deliver on other grounds, it should be left to the jury to say whether or not the buyer was ready to pay, as there is some evidence of such readiness. Burbank *v.* Wood, 3 Jones (N. Car.) 30.

Upon an agreement to deliver a certain amount of seed by a specified time, it was held in an action for the non-delivery that the defendant could not prove in mitigation of damages the declarations of the plaintiff that he did not believe the defendant could perform the contract. Myers *v.* Drake, 10 Watts (Pa.) 110.

When the seller of goods is sued for breach of non-delivery, it is a good defense to show that the buyer was insolvent at the time fixed for delivery. Diem *v.* Koblitz (Ohio 1892), 29 N. E. Rep. 1124.

In Coffin *v.* Reynolds, 21 Minn. 456, it was held that strict performance of a seller's engagement to deliver was excused by the buyer's notifying him under a mistake that he had probably delivered enough, but on discovering the mistake the obligation to deliver the balance revived.

Tender.—In order for the plaintiff to recover in an action for damages for non-delivery he must prove a tender of the price on his part. Lawrence *v.* Everett, 11 N. Y. Supp. 881. Or else the goods must be proved to have been bought on time, or that they were to be delivered without payment of the price. Sexton *v.* Brown, 36 Ill. App. 281. See *infra*, this title, *Mutual or Concurrent Conditions*.

Where property was sold to be paid for when delivered, it was sufficient for the buyer to offer to pay the price in order to maintain an action for failure of delivery. It was not necessary for him to keep up a technical continuing offer. Phillips *v.* Williams, 39 Ga. 597.

But where the seller refuses to deliver the property on demand, it is not necessary for the purchaser to make a tender of the purchase money in order to maintain his action. Anderson *v.* Sherwood, 56 Barb. (N. Y.) 66; Lea *v.* Ennis, 6 Houst. (Del.) 433; Lieberman *v.* Isaacs, 43 Minn. 186. See Fisher *v.* Dow, 72 Tex. 432.

So where goods have been sold to another before delivery. Foster *v.* Leeper, 29 Ga. 294; Harriss *v.* Williams, 3 Jones (N. Car.) 483; Anderson *v.* Garth, 1 Stew. (Ala.) 160. *Compare* Williams *v.* Woods, 16 Md. 220; Biggers *v.* Pace, 5 Ga. 171.

Lowry *v.* Varelli, 21 Ohio St. 324, arose out of a contract for the sale and delivery of a certain quantity of marble, which was to be measured by either party, or together, and in case they should not agree, by some third person appointed by them, and after the measurement and account being made up, the buyer was to pay a certain price per foot. It was held that upon the seller's failure to measure the marble and make up an account, the buyer was not bound to pay or tender payment before suing for breach.

Where in an action by the buyer on a contract for the sale and purchase of an article, to be paid for in New York funds, the buyer proves that he had means to procure them, he need not prove that he had procured them. Bronson *v.* Wiman, 8 N. Y. 182.

and place of delivery;[1] and where there is no market at the place

1. Thus in Barrow *v.* Arnaud, 8 Q. B. 604; 53 E. C. L. 604, it is said by Tindal, C. J.: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time the contract is broken, because the purchaser, having the money in his hand, may go into the market and buy." Again, in Elbinger *v.* Armstrong, L. R., 9 Q. B. 473, Blackburn, J., says: "It is no doubt quite settled that on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of damages is the difference between the contract price and the market price at the time of the breach." Chinery *v.* Viall, 5 H. & N. 288; Wilson *v.* Lancaschire, etc., R. Co., 9 C. B. N. S. 632; 99 E. C. L. 631; Peterson *v.* Ayre, 13 C. B. 352; 76 E. C. L. 352; Griffiths *v.* Perry, 1 E. & E. 680; 102 E. C. L. 680. This rule is supported by numerous cases in the United States; Halsey *v.* Hurd, 6 McLean (U. S.) 102; Barnard *v.* Conger, 6 McLean (U. S.) 497; Blydenburgh *v.* Welsh, 1 Baldw. (U. S.) 331; Rabaud *v.* D'Wolf, Paine (U. S.) 580; Gregory *v.* McDowel, 8 Wend. (N. Y.) 435; Dey *v.* Dox, 9 Wend. (N. Y.) 129; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Beals *v.* Terry, 2 Sandf. (N. Y.) 127; McKnight *v.* Dunlop, 5 N. Y. 537; 55 Am. Dec. 370; Dana *v.* Fiedler, 12 N. Y. 40; 62 Am. Dec. 130; Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14; Clark *v.* Dales, 20 Barb. (N. Y.) 42; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515; Fishell *v.* Winans, 38 Barb. (N. Y.) 228; Yorke *v.* Verplanck, 65 Barb. (N. Y.) 316; Currie *v.* White, 6 Abb. N. S. (N. Y.) 352; Norton *v.* Wales, 1 Robt. (N. Y.) 561; Brock *v.* Knower, 37 Hun (N. Y.) 609; Laird *v.* Townsend, 5 Hun (N. Y.) 107; Bartlett *v.* Blanchard, 13 Gray (Mass.) 429; Shaw *v.* Nudd, 8 Pick. (Mass.) 9; Bush *v.* Holmes, 53 Me. 417; Fessler *v.* Love, 48 Pa. St. 407; White *v.* Tompkins, 52 Pa. St. 363; Kountz *v.* Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 687; Bear *v.* Harnish, 3 Brew. (Pa.) 113; Arnold *v.* Blabon (Pa. 1892), 23 Atl. Rep. 575; Phelps *v.* McGee, 18 Ill. 155; Fletcher *v.* Patton, 21 Ill. App. 228; Kitzinger *v.* Sanborn, 70 Ill. 146; Driggers *v.* Bell, 94 Ill. 223; Van Arsdale *v.* Rundel, 82 Ill. 63; Loescher *v.* Deisterberg, 26 Ill. App. 520; Andrews *v.* Himrod, 37 Ill. App. 124; Capen *v.* De Steiger Glass Co., 105 Ill. 185; Goodrich *v.* McClary, 3 Neb. 123; Wasson *v.* Palmer, 13 Neb. 378; Post *v.* Garrow, 18 Neb. 687; Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572; McCormick Harvesting Machine Co. *v.* Jenson, 29 Neb. 102; Boyer *v.* Cox (Neb. 1892), 52 N. W. Rep. 715; Stevens *v.* Lyford, 7 N. H. 360; Worthen *v.* Wilmot, 30 Vt. 555; Boies *v.* Vincent, 24 Iowa 387; Jemmison *v.* Gray, 29 Iowa 537; Cook Mfg. Co. *v.* Randall, 62 Iowa 244; Osgood *v.* Bander, 75 Iowa 550; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619; Hill *v.* Chapman, 59 Wis. 211; Ward *v.* Burr, 5 Blackf. (Ind.) 116; Kent *v.* Ginter, 23 Ind. 1; Zehner *v.* Dale, 25 Ind. 433; Frink *v.* Tatman, 36 Ind. 259; 10 Am. Rep. 19; Rahm *v.* Deig, 121 Ind. 283; Caldwell *v.* Reed, Litt. Sel. Cas. (Ky.) 366; 12 Am. Dec. 314; Koch *v.* Godshaw, 12 Bush. (Ky.) 318; Miles *v.* Miller, 12 Bush. (Ky.) 134; White *v.* Salisbury, 33 Mo. 150; Northrup *v.* Cook, 39 Mo. 208; Harrison Wire Co. *v.* Hall, etc., Hardware Co., 97 Mo. 289; Shouse *v.* Neiswaanger, 18 Mo. App. 236; Price *v.* Vanstone, 40 Mo. App. 207; Griffith *v.* Kansas City Material, etc., Co., 46 Mo. App. 539; Stewart *v.* Power, 12 Kan. 596; Gray *v.* Hall, 29 Kan. 705; York Draper Mercantile Co. *v.* Lush, 45 Kan. 182; Kribs *v.* Jones, 44 Md. 396; Camden Consolidated Oil Co. *v.* Schlens, 59 Md. 31; 43 Am. Rep. 537; Pinckney *v.* Dambmann, 72 Md. 173; Camors *v.* Madden, 36 La. Ann. 425; Thompson *v.* Howes, 14 La. Ann. 45; Porter *v.* Barrow, 3 La. Ann. 140; Day *v.* Cross, 59 Tex. 595; Duncan *v.* McMahan, 18 Tex. 597; Crosby *v.* Watkins, 12 Cal. 85; Tobin *v.* Post, 3 Cal. 373; McKercher *v.* Curtis, 35 Mich. 478; Erwin *v.* Harris, 87 Ga. 333; Clements *v.* Beatty, 87 Ala. 238; Bell *v.* Reynolds, 78 Ala. 511; 56 Am. Rep. 52; Harris *v.* Rodgers, 6 Heisk. (Tenn.) 626; Newbrough *v.* Walker, 8 Gratt. (Va.) 16; 56 Am. Dec. 127; Boyd *v.* Gunnison, 14 W. Va. 1; Weltner *v.* Riggs, 3 W. Va. 445; Hall *v.* Pierce, 4 W. Va. 107.

As to the allowance of interest, see INTEREST, vol. 11, p. 379.

The same general rule applies where the failure to deliver was inadvertent

on the part of the seller, as for example where he did not have the title to the property sold. Lister *v.* Windmuller, 52 N. Y. Super. Ct. 407; see Camden Consolidated Oil Co. *v.* Schlens, 59 Md. 31.

In *California*, the rule is prescribed by statute Civ. Code *California*, §§ 3308, 3354. Bullard *v.* Stone, 67 Cal. 477.

It has been held that the "market price" within the meaning of this rule is the price at which the goods can be replaced, and not their retail value. Wehle *v.* Haviland, 69 N. Y. 448.

When the market value is unnaturally inflated by unlawful means, it is not the true means of ascertaining the measure of damages. Kountz *v.* Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 687.

In Blydenburgh *v.* Welsh, 1 Baldw. (U. S.) 331, it was held that if the market price was not fixed and appeared by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate, according to the conduct of the defendant.

In an action for non-delivery of whiskey by a certain day according to contract, the rise in price, owing to excise laws passed since the date of the contract, will not alter the rule for estimating damages. Edgar *v.* Boies, 11 S. & R. (Pa.) 445.

In an action for damages for the non-delivery of lumber, an instruction that the proper measure is the difference between the contract price of the lumber not delivered and the *wholesale* price at the place of delivery is erroneous. The true measure of damages is the difference between the contract price and what it would have cost plaintiffs to procure it at the place of delivery and at the time or times when it was reasonably proper for them to supply themselves with lumber of the kind and quality they were to receive under the contract. And if it was impracticable for them thus to supply themselves except at retail rates, they were entitled to demand those rates of the defendants. Haskell *v.* Hunter, 23 Mich. 305.

If the seller of a quantity of cheese to be paid for on delivery sells a portion of it to a third person, the buyer's recovery, in an action for damages for non-delivery, will not be limited to the loss he has sustained upon the portion sold to such third person, but he is entitled to the difference between the market value and the contract price on all the cheese. Crist *v.* Armour, 34 Barb. (N. Y.) 378.

But in Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204, where it appeared that the defendant had agreed to sell and deliver all the sound merchantable corn growing on a specified area of land, and it turned out that only about one fourth of it was sound, whereupon he refused to deliver such part, but insisted upon delivering the whole, it was held, in an action for non-delivery, that the buyer could recover only the difference between the market value and the contract price of the merchantable portion. *Aff'd* in 2 Abb. App. Dec. (N. Y.) 315.

Where A contracted to deliver to B a certain amount of iron to be paid for by bills and the bills were accordingly accepted by B, but upon maturity were dishonored, and afterwards B became bankrupt, it was held, in an action by the assignees of B against A for non-delivery, that they were entitled to recover only such damages as could have been recovered by B if the action had been brought by him on the day of his bankruptcy, and therefore only the difference between the contract and the market price of the iron. Valpey *v.* Oakley, 16 Q. B. 941.

In an action for the breach of a contract of sale for a cargo of coal sold for a specified price, to be delivered to the purchaser at a certain place at the expense and risk of the seller, but resold the next day by the seller to a third person at the same price, which was shown to have been the market price, the latter agreeing to take the cargo at the place at which it was lying at the time of the first and second sales, the first purchaser can only recover as damages the expense of transporting the coal from the place at which it was sold to the place at which it was to have been delivered to him, and the value of the risk incurred in its transportation. Marchesseau *v.* Chaffee, 4 La. Ann. 25.

A covenant to pay a certain amount of money payable in good merchantable pig-iron delivered at a specified place at so much per ton, cannot be discharged by the payment of the amount on the day appointed, and the damages for failure to deliver are properly estimated by the value of such property at the time and place of delivery. Cole *v.* Ross, 9 B. Mon. (Ky.) 393; 50 Am. Dec. 517. See Mattox *v.* Craig, 2

Bibb. (Ky.) 584. So in M'Donald *v.* Hodge, 5 Hayw. (Tenn.) 85, it was held, where the plaintiff had advanced one hundred and twenty-five dollars in cash, for which he was to receive that amount in potash at the price of five dollars per hundred, to be delivered in ninety days, that the criterion of the damages was the value of the article at the time it was to be delivered.

But see White *v.* Tompkins, 52 Pa. St. 363, where it was held that if a contract of sale provides for the payment in specified articles, the payment may be made in such articles or in money, and in case of failure to deliver the articles, the measure of damages is the interest on the money.

In Murray *v.* Gale, 52 Barb. (N. Y.) 427, it was held that parties might contract for the delivery of gold or silver coin considered as a commodity, in which case the rule of damages would be governed by the market price at the date of the breach; but that the agreement in question to pay so many dollars in coin was an agreement for the payment of the sum of money named.

A provision in a contract for the sale of coal to the effect that if the seller fails to deliver it the buyer may purchase elsewhere is not a waiver of the seller's liability to an action for damages for the non-delivery. Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38.

Harrison *v.* Charlton, 37 Iowa 134, was an action for the price of lumber contained in a yard bought by the defendant, to which, contrary to the agreement, the plaintiff had made additions and fraudulently induced the defendant to accept them. It was held that the latter in his cross action might recover as damages the difference between the contract and the market price, applying the same rule as in case of failure to deliver.

When Market Value to be Taken.—The amount of damages must be estimated according to the market value of the article at or about the time it was to be delivered, and at no later day. Gainsford *v.* Carroll, 2 B. & C. 624; 93 E. C. L. 204; Shepherd *v.* Hampton, 3 Wheat. (U. S.) 200.

In an action to recover damages for the breach of an executory contract to deliver a certain quantity of tallow during the whole month of December, it was held that the damages should be regulated according to the market price on the last day of December. Leigh *v.* Patterson, 8 Taunt. 540; 4 E. C. L. 204. See Quarles *v.* George, 23 Pick. (Mass.) 400.

Where contract was to deliver wood as needed, the damages were measured according to the value at the different times it was needed, and was not restricted to the value at the time of the refusal to deliver. Long *v.* Conklin, 75 Ill. 32.

In Douglass *v.* McAllister, 3 Cranch (U. S.) 298, where it appeared that defendants were allowed five days between the 14th and the 19th of the month to consider the plaintiff's demand for flour to be delivered under contract, and to make propositions for a compromise, and no answer was made until the 19th, when the defendants refused to make any delivery, it was held that the breach should be considered as of that date and the damages estimated accordingly, and not as of the 14th.

Where no time is fixed for delivery, damages must be estimated with reference to the time of the refusal to deliver. Eastern R. Co. *v.* Benedict, 10 Gray (Mass.) 212; Williams *v.* Woods, 16 Md. 226; Guice *v.* Crenshaw, 60 Tex. 344; Tempest *v.* Kilner, 3 C. B. 249; 54 E. C. L. 248.

Where a contract was made in October to deliver a load of oats, "on or about the first of November next," and upon failure to deliver an action was brought to recover damages, it was held that the measure of damages was the difference between the contract price and the market value of the oats within a reasonable time after the first of November, and what was a reasonable time was a question of fact for the jury to determine according to all the circumstances in the case. Kipp *v.* Wiles, 3 Sandf. (N. Y.) 585. See Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401.

Where contract was to deliver wool at a certain place, "in a reasonable time, to wit, within two weeks of the purchase," which was on the 20th of July, and the plaintiffs made a demand on the 12th day of August, it was held that such demand was made within a reasonable time, and the damages were to be estimated according to the market value at that time. Chadwick *v.* Butler, 28 Mich. 349.

In McDermid *v.* Redpath, 39 Mich. 372, damages for refusal to deliver wheat, after several demands and prom-

ises, were held to be properly fixed by the value of the wheat at the time of the last promise. See Roberts *v.* Benjamin, 124 U. S. 64.

Whether a contract fixes a day for delivery or allows a reasonable time, delay in delivery made at the seller's request, but without any valid agreement for delay, at any time which would preclude the purchaser from bringing an action immediately, does not extend the time so that an advance in the market price in the meanwhile can be considered in computing the damages. Norton *v.* Wales, 1 Robt. (N. Y.) 561. See Ogle *v.* Vane, L. R., 2 Q. B. 275; Smith *v.* Snyder, 77 Va. 432.

Nominal Damages.—If the market price of the goods sold has not advanced, or has declined, within the period between the formation and the breach of the contract, the plaintiff can suffer no material damages. But in such a case, on the principle that a breach of contract always entitles the party not in default to a remedy, nominal damages will be allowed. Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Currie *v.* White, 6 Abb. Pr. N. S. (N. Y.) 386; Stevens *v.* Lyford, 7 N. H. 360; Woodbury *v.* Jones, 44 N. H. 209; Deere *v.* Lewis, 51 Ill. 254; Kehler *v.* Einstman, 38 Ill. App. 91; Faulkner *v.* Closter, 79 Iowa 15; Rose *v.* Boseman, 41 Ala. 678; Wilson *v.* Whitaker, 49 Pa. St. 114; Moses *v.* Rasin, 14 Fed. Rep. 772; Barnard *v.* Conger, 6 McLean (U. S.) 497.

And so if no price has been agreed upon, nominal damages will be allowed. Smith *v.* Loag, 132 Pa. St. 301; Barnes *v.* Brown, 130 N. Y. 372. As where the price is to be fixed by appraisers. Koch *v.* Godshaw, 12 Bush (Ky.) 320; or if the price agreed upon is the market price at the time of delivery. Wire *v.* Foster, 62 Iowa 114.

Non-Delivery of Instalment.—In a contract sale, where delivery is to be made by instalments, if the seller fails to deliver one, the buyer will be entitled to recover the sum of the differences between the contract and the market price on the several days when the goods should have been delivered. Brown *v.* Muller, L. R., 7 Exch. 319; Roper *v.* Johnson, L. R., 8 C. P. 167; Boorman *v.* Nash, 9 B. & C. 153; 17 E. C. L. 344; *Ex parte* Llansamlet Tin Plate Co., L. R., 16 Eq. 155; Tyers *v.* Rosedale, etc., Iron Co., L. R., 8 Exch. 305; Frost *v.* Knight, L. R., 7 Exch. 111; Missouri Furnace Co. *v.* Cockran, 8 Fed. Rep. 463; Hill *v.* Chipman, 59 Wis. 211; Johnson *v.* Allen, 78 Ala. 387; 56 Am. Rep. 34; Brock *v.* Knower, 37 Hun (N. Y.) 609; Hill *v.* Chipman, 59 Wis. 111.

The rule is thus stated in Sedg. on Damages (8th ed.), § 737: "Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time its delivery should have been made. So where the contract is for delivery of goods in equal proportions in a given number of months, and the action for non-delivery is brought after the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market price on the last day of each month, respectively."

In Bergheim *v.* Blaenavon Iron, etc., Co., L. R., 10 Q. B. 319, the defendants had contracted to deliver to the plaintiffs a certain quantity of iron rails, to be delivered in instalments between January 1st and May 15th, and there was a stipulation that in case the defendants exceeded the time of delivery they were to pay a certain sum per ton for each week beyond the 15th of May, by way of fine. Upon failure to deliver within the time specified the plaintiffs brought an action to recover the damages for non-delivery, and it was held that the fine ought to be calculated from the date upon which the contract was to be completed, and not from the different dates at which the delivery of an instalment might reasonably have been expected.

Non-Delivery of a Part.—In case the seller delivers part of the goods sold but fails to deliver the rest, the same general rule as to the amount of damages recoverable applies in respect to the part undelivered. Bush *v.* Holmes, 53 Me. 417; Capen *v.* De Steiger Glass Co., 105 Ill. 185. See Kehler *v.* Einstman, 38 Ill. App. 91. And in case the buyer is sued for the price of the goods he may set up the difference between the contract price and the market value by way of counter claim, provided he establishes his right to such damages. Fishell *v.* Winans, 38 Barb. (N. Y.) 228; Snook *v.* Fries, 19 Barb. (N. Y.) 313; Bowker *v.* Hoyt, 18 Pick. (Mass.) 555; Horn *v.* Batchelder, 41 N. H. 86; Cole *v.* Swanston, 1 Cal. 51; 52 Am. Dec. 288. And a failure by the buyer in such case to notify the seller that he will be

held responsible if he fails to deliver all the goods, does not waive such right. Elliott *v.* Espenhain, 59 Wis. 272.

Delay in Delivery.—Where the seller delays to deliver the goods for any time after that fixed by the contract, but the buyer accepts them notwithstanding such delay, the latter may recover damages, to be measured by the difference between the market value at the time they were delivered and when they should have been delivered. Boomer *v.* Flagler, 51 N. Y. Super. Ct. 211; Whalon *v.* Aldrich, 8 Minn. 346.

In Ramsey *v.* Tully, 12 Ill. App. 463, it was held that acceptance of an article after the time specified for its delivery does not constitute a waiver of damages for the delay, unless there are other circumstances manifesting an intention to waive damages. Dignan *v.* Spurr, 3 Wash. 309. See Gaylord *v.* Karst, 17 N. Y. Supp. 720; Halstead Lumber Co. *v.* Sutton, 46 Kan. 192; Strain *v.* Pauley, etc., Mfg. Co., 80 Tex. 622.

Evidence.—Evidence of the value of similar articles at other places is inadmissible when the evidence is clear and explicit at the place of delivery; when that is not the case, evidence at other places may be resorted to in order to ascertain the value at the place of delivery. Gregory *v.* McDowel, 8 Wend. (N. Y.) 435; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154.

The plaintiff in an action for refusal to deliver may prove the market value on the day of delivery, and to that end it is competent for him, on the examination of his own witnesses, to prove the price at which sales were made after that day, to be viewed in connection with other evidence so as to form an average of the whole testimony upon which the finding as to the market value is based. Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14.

Evidence of the price of lumber at a boom many miles below the place where the lumber was to be delivered is not admissible, especially where the risk and danger of driving the logs down the river were such that the price at the boom, deducting the cost of driving, was no test of value at the place of delivery. Fessler *v.* Love, 48 Pa. St. 407.

In an action for the non-delivery of a certain number of ties, the fact that they could not have been purchased for immediate delivery at the time and place when and where by the terms of the contract they were to be delivered, would not of itself establish that there was no market price at such time and place. Jemmison *v.* Gray, 29 Iowa 537.

In proving the relative prices of different qualities of flour at Z. in 1817, other testimony is admissible than direct positive proof from a witness who knew the value at that place; in the absence of such positive proof the jury may infer such value, from proof of the price of each kind of flour in 1817, at other places in the neighborhood of Z., and at N. O., a port to which flour was commonly sent from Z. for inspection and sale; and this latter species of evidence, which is admissible for the above purpose, is not secondary, though of a less conclusive character than direct proof. Williamson *v.* Dillon, 1 Har. & J. (Md.) 445.

The market price of goods may be determined by offers to sell, made by dealers in the ordinary course of business, and answers of dealers to inquiries as to price are competent evidence. Harrison *v.* Glover, 72 N. Y. 451.

Evidence of the market value of personal property within a reasonable time before and after the day of delivery is admissible to ascertain the value on such day. Boyd *v.* Gunnison, 14 (W. Va.) 1.

In an action for the non-delivery of 150 tons of madder on a certain day according to contract, evidence is not admissible to show that the delivery of so large an amount on that day might have affected the market price; nor can a witness be asked the difference in market price between five and 150 tons, unless it is first shown that there is a market price for 150 tons. Dana V. Fiedler, 12 N. Y. 40; 62 Am. Dec. 130.

In a suit on a contract to deliver wheat in the interior of the State of *Pennsylvania*, evidence as to its price in Philadelphia at and soon after the time agreed upon for its delivery is receivable as corroborative of the testimony as to its value at the place of delivery. Gordon *v.* Bowers, 16 Pa. St. 226.

In an action on a contract to deliver property on a certain day, the plaintiff is not at liberty on direct examination to prove sales after the agreed time of delivery as a ground for an inference by the court or jury that the value of

of delivery, then at the nearest available market with the additional expense of transportation and hauling.[1]

(b) **Where Price Has Been Paid—Damages.**—If, however, the price or part of it has been paid, the rule as to damages is not so clear, some authorities asserting that the measure of damages is the market price at the time and place of delivery, with interest added; others maintaining that the buyer may recover the highest market price which has been reached at any time between the time fixed for delivery and the beginning of the trial.[2]

the property was the same at which such sales were made. Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14.

1. Grand Tower Min. etc., Co. *v.* Phillips, 23 Wall. (U. S.) 471; Furlong *v.* Polleys, 30 Md. 491; 50 Am. Dec. 635; Berry *v.* Dwinel, 44 Me. 255; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Deifendorff *v.* Gage, 7 Barb. (N. Y.) 18; Richmond *v.* Bronson, 5 Den. (N. Y.) 56; Rice *v.* Morley, 66 N. Y. 82; 23 Am. Rep. 30; McDonald *v.* Unaka Lumber Co., 88 Tenn. 38; East Tenn. etc., R. Co. *v.* Hale, 85 Tenn. 69; McCormick *v.* Hamilton, 23 Gratt. (Va.) 561; Hazleton Coal Co. *v.* Buck Mountain Coal Co., 57 Pa. St. 301; Sellar *v.* Clelland, 2 Colo. 533; Capen *v.* De Steiger Glass Co., 105 Ill. 185; Vickery *v.* McCormick, 117 Ind. 594; Bullard *v.* Stone, 67 Cal. 477. See Johnson *v.* Allen, 78 Ala. 387; 56 Am. Dec. 34.

In order to prove the value of cattle lost by disease in an uninhabited country where there was no market for such animals, evidence of their value in the nearest markets may be received, although such markets are more than 200 miles distant from the place where the cattle were lost; nor would the evidence be restricted to a single market, nor to the very time of loss; but the value in the several markets nearest the place and before and after the date of the loss may be proved. Sellar *v.* Clelland, 2 Colo. 533.

In Equitable Gas Light Co. *v.* Baltimore Coal Tar, etc., Co., 65 Md. 73, it was held that if there is no market price at the place of delivery, and the goods are costly and difficult of transportation from a distance, and are intended to be used for manufacturing purposes, then the market price may be arrived at by deducting the cost of manufacturing and the price of the raw material from the market price of the manufactured article.

2. The decisions on this proposition are nearly evenly divided, the courts of some jurisdictions being unanimous in support of the distinction, while those of others adhere to the general rule laid down in the first part of the text, whether the price has been paid in advance or not. The reasoning used in the *English* and *New York* cases, which maintain the distinction, is that the purchaser, being deprived of the use of his property, ought to be allowed the best price he could have obtained up to the time of the trial and settlement of the question; and this reasoning has been followed by numerous authorities in other jurisdictions. In Shephard *v.* Johnson, 2 East 211, Grose, J., said: "The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglects to replace the stock at the day appointed and the stock afterwards rise in value, plaintiff can only be indemnified by giving him the price of it at the time of trial; and it is no answer to say that defendant may be prejudiced by the plaintiff's delaying to bring his action, for it is his own fault that he does not perform his engagement at the time." Downes *v.* Back, 1 Stark. 318; McArthur *v.* Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412; 11 E. C. L. 436. These cases, as will be seen, arose out of stock transactions, and were brought to recover damages for failure to deliver or return stock that had been borrowed; and while the principle involved may be analogous to the sale of goods, and they are cited to support the rule in regard to sales, they can hardly be called direct authority. And in a later *English* case Startup *v.* Cortazzi, 2 C. M. & R. 165, which arose out of a contract for the sale and delivery of a certain amount of linseed for which part of the price had been paid, it was distinctly held that the plaintiffs were not entitled to treat it as a case resembling contracts for the replacing

of stocks. But the rule is approved in Elliott *v.* Hughes, 3 F. & F. 387, a case decided at *nisi prius*, where the whole price had been paid in advance.

In 2 Sedgwick on Damages (8th ed.), § 745, it is said that "in *England* actions for the non-delivery of railway shares pursuant to a contract of sale are distinguished from actions for not replacing borrowed stock, and in the former class of cases the market price on the day when the contract of sale is to be performed, instead of that on the day of trial, is fixed as the standard for the computation of damages. Tempest *v.* Kilner, 2 C. B. 300; 52 E. C. L. 298; Shaw *v.* Holland, 15 M. & W. 136; Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624." Thus it is seen that there is very little authority for applying the rule to *sales* generally in *England*. Upon this authority, however, the rule has been followed in *New York*. Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; West *v.* Wentworth, 3 Cow. (N. Y.) 82; Clark *v.* Pinney, 7 Cow. (N. Y.) 687, where Sutherland, J., said: "We hold it to be settled by authority, and rightly settled upon principle, that where a contract is made for the sale and delivery of goods or chattels, and the price or consideration is paid in advance, and an action is brought upon the contract for the non-delivery, the plaintiff is not confined, in measuring his damages, to the value of the articles on the day when they should have been delivered." An important case in which the question was discussed was Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614. In it the leading *English* cases and the *New York* cases, cited *supra*, were reviewed at length, and Duer, J., arrived at the conclusion that "whether the action be trover or assumpsit, the highest intermediate value or price ought never to be taken as the measure of damages, unless the evidence justifies the belief, not that it *might*, but that it *would*, have been realized by the plaintiff had he retained the possession of the property, or that it has been or might still be realized by the defendant." In the course of his opinion the learned judge pointed out that though the *English* cases were cited as authority for the rule, what was really decided in them was, not that damages were recoverable according to the highest market price at any time during the interval between the breach of the contract and the trial, but that the plaintiff might justly claim the highest price that the article bore at the day of trial. In regard to the *New York* cases, he also said that it was also evident that in the two last cited the goods were not purchased for the personal use or accommodation of the vendees, but for the purpose of sale by them, and in one of them this fact is not only distinctly admitted but is stated as a necessary ground of the decision. (Clark *v.* Pinney, 7 Cow. (N. Y.) 696). On the other hand, it has been said that in the case of Shephard *v.* Johnson, 2 East 211, the stock had reached its highest price at the day of trial and that this was evidently the reason for the remark of Grose, J., that the plaintiff could only be indemnified by giving him the price at the time. Romaine *v.* Van Allen, 26 N. Y. 313.

Notwithstanding, however, the vigorous attack upon the rule as prevailing in *New York* by Duer, J., in Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614, it is supported in that State, both in regard to ordinary sales and stock transactions, by the weight of authority. Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348; Potter *v.* Hopkins, 25 Wend. (N. Y.) 417; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Van Allen *v.* Illinois Cent. R. Co., 7 Bosw. (N. Y.) 538. See Baker *v.* Drake, 53 N. Y. 211; 13 Am. Rep. 507. Other States in which the rule is to allow the highest market valve at any time before the trial are *California*, Maher *v.* Riley, 17 Cal. 415; *Connecticut*, West *v.* Pritchard, 19 Conn. 211; *Iowa*, Davenport *v.* Wells, 3 Iowa 242; Cannon *v.* Fulsom, 2 Iowa 101; 63 Am. Dec. 474; Stapleton *v.* King, 40 Iowa 278; Myer *v.* Wheeler, 65 Iowa 390; Gilman *v.* Andrews, 66 Iowa 116. These *Iowa* cases hold that the measure of damages is the difference in price at the time of delivery and the commencement of the *suit*, not of the *trial*. *Indiana*, Kent *v.* Ginter, 23 Ind. 1; *Texas*, Randon *v.* Barton, 4 Tex. 289; Calvit *v.* McFadden, 13 Tex. 324; Brasher *v.* Davidson, 31 Tex. 190; 98 Am. Dec. 525; Cartwright *v.* McCook, 33 Tex. 612; Gregg *v.* Fitzhugh, 36 Tex. 127; Ranger *v.* Hearne, 37 Tex. 30. See also Davis *v.* Richardson, 1 Bay (S. Car.) 105.

In Shepherd *v.* Hampton, 3 Wheat. (U. S.) 200, Marshall, C. J., after laying down the general rule in regard to the measure of damages where the price has not been paid in advance, intimated that if the price had been paid,

the rule might be otherwise, and said: "For myself only I can say that I should not think the rule would apply to a case where advances of money had been made by the purchaser under the contract, but I am not aware what would be the opinion of the court in such a case."

But in Marsh *v.* McPherson, 105 U. S. 709, a case where certain realty and personalty were to be exchanged for a lot of machines, the court by Matthews, J., said: "If there had been a total failure on the part of the defendants below to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which, at the time of the breach, he could have supplied himself by purchase from others, with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more, or, if it had fallen, it would be for less than the contract price; the rule to measure the loss, in such cases, being the difference between the contract and the market price. The same rule applies where the breach is partial and not total."

But it seems there must be no unreasonable delay in bringing suit; thus in Clark *v.* Pinney, 7 Cow. (N. Y.) 681, the court by Sutherland, J., said: "But we doubt the propriety of giving the vendee in all cases, as a measure of damages, the highest price of the article between the day when it should have been delivered and the day of trial. If he immediately, or without any unreasonable delay, commences and prosecutes his action, we think it just and proper that the fluctuation in price should be exclusively at the hazard of the defendant—the plaintiff having done everything in his power to have the contract settled and adjusted, and which is prevented solely by the laches or default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made and the day of trial. But where he delays the prosecution of his claim beyond the period which may be considered reasonable, for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it. In such a case, we are inclined to think the rule of damages should be the value of the article at the commencement of the suit." See Cannon *v.* Folsom, 2 Iowa 101; 63 Am. Dec. 474.

In Heilbroner *v.* Douglass, 45 Tex. 407, it was said by Roberts, C. J.: "Where the money or other consideration for the article contracted for has not been paid in advance of the time when it was to have been delivered, or when extraordinary circumstances have occurred to produce extreme prices in the article during a long period of time, and the suit has been protracted without any fault of the defendant, or when the article contracted for is of a perishable nature, or such as to be readily parted with when delivered, or when there are other circumstances attending the transaction, not in the ordinary course of trade calculated to render such a measure of damages inequitable and unjust, the rule of the highest price in the intervening time would not be applicable."

In Worthen *v.* Wilmot, 30 Vt. 555, the question whether any distinction should be made where the price, or part of it, had been paid was not decided. But it was held that a small sum of money paid as earnest on a contract of sale was not such payment in advance as would bring the case within such rule, if it existed.

Opposed to these authorities in support of a higher intermediate value, the decisions are numerous and entitled to much weight. In *Pennsylvania* the contrary rule is laid down, in Smethurst *v.* Woolston, 5 W. & S. (Pa.) 106, where Rogers, J., in speaking of the general rule, says: "This is a just rule, for if it [the article] has arisen in value he [the purchaser] has the advantage of the increased price; if it has decreased, why should he, if he adheres to the contract, recover more from the vendor than the injury he has sustained by the non-performance of the contract?" See also Meason *v.* Phillips, Add. (Pa.) 246. The exceptional rule is also denied in *Vermont*, Hill *v.* Smith, 32 Vt. 433; Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92; *Maine*, Smith *v.* Berry, 18 Me. 122; *New Hampshire*, Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 461. See Frothingham *v.* Morse, 45 N. H. 545; *Illinois*, Sleuter *v.* Wallbaum, 45 Ill. 43; *Michigan*, Chadwick *v.* Butler, 28 Mich. 349; Edwards *v.* Sanborn, 6 Mich. 347. See Bowser *v.* Birdsell, 49 Mich. 5; *Colorado*, Cofield *v.* Clark, 2

(c) **Special Damages.**—If the circumstances warrant it, not only are recoverable such general damages as are the necessary and immediate result of the breach of contract, but special damages, such as are a natural and proximate consequence of the breach, although not in general following as its immediate effect. Such special damages may include both gains prevented as well as losses sustained, if these be such as arise naturally, in the usual course of things, or such as could be considered to have been contemplated by the parties, at the time of making the contract, as the natural and probable result of its breach.[1]

Colo. 101; *Kentucky*, Yoder *v.* Allen, 2 Bibb. (Ky.) 338; Pope *v.* Campbell, Hard. (Ky.) 131; 3 Am. Dec. 722; *Tennessee*, Coffman *v.* Williams, 4 Heisk. (Tenn.) 240; *Mississippi*, Bicknell *v.* Colton, 41 Miss. 368; *Louisiana*, Arrowsmith *v.* Gordon, 3 La. Ann. 105. See also Baltimore Marine Ins. Co. *v.* Dalrymple, 25 Md. 269; Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238; 6 Am. Rep. 402; Andrews *v.* Clark, 72 Md. 396; Cushman *v.* Hayes, 46 Ill. 145; 2 Kent's Com. (13th ed.), p. 480, n.; Sedg. on DAMAGES (8th ed.), p. 274.

Where the seller is unable to perform without his default it seems that the recovery will be limited to the amount paid. Weiland *v.* Townsend (N. J. 1888), 13 Atl. Rep. 672.

In *Pennsylvania*, it has been said, the rule of the highest intermediate value applies to the sale of stocks though not to that of other chattels. But an examination of the cases cited in regard to stocks shows that they did not involve sales and that the defendant's liability arose from a breach of trust. See Bank of Montgomery *v.* Reese, 26 Pa. St. 143; Musgrave *v.* Beckendorff, 53 Pa. St. 310. And that this doctrine has any application to a *sale* of stock is denied in Wilson *v.* Whitaker, 49 Pa. St. 114; Huntingdon, etc., R., etc., Co. *v.* English, 86 Pa. St. 247; North *v.* Phillips, 89 Pa. St. 250.

In *Virginia* likewise no exception is made in the case of stock sales. Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364; Bull *v.* Douglas, 4 Munf. (Va.) 303; 6 Am. Dec. 518. Nor in *Maine*, McKenney *v.* Haines, 63 Me. 74. In *Massachusetts* the general rule is followed. Gray *v.* Portland Bank, 3 Mass. 364; 3 Am. Dec. 156; Wyman *v.* American Powder Co., 8 Cush. (Mass.) 168; Hussey *v.* Manufacturers, etc., Bank, 10 Pick. (Mass.) 415; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90; 19 Am. Dec. 306. So in *Wisconsin*, Noonan *v.* Ilsley, 17 Wis. 314; 84 Am. Dec. 742.

Where the Value Has Decreased.—Where the price of the goods has fallen at the time of delivery it seems that the buyer may recover the amount he has paid with interest. Thus in Bush *v.* Canfield, 2 Conn. 485. A and B had entered into an agreement whereby B agreed to deliver to A at New Orleans 2,000 barrels of flour at seven dollars per barrel and A agreed to receive the flour and pay $5,000 in advance and the residue by certain instalments. He accordingly paid the $5,000, but B wholly failed to deliver flour. At the stipulated time flour at New Orleans was only worth $5.50 per barrel, and in an action by A against B it was held that the rule of damages was the money advanced with interest.

1. Benj. on Sales (6th Am. ed.), § 870; Wood's Mayne on Damages (1st Am. ed.), § 13; Sedgw. on Damages, § 742; Sutherland on Damages, vol. 1, p. 113; Smeed *v.* Foord, 1 E. & E. 602; 102 E. C. L. 600. See also Fletcheur *v.* Tayleur, 17 C. B. 20; 84 E. C. L. 20; U. S. *v.* Behan, 110 U. S. 338; Hamilton *v.* McPherson, 28 N. Y. 76; 84 Am. Dec. 330; Zabriskie *v.* Central Vt. R. Co. (Supreme Ct.), 13 N. Y. Supp. 735; Miller *v.* Mariner's Church, 7 Me. 51; 20 Am. Dec. 341; Thoms *v.* Dingley, 70 Me. 100; Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365; Benton *v.* Fay, 64 Ill. 417; Burckhardt *v.* Burckhardt, 36 Ohio St. 261; Calvit *v.* McFadden, 13 Tex. 324; James *v.* Adams, 8 W. Va. 568; Sweeney *v.* Jamieson, 2 Wash. Ter. 254; Furstenburg *v.* Fawsett, 61 Md. 184; Myer *v.* Wheeler, 65 Iowa 390; Mann *v.* Taylor, 78 Iowa 355; Jones *v.* Nathrop, 7 Colo. 1; Richardson *v.* Chynoweth, 26 Wis. 657; Hammer *v.* Schoenfelder, 47 Wis. 455; see also Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. Rep. 440, in which case profits

and special damages and the leading English and American cases on the subject were discussed at length. Passinger *v.* Thorburn, 34 N. Y. 635; 90 Am. Dec. 753; Landsberger *v.* Magnetic Tel. Co., 32 Barb. (N. Y.) 530; Myers *v.* Burns, 35 N. Y. 269; Ward *v.* New York Cent. R. Co., 47 N. Y. 32; 7 Am. Rep. 405; Devlin *v.* Mayor, etc., of N. Y., 63 N. Y. 10; Wakeman *v.* Wheeler, etc., Mach. Co., 101 N. Y. 205; 54 Am. Rep. 676; Manville *v.* Western Union Tel. Co., 37 Iowa 214; 18 Am. Rep. 8; Merrimac Mfg. Co. *v.* Quintard, 107 Mass. 127; Brock *v.* Gale, 14 Fla. 523; Mississippi, etc., B. Co. *v.* Prince, 34 Minn. 71. In Olmstead *v.* Burke, 25 Ill. 74, general and special damages are defined and the distinction between them explained.

In the leading case of Hadley *v.* Baxendale, 9 Exch. 341, the doctrine of special damages was thus definitely laid down. The court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated."

In Cory *v.* Thames Iron Works, L. R., 3 Q. B. 181, the buyer intended the chattel purchased for a special purpose, but the seller supposed it to be for another and a more obvious purpose. The court held that the buyer could recover for the loss of profits which might have been made if the article had been used for the purpose supposed by the seller, provided the buyer had actually sustained damages to that or a greater amount, but that he could not recover for loss of its use for the special purpose for which he intended it, but of which the seller was not aware.

In regard to the second branch of the rule stated in Hadley *v.* Baxendale, it is not universally true that the *mere* communication of special circumstances by the buyer to the seller will render the latter liable for all damages resulting from a breach of such contract; and in order to produce such a result it must be shown either that the seller assented to such a liability, or that such an assent could reasonably be inferred from the whole transaction. Wood's Mayne on Damages (1st Am. ed.), § 36; Benj. on Sales (6th Am. ed.), § 872; Elbinger *v.* Armstrong, L. R., 9 Q. B. 473; Horne *v.* Midland R. Co., L. R., 8 C. P. 131. This case is cited in support of the above doctrine, but the action was brought against a carrier for failure to carry goods according to contract, and the statements of the judges, referring to the facts in question, are not necessarily applicable to the law of sales.

The American doctrine is substantially the same as the English, and is stated by Seldon, J., in the leading case of Griffin *v.* Colver, 16 N. Y. 489; 69 Am. Dec. 718, as follows: "The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance: That the damage must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be not the remote but the proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

In Shouse *v.* Neiswaanger, 18 Mo. App. 236, the seller knew at the time of making the contract that the lumber sold was to be used by the buyer in the construction of a certain building. It might reasonably be inferred from the nature of the lumber that it was needed to form a support for the flooring; and, also, from the statements made by the buyer to the seller that the emergency for the prompt delivery of the lumber was great. Under these circumstances,

the court held that the plaintiff would be liable for the loss of the use of the building during the time its completion was delayed by the failure of the plaintiff to furnish the lumber.

In the following cases the application of the doctrine of special damages is shown: In Harrow Spring Co. *v.* Whipple Harrow Co. (Mich. 1892), 51 N. W. Rep. 197, the plaintiff agreed to furnish the defendant with harrow teeth, but failed to deliver a portion of the goods contracted for. At the trial, the defendant offered evidence tending to show that it had incurred large expense in taking orders which it had been unable to fulfill by reason of the seller's default. The court held that the profits to be derived from a resale were clearly within the contemplation of both parties, and that the buyer would be entitled to recover the profits which he would have made by resales; and, also, the expense incurred by him in making such sales.

In Friend *v.* Miller, 67 Cal. 464, the buyer contracted for piles to be used in the fulfillment of a contract with the drainage committee, of which fact the seller was aware. By the delay of the latter in delivering the piles, defendant suffered loss, was compelled to pay for the use of a pile-driver, lost his time, and sustained other expenses which he proved and recovered; but the court ruled that the loss sustained by reason of his failure to collect the money due him from the State was too remote and could not have been contemplated by the parties.

In Mihills Mfg. Co. *v.* Day, 50 Iowa 250, the seller agreed to deliver doors and sashes on or about a certain day; the buyer had contracted with a third party to furnish the articles in question for use in the construction of the latter's hotel, and by reason of the seller's default the completion of the hotel was delayed one month. The buyer claimed the damage for which he was liable to the third party, as well as the additional cost of procuring the goods from others, and the trial judge instructed the jury that if the seller, at the time of the making of the contract, knew that the goods were for use upon a certain building, the plaintiff could so recover. Upon appeal, the court, recognizing the general rule as laid down in Hadley *v.* Baxendale, 25 Eng. L. & Eq. 398, held this instruction to be wrong, saying: "In the case at bar there was nothing tending to show that the time of performance was deemed material; that is to say, time was not of the essence of the contract, but the contrary clearly appeared. The plaintiff may have had reason to suppose, from the character of the order, that the defendants intended to use the doors and window-sash in a particular building; but there was no evidence tending to show that the plaintiff knew they were intended for the 'Strother Hotel,' or that defendants were bound to deliver the same at any definite time. Nor did the plaintiff agree to have the same ready by a day certain. In making the contract the plaintiff had no reason to suppose it would be responsible for a month's rent of the hotel if the doors, etc., were not furnished by September 20th, if thereby a month's delay in finishing the building occurred, or because additional expense was incurred in temporarily closing the openings in said building. If the plaintiff had been informed of the special circumstances, and the consequences likely to arise from a failure to furnish the goods by the time indicated, the contract might never have been entered into. The damages sought to be recovered were not such as naturally and usually follow the breach of the contract, and were not contemplated by the plaintiff at the time, and are not, therefore, recoverable in this action."

Profits Must Be Proximate, Certain, and Not Speculative.—In Fox *v.* Harding, 7 Cush. (Mass.) 516, Bigelow, J., said: "If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." In Hamilton *v.* Schumacher (Tex. 1891), 15 S. W. Rep. 715, the buyer purchased other goods at an advanced price to supply the place

of those which were to be delivered by the seller. And the court held that he might recover the difference between such advanced price and the price agreed upon with the seller, but that profits to be derived from resales would not be allowed. The court said : "Loss of profits in a business cannot be allowed as damages, unless the *data* of estimation are so certain and definite that they can be ascertained reasonably by calculation, and the party in fault must have had notice either from the nature of the contract, or by explanation of the circumstances at the time the contract was made, that such damage would ensue from the non-performance."

In the following cases profits were considered to be the natural and proximate result of the breach of the contract and were allowed : Imperial Coal Co. *v.* Port Royal Coal Co., 138 Pa. St. 45; Bell *v.* Reynolds, 78 Ala. 511; 56 Am. Rep. 52; Burrell *v.* New York, etc., Salt Co., 14 Mich. 34; Hopkins *v.* Sanford, 41 Mich. 243; Leonard *v.* Beaudry, 68 Mich. 312; Jones *v.* Foster, 67 Wis. 296; Hubbard *v.* Rowell, 51 Conn. 423.

In the following cases profits were deemed too remote and speculative and were not allowed; Young *v.* Cureton (Ala.), 6 So. Rep. 352; McKinny *v.* McEwen, 48 Mich. 106; Koch *v.* Godshaw, 12 Bush. (Ky.) 318; Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572; Berry *v.* Dwinel, 44 Me. 255; Pennypacker *v.* Jones, 106 Pa. St. 237. In Williams *v.* Reynolds, 6 B. & S. 495; 118 E. C. L. 493, the contract of resale was made by the buyer subsequent to his contract with the seller. In Thol *v.* Henderson, 8 Q. B. Div. 457, the seller knew generally that the buyer intended the goods for resale but did not know of the existence of a sub-contract made by the buyer. The court held that the plaintiff could not recover profits which would have resulted from such resale. See also Wetmore *v.* Pattison, 45 Mich. 439.

Sub-Contract.—The existence of a sub-contract between the buyer and a third party is such a special circumstance as will furnish a measure of recovery, if this fact be communicated to or known by the seller at the time of the making of the contract. The buyer in such event will, in general, recover the profits which would have been derived from the resale, but may also recover for other damage resulting from the circumstances of each particular case. Grébert-Borgnis *v.* Nugent, 15 Q. B. Div. 85. In this case the defendant contracted to furnish the buyer certain goods of a particular shape and description, knowing that the buyer had made a contract for the resale of such goods. Upon the seller's default, the buyer was permitted to recover not only the amount which he would have made as profit upon a resale, but also damages for which he was liable to his customer. See also Josling *v.* Irvine, 6 H. & N. 512.

In Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. Div. 670, the defendants failed to furnish certain parts of a machine which they knew would be needed by the buyer before the date specified in order to complete a contract with a third party. The plaintiffs were held entitled to recover for the loss of profit upon a resale, and also for the expenditure uselessly incurred by them in making other parts of the machine. See Messmore *v.* New York Shot, etc., C. Co., 40 N. Y. 422; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 488; Stewart *v.* Power, 12 Kan. 596.

When Other Goods Cannot be Obtained.—When other articles of the same kind cannot be obtained in the market, or have no ascertainable market value, special damages may be claimed, on the ground that the loss likely to result to the buyer by reason of his inability to supply their place, must have been in the minds of the parties at the time the contract was made. Sedgw. on Dam. (8th ed.), vol. 1, p. 558; Borries *v.* Hutchinson, 18 C. B. N. S. 445; 114 E. C. L. 443; Halstead Lumber Co. *v.* Sutton, 46 Kan. 192; Culin *v.* Woodbury Glass Works, 108 Pa. St. 220; Trigg *v.* Clay (Va. 1891), 13 S. E. Rep. 434; Vickery *v.* McCormack, 117 Ind. 594; Equitable Gas Light Co. *v.* Baltimore Coal Tar etc., Co., 65 Md. 73; Ramsey *v* Tully, 12 Ill. App. 463; Loescher *v.* Deisterberg, 26 Ill. App. 520; Prettyman *v.* Oregon R., etc., Co., 13 Oregon 341; McKay *v.* Riley, 65 Cal. 623. In Hinde *v.* Liddell, L. R., 10 Q. B. 265, the buyer was allowed to recover the difference between the price he had agreed to pay the seller and the price which he had paid to obtain the best substitute to be found in the market in order to fulfill his sub-contract.

In McHose *v.* Fulmer, 73 Pa. St. 365, the court held that the seller must be presumed to know that the article

The circumstances on which the claim to special damages is founded must be alleged in the pleadings.[1]

was of limited production, and that the measure of recovery would be the loss sustained by having to use an article of inferior quality. In Abbott *v.* Hapgood, 150 Mass. 248; 15 Am. St. Rep. 193, Knowlton, J., delivering the opinion of the court, said: "The only damages for which the defendants are liable to anyone must be recovered in this action; and, inasmuch as the machines could not be procured in the market, we are of opinion that the parties must be presumed to have contracted in reference to the declared purpose for which they were to be furnished, and that that purpose may be considered in assessing the damages."

In Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, which was an action for breach of a contract to furnish camp supplies, it was held that the plaintiff could recover expenses incurred by him for several trips from his camp to the defendant's store, resulting in failures to procure the supplies, which the information of the defendant had led him to believe would be ready for him.

In Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, it was held that the buyers could show that deals bargained for were intended for transportation to Quebec, and that this fact was known to the seller; and thereupon their recovery would be the difference between the contract price and the price at Quebec at the time the deals would have reached there if the contract had been fulfilled, deducting therefrom the cost of transportation, including insurance and fees for inspection and any other expense usual and necessary to put the deals upon the market.

The buyer, however, cannot recover for loss which might have been prevented by the exercise of reasonable care and diligence upon his part. In Miller *v.* Mariners' Church, 7 Me. 51; 20 Am. Dec. 341, an early case upon the subject of special damages, Mr. Justice Watson said: "And if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. If the party entitled to the benefit of a contract can protect himself from loss arising from a breach, at a trifling expense or with reasonable exertion, he is bound to do so."

In Parsons *v.* Sutton, 66 N. Y. 92, certain paper bargained for was not delivered at the time specified. The buyer endeavored to purchase other paper to take its place but was unable to do so. Subsequently the seller offered to deliver the paper to the buyer, who then refused to receive it. Upon the buyer's counter-claim for special damages, the court held that his claim could not be supported upon the ground that no other paper could be obtained in the market, because he could have saved himself any loss by purchasing the paper subsequently offered by the seller. See Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92; Sweeney *v.* Jamieson, 2 Wash. Ter. 254; Loker *v.* Damon, 17 Pick. (Mass.) 284.

1. Suth. on Damages, vol. 1, p. 763; Benj. on Sales (6th Am. ed.), § 870; Stevens *v.* Lyford, 7 N. H. 360; Furlong *v.* Polleys, 30 Me. 491; 50 Am. Dec. 635; Parsons *v.* Sutton, 66 N. Y. 92; Olmstead *v.* Burke, 25 Ill. 74; Miles *v.* Miller, 12 Bush. (Ky.) 134. See also Barruso *v.* Madan, 2 Johns. (N. Y.) 145; Ryerson *v.* Marseillis, 16 N. J. L. 450.

The rule has been thus stated: Such *damages* as may be presumed *necessarily* to result from the breach of contract, need not be stated with any great particularity in the declaration; but in other cases it is necessary to state the damage arising from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damage on the trial. Chit. on Pl. (16th Am. ed.), vol. 1, p. 348. See Boorman *v.* Nash, 9 B. & C. 145; 17 E. C. L. 344; Mullaly *v.* Austin, 97 Mass. 30. The damages for which defendants are liable to a third party, to whom they have sold the lumber in question, do not legally result from the breach of the contract, and not being specially alleged in the answer ought not to be allowed. Cole *v.* Swanston, 1 Cal. 51; 52 Am. Dec. 288. In Cofield *v.* Clark, 2 Colo. 101, it was held that the plaintiff could not, in order to fix the measure of damages, offer evidence of the value in a foreign market of the cattle contracted for, unless it was averred in his declaration that the cattle were intended for sale in such foreign market.

(2) *Where Property Has Passed.*—Where the property in the goods has passed to the buyer and the contract is executed, the buyer may have his action for damages in case of the seller's failure to deliver;[1] or he may maintain trover, and, generally, the measure of his recovery will be the same as when he brings his action for breach of the contract.[2] In some instances he may enforce specific performance, but as a general rule specific performance of a contract for the sale of goods or chattels will not be decreed, for the reason that ordinarily an action for damages affords an adequate remedy.[3] To this general rule, however, there are exceptions, as where the subject matter of the sale possesses a peculiar interest or value, as in the case of an heirloom or an object of vertu.[4]

c. AFTER TAKING POSSESSION.—After the buyer has taken possession of the goods under the contract he may have an action

In Burrell *v.* New York Salt, etc., Co., 14 Mich. 34, by reason of the failure of the defendant to deliver certain material, the plaintiff was hindered and delayed in the performance, and finally compelled to abandon his contract. The plaintiff, under a general allegation of damage, was allowed to recover the profits which he would have made had he been suffered to complete the work, the court holding that these damages were such as the law presumed to have accrued from the wrong complained of and need not be more specially claimed. To the same effect is the decision in Camden Consolidated Oil Co. *v.* Schlens, 59 Md. 31; 43 Am. Rep. 537. This was an action for delivery of an inferior quality of oil, and the buyer sought to recover the difference between the price he had been able to obtain for the oil furnished and the market price of the quality of the oil purchased from the defendant. The court held that the damages claimed were not in their nature special, but were the natural and proximate results for the breach, and need not be particluarly stated in the declaration.

1. Benj. on Sales (6th ed.), § 883, where it is said that this "is a right common to all parties to contracts of every kind, and was formerly the only remedy at common law for such breach."

2. Benj. on Sales (6th ed.), § 886; Story on Sales (4th ed.), § 413; Kennedy *v.* Whitewell, 4 Pick. (Mass.) 466. See generally TROVER.

Where the goods sold cannot be identified either from the contract or the evidence, an action of trover cannot be maintained by the buyer. Browning *v.* Hamilton, 42 Ala. 484.

3. McLaughlin *v.* Piatti, 27 Cal. 461; Thorndike *v.* Locke, 98 Mass. 340; Jones *v.* Newhall, 115 Mass. 244; 15 Am. Rep. 94; Somerby *v.* Buntin, 118 Mass. 279; 19 Am. Rep. 459; Barton *v.* DeWolf, 108 Ill. 195; Avery *v.* Ryan, 74 Wis. 591; Stayton *v.* Riddle, 114 Pa. St. 464.

In 1 White & Tudor's Lead. Cas. in Equity the rule is stated thus: "The question in all cases is this—will damages at law afford an adequate compensation for breach of the agreement? If they will, there is no action for the interference of equity; the remedy at law is complete. If they will not, specific performance of the agreement will be enforced." See generally SPECIFIC PERFORMANCE, vol. 22.

4. Williams *v.* Howard, 3 Murph. (N. Car.) 74; Falcke *v.* Gray, 4 D. & D. 651. Where the sale was of a slave, specific performance has been decreed. Sarter *v.* Gordon, 2 Hill Eq. (S. Car.) 121; Young *v.* Burton, 1 McMull. Eq. (S. Car.) 255. So in the case of a sale of a patent right. Binney *v.* Annan, 107 Mass. 94; 9 Am. Rep. 10; Clark *v.* Flint, 22 Pick. (Mass.) 231; 33 Am. Dec. 733; Leach *v.* Fobes, 11 Gray (Mass.) 506; 71 Am. Dec. 732; Todd *v.* Taft, 7 Allen (Mass.) 371; Corbin *v.* Tracy, 34 Conn. 325; Satterthwait *v.* Marshall, 4 Del. Ch. 337. In Adams *v.* Messinger, 147 Mass. 185; 9 Am. St. Rep. 679; specific performance of an agreement by the owner of a patent to furnish and deliver the patented article was decreed, it not appearing that any special or peculiar skill was required to make the

for breach of warranty, if the collateral contract of warranty is broken;[1] or he may reject or return the goods if they do not fulfill the conditions of the warranty.[2]

IX. CONDITIONAL SALES—1. Definition.—The parties to a contract of bargain and sale of goods may agree that the investiture of the purchaser with complete title to the thing sold, or his retention of it, shall depend upon a condition, precedent or subsequent. In either case the transaction is known as a conditional sale. If the condition is precedent, no title passes until it is performed, but after that the sale becomes absolute. If the condition is subsequent, the vendee takes a title which is subject to be divested by the performance of the condition.[3]

2. Rules of Construction.—Whether a sale is conditional depends primarily upon intention,[4] to be gathered, where not expressed, from the circumstances and the language used.[5] Where, by the agreement, the seller is to put the goods into a deliverable shape, this may constitute a condition precedent to the vesting of title in the purchaser, in the absence of language or circumstances indicating an intention to the contrary.[6] So

article. As to sales of corporate stock, see SPECIFIC PERFORMANCE, vol. 22.

1. See IMPLIED WARRANTY, vol. 10, pp. 170–173; WARRANTY. See also Williamson *v.* Dillon, 1 Har. & G. (Md.) 444; Eastern Ice Co. *v.* King, 86 Va. 97.

2. In regard to this right, see IMPLIED WARRANTY, vol. 10, p. 165; RESCISSION; WARRANTY.

Buyer's Right of Resale.—In some cases where the buyer rejects goods delivered to him he may sell them as agent for the seller, and if the price received at the resale is less than the contract price, the seller is liable for the difference, if such resale has been made in good faith and with proper care. Bacon *v.* Cobb, 45 Ill. 47; Walker *v.* Gooch, 10 Biss. (U. S.) 159; Story on Sales (4th ed.), § 409.

3. Sewall *v.* Henry, 9 Ala. 24; Rowan *v.* Union Arms Co., 36 Vt. 124.

A sale of a horse on the agreement that the title should remain in the seller until the residue of the purchase money was paid, is a conditional sale. Vasser *v.* Buxton, 86 N. Car. 335.

An agreement for the sale of eighteen looms to be immediately delivered to the buyer for use in his business, and to be paid for in quarterly payments and the title to remain in the seller until paid for, is a conditional sale. Forrest *v.* Nelson, 108 Pa. St. 401.

A sale of goods under agreement that the seller shall retain title until they are paid for, but that the purchaser may sell at retail and as soon as the seller's agent calls shall pay for the goods so sold, the seller retaining title to the rest, the purchaser at the time of sale accepting a draft on time for the price, is a conditional sale, leaving the title in the seller. Mack *v.* Story, 57 Conn. 407.

4. Palmer *v.* Howard, 72 Cal. 293; 1 Am. St. Rep. 60; Forrest *v.* Hamilton, 98 Ind. 91; Hamilton *v.* Gordon (Oregon, 1892), 30 Pac. Rep. 495; Wood, etc., R. Co. *v.* Brookes, 2 Sawy. (U. S.). 576.

5. Shoshonetz *v.* Campbell (Utah, 1890), 24 Pac. Rep. 672.

6. McClung *v.* Kelley, 21 Iowa 508; Cadwell *v.* Blake, 6 Gray (Mass.) 402; Gilbert *v.* New York, etc., R. Co., 4 Hun (N. Y.) 378.

No title passes where anything remains to be done by a seller of merchandise to put the same in a deliverable shape, and the purchaser has an option of refusal to accept in case such things are not done. Blossom *v.* Shotter, 59 Hun (N. Y.) 481.

Where the capacity of a machine was to be tested in establishing a condition precedent to payment, the test should comply with the conditions mentioned in the contract of sale. Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263.

If the price is to depend on quantity or quality, weighing, measuring or

where the passing of title is made dependent upon the happening of some event, as where a horse absent on a journey is sold on condition that he returns therefrom safely.[1]

Where both parties are to do something simultaneously, as, for example, where the seller is to deliver and the buyer is to pay the price, these are concurrent conditions, and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do.[2] Where the condition operates upon the title already vested and renders it liable to be defeated, as where a sale is made with a right on the part of the vendee to return the goods within a reasonable time, the condition is subsequent and, if performed, will defeat the title already vested.[3]

3. Conditional Sales Distinguished from Other Agreements—*a.* BAILMENTS AND LEASES.—Conditional sales are frequently confounded with bailments, leases, and other agreements. Whatever the form of the agreement, if its purpose is to cover up a sale and preserve a lien in the seller for the price of the goods, it is a conditional sale, although called in the agreement a bailment or lease. The courts look to the intent rather than the name given to the transaction by the parties.[4] If there is an express or implied intent that the title shall not pass until the condition is per-

testing are conditions precedent to the transfer of title, even though such weighing, measuring or testing effects nothing further than to satisfy the buyer that he is getting what he bargained for. Barrett *v.* Goddard, 3 Mason (U. S.) 112; Straus *v.* Ross, 25 Ind. 300; Foster *v.* Ropes, 111 Mass. 10; Sumner *v.* Hamlet, 12 Pick. (Mass.) 82; Crofoot *v.* Bennett, 2 (N. Y.) 258.

In an action for goods sold and delivered and goods bargained and sold, proof was of a bargain for 2000 telegraph poles, and that the plaintiff had at the time and place of delivery 2130 of such poles, and notified the defendant that he was ready to deliver them and receive the price, to which the defendant replied admitting that the plaintiff had the poles, and said he would settle for them soon; but before anything farther was done the poles were carried away by a freshet. It was held that on this evidence the plaintiff could not recover, upon the ground that the separation of the 2000 from the entire lot not having been made the title to them had not vested. Bailey *v.* Smith, 43 N. H. 141.

1. Redman *v.* Ætna Ins. Co., 49 Wis. 439. See Osborn *v.* Jernegan, 126 Mass. 362.

One to whom a corn-planter was delivered agreed to buy it if it did not break before a certain field was planted. It did not break and he kept it. It was held that the condition was fulfilled and that there was a complete sale. Norton *v.* Hummel, 22 Ill. App. 194.

2. Ballantyne *v.* Appleton, 83 Me. 570; Pinkham *v.* Appleton, 82 Me. 574; Seymour *v.* Bennet, 14 Mass. 266; Dana *v.* King, 2 Pick. (Mass.) 155; Levy *v.* Burgess, 64 N. Y. 390; Watjen *v.* Green, 48 N. J. Eq. 322.

3. Hickman *v.* Shimp, 109 Pa. St. 16; Redman *v.* Ætna Ins. Co., 49 Wis. 439.

4. Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664; Palmer *v.* Howard, 72 Cal. 293; 1 Am. St. Rep. 60; Hine *v.* Roberts, 48 Conn. 269; 40 Am. Rep. 170; Murch *v.* Wright, 46 Ill. 487; 95 Am. Dec. 455; Greer *v.* Church, 13 Bush (Ky.) 431; Enlow *v.* Klein, 79 Pa. St. 490; Whitcomb *v.* Woodworth, 54 Vt. 544; Smith *v.* Niles, 20 Vt. 315; 49 Am. Dec. 782; Page *v.* Edwards (Vt. 1892), 23 Atl. Rep. 917.

An agreement, which is evidently a mere device to evade the requirements of the statute concerning conditional sales, the transaction being designated by the parties as a lease, will be treated by the courts as a conditional sale. Campbell Printing Press, etc., Co. *v.* Oltrogge, 13 Daly (N. Y.) 247.

formed, it is a conditional sale.[1] If the agreement is that the transferee must take the goods and keep them for a certain period, and if in that time he pays for them, he is to become the owner, but otherwise he is to return the goods,[2] and pay for the use of them,[3] the transaction is a bailment and not a conditional sale. But whenever it appears from the contract between the parties that the owner of the property has transferred the possession thereof to another, reserving to himself the naked title solely for the purpose of securing to himself the payment of the price agreed between them, the contract is necessarily a conditional sale and not a bailment.[4] The authorities in some States show a distinction between possession under a conditional contract of sale and possession under a bailment. In *Pennsylvania*, for instance, it is held that in the case of a bailment with an option in the bailee to purchase at a named price, the property does not pass as in favor of purchasers of the bailee; while in a contract of sale, containing a reservation of title in the seller until the price is paid, delivery to the buyer subjects the property to execution at the suit of his creditors and makes it transferable by him to *bona fide* purchasers. In consequence of this distinction attempts are frequently made by sellers of sewing machines, pianos, organs, and furniture, to disguise conditional sales as leases in order to protect themselves against the creditors and purchasers of the buyers. Where this distinction is recognized the courts hold these dubious transactions to be present leases with the conditional right of sale *in futuro*;[5] but where this distinction is discredited and possession

Parol Evidence as to Intent.—Parol evidence is admissible to show intent. Domestic Sewing Mach. Co. *v.* Anderson, 23 Minn. 57; Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

1. Shoshentz *v.* Campbell (Utah, 1890), 24 Pac. Rep. 672; Forest *v.* Hamilton, 98 Ind. 91; Vaughn *v.* Hopson, 10 Bush (Ky.) 337.

2. Farquhar *v.* McAlevy, 142 Pa. St. 233; 24 Am. St. Rep. 497; see Smith *v.* Niles, 20 Vt. 315; 49 Am. Dec. 782.

3. Sargent *v.* Gile, 8 N. H. 325; Sumner *v.* Cottey, 71 Mo. 121; Chamberlain *v.* Smith, 44 Pa. St. 431; Rose *v.* Story, 1 Pa. St. 190; 44 Am. Dec. 121; see Davis *v.* Giddings, 30 Neb. 209; 1 Neb. L. J. 13.

In every bailment or let for hire a price or compensation to the hirer is essential. The amount may not be stipulated, but the contract must contemplate payment for the use of the thing let or bailed. Herryford *v.* Davis, 102 U. S. 235.

4. Sumner *v.* Woods, 67 Ala. 139; 42 Am. Rep. 104; Loomis *v.* Bragg, 50 Conn. 228; 47 Am. Rep. 638; Forrest *v.* Nelson, 108 Pa. St. 481. See Greer *v.* Church, 13 Bush (Ky.) 430; Collender Co. *v.* Marshall, 57 Vt. 232; Whitcomb *v.* Woodworth, 54 Vt. 544; Singer Mfg. Co. *v.* Cole, 4 Lea (Tenn.) 439; 40 Am. Rep. 20; Meagher *v.* Hollenberg, 9 Lea (Tenn.) 392; Sanders *v.* Wilson, 19 D. C. 555.

See LEASE, vol. 12, p. 976.

A contract purporting to rent a sewing-machine for fifteen months for $95, the machine to remain the property of the lessor until the amount is paid, and then to become the property of the hirer, without further payment, is not a contract of letting, but one of sale. Singer Mfg. Co. *v.* Cole, 4 Lea (Tenn.) 439; 40 Am. Rep. 20.

5. McCall *v.* Powell, 64 Ala. 254; Chamberlain *v.* Smith, 44 Pa. St. 431; Enlow *v.* Klein, 79 Pa. St. 488; Becker *v.* Smith, 59 Pa. St. 469; Crist *v.* Kleber, 79 Pa. St. 290; Rowe *v.* Sharp, 51 Pa. St. 26. See Bean *v.* Edge, 84 N. Y. 510; Austin *v.* Dye, 46 N. Y. 500; Haviland *v.* Johnson, 7 Daly (N. Y.) 297.

When a landlord purchases a mule,

under a conditional contract of sale and possession under a bailment are put upon the same footing, it is held that these transactions are conditional sales.[1]

and delivers it to his tenant, to be used in the cultivation of the crops on the rented lands, promising to sell the mule to the tenant when the latter may be able to buy it, but specifying no time or price, the transaction is not a conditional sale, but is a mere bailment, with a privilege to the tenant of purchasing, which he may or may not exercise at his option; and a purchaser from the tenant, without notice of the bailment, acquires no title. McCall *v.* Powell, 64 Ala. 254.

1. Herryford *v.* Davis, 102 U. S. 235; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664; Hine *v.* Roberts, 48 Conn. 267; 40 Am. Rep. 170; Loomis *v.* Bragg, 50 Conn. 228; 47 Am. Rep. 638; Hays *v.* Jordan, 85 Ga. 749; Lucas *v.* Campbell, 88 Ill. 447; Latham *v.* Sumner, 89 Ill. 233; 31 Am. Rep. 79; Murch *v.* Wright, 46 Ill. 487; 95 Am. Dec. 455; Greer *v.* Church, 13 Bush (Ky.) 430; Gross *v.* Jordan, 83 Me. 380; Gorham *v.* Holden, 79 Me. 317; Cole *v.* Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Singer Mfg. Co. *v.* Graham, 8 Oregon 17; 34 Am. Rep. 572; Singer Mfg. Co. *v.* Cole, 4 Lea (Tenn.) 439; 40 Am. Rep. 20; Collender Co. *v.* Marshall, 57 Vt. 232; Carpenter *v.* Scott, 13 R. I. 477. See Price *v.* McCallister, 3 Grant (Pa.) 248; Forrest *v.* Nelson, 108 Pa. St. 481; Stadtfeldt *v.* Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661; Summerson *v.* Hicks, 134 Pa. St. 566; Smith *v.* Lozo, 42 Mich. 6.

Where by the terms of a written agreement between M and L the latter received from the former a piano, the price of which was fixed at $700, and upon taking it L paid $50, which was called the rent of the instrument for the first month, and he was to pay $50 at the beginning of each month thereafter for thirteen months, the monthly payments as rent to count as part of the $700. The court, in rendering judgment in this case, said: "It was a mere subterfuge to call this transaction a lease, and the application of that term in the written agreement between the parties does not change its real character. It was a conditional sale with a right of rescission on the part of the vendor in case the purchaser should fail in the payment of his instalments; a contract legal and valid as between the parties, but made with the risk on the part of the vendor of losing his lien in case the property should be levied upon by creditors of the purchaser while in possession of the latter." Murich *v.* Wright, 46 Ill. 487.

An instrument reciting a lease of a piano for a specified sum as rent, to be paid in monthly instalments, and providing that, in case the lessee fail to make any of the payments, the piano is to be returned to the lessor; that upon payment of the full sum mentioned as rent the lessor shall give an absolute bill of sale; and that title shall remain in him until the last payment is made,—is a conditional sale. Sanders *v.* Wilson, 19 D. C. 555.

Where a sewing machine was delivered under a writing purporting to hire the same for $5 per month, the company agreeing that when $85 was paid in such monthly advances or otherwise to sell and deliver the machine under a receipted bill of sale, it was held that the writing showed a sale and that the machine was liable to attachment against the purchaser. Lucas *v.* Campbell, 88 Ill. 447.

The defendant received of the plaintiff an organ and signed and delivered to him the following agreement prepared by the plaintiff: "The subscriber has this 21st day of December, 1877, rented of H (the plaintiff) one choral organ, during the payment of rent as herein agreed, for the full rent of $190, payable as follows: one melodeon valued at $50 as first payment, and one note for $140 due January 15, 1879; with the understanding that if I shall have punctually paid all said rent I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due all my rights herein shall terminate and said H may take possession of said organ." Held not to be a lease of the organ, but a conditional sale, and that the plaintiff could not recover upon the $140 note after the organ had been returned. Hine *v.* Roberts, 48 Conn. 267; 40 Am. Rep. 170.

The leasing of furniture for a stipulated rent per month, it being agreed

b. MORTGAGES.—In determining whether a transaction is a mortgage or a conditional sale, the understanding and purposes of the parties are to be considered.[1] If the instrument taken alone or in connection with surrounding facts, appears to have been given as a security for a debt subsisting between the parties,[2] and to have been executed in conformity with the requirements of the law as to mortgages[3] it must be considered a mortgage. But if there is no debt[4] or if it is the understanding of the parties that the debt shall be extinguished,[5] and the instrument contains no words of conveyance nor any retention of a lien, and expressly provides that the title shall remain in the seller until the whole of the purchase money is paid, it is a conditional sale and not a mortgage.[6] A contract, in effect a conditional sale, may, however, be afterwards modified so as to make it a mortgage.[7]

c. CONSIGNMENTS.—A transfer of goods evidenced by a written

that when the value of the furniture is paid the title shall vest in the lessee, constitutes a sale upon a condition precedent; and, under W. Va. Code, chap. 74, § 3, a reservation of the title, unless a notice is duly recorded, is void as to creditors of the purchaser. Baldwin *v.* Van Wagner, 33 W. Va. 293.

1. Turner *v.* Kerr, 44 Mo. 429.

2. Cooper *v.* Brock, 41 Mich. 488; Moore *v.* Murdock, 26 Cal. 514; Smith *v.* Beattie, 31 N. Y. 542; Wilmerding *v.* Mitchell, 42 N. J. L. 476; Ruffier *v.* Womack, 30 Tex. 332; Musgat *v.* Pumpelly, 46 Wis. 660.

A being indebted to B delivered to him certain property as a security for such indebtedness, with power to sell the same and to satisfy the debt out of the money raised by the sale, or to retain it until the debt was paid by A. Held, that this was a pledge, and not a sale to B. Houser *v.* Kemp, 3 Pa. St. 208.

3. Palmer *v.* Howard, 72 Cal. 293; 1 Am. St. Rep. 60; Gerow *v.* Castello, 11 Colo. 560; 7 Am. St. Rep. 260.

4. Slowey *v.* McMurray, 27 Mo. 113; 72 Am. Dec. 251.

If the relation of debtor and creditor never existed between the parties, the transaction must be a conditional sale. Logwood *v.* Hussey, 60 Ala. 417; Glover *v.* Payn, 19 Wend. (N. Y.) 518; Conway *v.* Alexander, 7 Cranch (U. S.) 218.

5. Todd *v.* Campbell, 32 Pa. St. 250. See Clayton *v.* Hester, 80 N. Car. 275.

6. Pate *v.* Oliver, 104 N. Car. 458; Frick *v.* Hilliard, 95 N. Car. 117; Clayton *v.* Hester, 80 N. Car. 275; Worthy *v.* Cole, 69 N. Car. 157; Ellison *v.* Jones, 4 Ired. (N. Car.) 48; Bingham *v.* Vandegrift, 93 Ala. 283; Rowan *v.* Union Arms Co., 36 Vt. 124; Page *v.* Edwards (Vt. 1892), 23 Atl. Rep. 917.

An instrument purporting to mortgage a mule to secure the payment of a note given in part for the purchase price of the mule, but providing that the mule shall remain the property of the mortgagee until paid for, is in effect a conditional sale, with reservation of title so far as the price of the mule is concerned. Smith *v.* DeVaughn, 82 Ga. 574.

An instrument of writing, in form a deed of bargain and sale, conveying personal property by absolute words of conveyance, but reserving to the grantor "the right to redeem the property" by a specified day, and containing a stipulation on his part, in the event of his failure to redeem, that he would pay a certain sum for the use of the property in the mean time,—held to be a conditional sale, and not a mortgage. Logwood *v.* Hussy, 60 Ala. 417.

A conveyance was absolute in form, and a separate paper gave the right to repurchase by a specified day. It appearing that the transaction did not originate in a proposition for a loan, and that no debt existed or continued between the parties,—held, that it would be deemed a conditional sale, and not a mortgage. Mitchell *v.* Wellman, 80 Ala. 16.

So where the agreement to reconvey was oral. Douglass *v.* Moody, 80 Ala. 61.

7. Griffith *v.* Morrison, 58 Tex. 46.

instrument in which a lien for the purchase price is reserved is a conditional sale, although the contract is contained in papers calling the transaction a consignment.[1] Such a contract is worthless as to the creditors of the purchaser, although good as between the parties.[2]

4. Sales Dependent Upon Conditions Precedent—*a.* GENERALLY.—When the buyer is by the contract bound to do anything as a condition precedent upon which the passing of the property depends, the property will not pass until the condition is fulfilled, even though the goods have been actually delivered into the possession of the buyer.[3] Until the performance of the condition the seller retains an interest subject to levy and sale.[4] And where the contract gives the right to the seller to retake possession whenever he deems himself insecure, he cannot be held liable

1. Peek *v.* Heim, 127 Pa. St. 500; 14 Am. St. Rep. 865.

2. Thompson *v.* Paret, 94 Pa. St. 275; Stadtfeld *v.* Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661; Peek *v.* Heim, 127 Pa. St. 500; 14 Am. St. Rep. 865.

3. Jones *v.* U. S., 96 U. S. 24; Beardsley *v.* Beardsley, 138 U. S. 262; Segrist *v.* Crabtree, 131 U. S. 287; Stone *v.* Waite, 88 Ala. 599; Sumner *v.* Wood, 67 Ala. 139; 42 Am. Rep. 104; Hays *v.* Jordan, 85 Ga. 749; Young *v.* Kansas Mfg. Co., 23 Fla. 394; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Van Duzor *v.* Allen, 90 Ill. 499; Thomas *v.* Winters, 12 Ind. 322; Mazone *v.* Caze, 18 La. Ann. 31; Dana *v.* King, 2 Pick. (Mass.) 155; Whitwell *v.* Vincent, 4 Pick. (Mass.) 449; Seymour *v.* Bennet, 14 Mass. 266; Miles *v.* Edsall, 7 Mont. 185; Cole *v.* Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Luther *v.* Cote, 61 N. H. 129; Levy *v.* Burgess, 64 N. Y. 390; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40; Frank *v.* Batten, 49 Hun (N. Y.) 91; Perry *v.* Young, 105 N. Car. 463; Singer Mfg. Co. *v.* Graham, 8 Oregon 17; 34 Am. Dec. 572; Edward's Appeal, 105 Pa. St. 103; Enlow *v.* Klein, 79 Pa. St. 488; Russell *v.* Harkness, 4 Utah 197.

On a conditional sale of goods, they are placed in the hands of an agent of the contracting parties; the right of the seller to the goods does not expire till the conditions are performed. Van Buskirk *v.* Purinton, 2 Hall (N. Y.) 561.

Where a party bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition—held, that he could not maintain case or trover for the value of the horse against a bailee who was to deliver him on the performance of such precedent condition. Ferrier *v.* Wood, 9 Ark. 85.

A conditional contract of sale does not lose its executory character by a mere delivery of the property. Sage *v.* Sleutz, 23 Ohio St. 1. See Hill *v.* McKenzie, 3 Thomp. & C. (N. Y.) 122.

Where by the contract of sale of timber-trees, the property in the trees passes to the vendee subject to a lien created by the contract for the payment of the price, and, by its terms, the possession was to remain with the vendor until the money was paid or security furnished, the lien is not destroyed by any possession taken by the vendee authorized by the contract in the usual course of such business. Bradeen *v.* Brooks, 22 Me. 463.

Thus cutting the trees and converting them into mill-logs will not destroy the lien. Bradeen *v.* Brooks, 22 Me. 463.

One from whose land wood is cut by another, under an agreement whereby he is to retain the title to the property until the latter pays therefor at the rate of a stated price per cord, has the exclusive property in the wood, and not a mere lien to the extent of the price agreed to be paid. Stokes *v.* Balaam, 73 Cal. 154.

4. McMillan *v.* Larned, 41 Mich. 521.

Burden of Proof.—Where one had sold a piano on condition, and had been allowed to assume the apparent ownership, it was held that the burden of proof was on the party claiming adversely to show non-fulfillment of the condition of sale. Goodell *v.* Fairbrother, 12 R. I. 233; 34 Am. Rep. 631.

for the conversion after so taking possession.[1] If the property increases in value after it is sold, the seller is entitled to the increase accruing before the performance of the condition.[2] If it is lost or destroyed, the loss must be borne by him in whom the title is.[3] But the fact that the property in the possession of the buyer is burned or destroyed without his fault before the payment is due does not relieve him of the obligation to pay the price.[4]

b. SEPARATION AND MEASUREMENT.—Where goods are sold and some act remains to be done in relation to them, as that of separating, weighing or measuring, the performance of such act is a prerequisite to the consummation of the contract, and until it is performed the property does not pass to the vendee.[5] But this

1. McClelland *v.* Nichols, 24 Minn. 176.

2. Clark *v.* Hayward, 51 Vt. 14.

Where a mare being with foal was sold, but with the condition that she was to "remain the property of the vendor until paid for," the colt subsequently foaled continued the property of the vendor until performance of the condition. Allen *v.* Delano, 55 Me. 113; 92 Am. Dec. 573.

3. Kein *v.* Tupper, 52 N. Y. 550; Pierce *v.* Cooley, 56 Mich. 552; Morey *v.* Medbury, 10 Hun (N. Y.) 540.

C agreed to sell to H a pair of horses for $300, the title to remain in C until payment of the price, notwithstanding their delivery. While they remained in C's stable, but were being used and controlled by H, and before payment of any of the price, one of them died. H removed the dead horse, and took away the living one, and afterwards sold groceries to C to the value of $163, to be applied on the price. When the time to pay arrived, H refused to pay the balance and C retook the horse. Held, that H could not maintain an action to recover the value of the goods sold. (Landon, J., dissenting.) Humeston *v.* Cherry, 23 Hun (N. Y.) 141.

4. Tufts *v.* Wynne, 45 Mo. App. 42.

5. Beller *v.* Block, 19 Ark. 566; McLaughlin *v.* Piatti, 27 Cal. 452; Dunlap *v.* Berry, 5 Ill. 327; 39 Am. Dec. 413; O'Keefe *v.* Kellogg, 15 Ill. 347; Frost *v.* Woodruff, 54 Ill. 155; Murphy *v.* State, 1 Ind. 366; Commercial Nat. Bank *v.* Gillette, 90 Ind. 268; Indianapolis, etc., R. Co. *v.* Maguire, 62 Ind. 140; Scott *v.* King, 12 Ind. 203; Moffatt *v.* Green, 9 Ind. 198; Cook *v.* Logan, 7 Iowa 142; Snyder *v.* Tibbals, 32 Iowa 447; Rosenthal *v.* Risley, 11 Iowa 541; Courtright *v.* Leonard, 11 Iowa 321; Seris *v.* Billocq, 17 La. Ann. 146; Rhea *v.* Otto, 19 La. Ann. 123; Abat *v.* Atkinson, 21 La. Ann. 414; Stone *v.* Peacock, 35 Me. 385; Houdlette *v.* Tallman, 14 Me. 400; Mason *v.* Thompson, 18 Pick. (Mass.) 305; Riddle *v.* Varnum, 20 Pick. (Mass.) 280; Young *v.* Austin, 6 Pick. (Mass.) 279; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; 13 Am. Dec. 449; Merrill *v.* Hunnewell, 13 Pick. (Mass.) 213; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Sherwin *v.* Mudge, 127 Mass. 547; Ortman *v.* Green, 26 Mich. 209; First Nat. Bank *v.* Crowley, 24 Mich. 492; Lingham *v.* Eggleston, 27 Mich. 324; Wilkinson *v.* Holiday, 33 Mich. 386; Hahn *v.* Fredericks, 30 Mich. 223; 18 Am. Rep. 119; Martin *v.* Hurlbut, 9 Minn. 142; Ober *v.* Carson, 62 Mo. 209; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Davis *v.* Hill, 3 N. H. 382; Messer *v.* Woodman, 22 N. H. 172; 53 Am. Rep. 241; Warren *v.* Buckminster, 24 N. H. 336; Fuller *v.* Bean, 34 N. H. 300; Gilman *v.* Hill, 36 N. H. 311; Ockington *v.* Richey, 41 N. H. 275; Bailey *v.* Smith, 43 N. H. 141; Smart *v.* Batchelder, 57 N. H. 140; Andrews *v.* Dieterich, 14 Wend. N. Y. 31; Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Rapelye *v.* Mackie, 6 Cow. (N. Y.) 250; Kein *v.* Tupper, 52 N. Y. 550; Woods *v.* McGee, 7 Ohio 127; 30 Am. Dec. 220; Lowry *v.* Barrelli, 21 Ohio St. 324; Hutchinson *v.* Hunter, 7 Pa. St. 140; Nicholson *v.* Taylor, 31 Pa. St. 128; Haldeman *v.* Duncan, 51 Pa. St. 66; Simmons *v.* Swift, 5 B. & C. 857; 12 E. C. L. 388; Shepley *v.* Davis, 5 Taunt. 617; Rugg *v.* Minett, 11 East 210.

In Hutchinson *v.* Hunter, 7 Pa. St. 145, Roger, J., said: "The rule I take it, is now too firmly settled to be

rule has been held to apply only to cases of constructive delivery.[1] Where the goods are delivered with the intention of passing the title and the sale is absolute and complete, the title passes to the vendee although the weight or measure of the article sold remains yet to be ascertained.[2] Whether a sale is absolute and complete is a matter to be ascertained from the intention as expressed in the terms of the agreement and conduct of the parties.[3] If the condition has been partly performed and something happens to prevent its completion, as where goods are sold and part of them delivered and the remainder refused by the vendee by reason of his insolvency, the portion already delivered becomes the property of the vendee.[4] If the vendor is guilty of some negligence in separating the goods which renders them worthless, the vendee may refuse to receive them.[5]

c. DELIVERY BY INSTALMENTS.—A sale upon condition that goods of a certain quality and quantity will be delivered at specified times is one to which the doctrine of condition precedent applies. If the seller fails to comply with the terms of such an agreement, the party aggrieved may repudiate the whole contract.[6] Where the delivery of the first instalment is not in compliance with the terms of the contract of sale, the buyer cannot be compelled to take goods subsequently offered to him.[7] If the seller, after making a partial delivery, refuses without cause or excuse

shaken that the goods sold must be ascertained, designated and stipulated from the stock or quantity with which they are mixed before they can pass; until this be done it remains the property of the vendor and not of the vendee."

1. Bogy *v.* Rhodes, 4 Greene (Iowa) 133.

2. Beller *v.* Block, 19 Ark. 566; Chamblee *v.* McKenzie, 31 Ark. 155; Riddle *v.* Varnum, 20 Pick. (Mass.) 284; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Ober *v.* Carson, 62 Mo. 209; Hammond *v.* Anderson, 1 N. R. 69; Greaves *v.* Hepke, 2 B. & Ald. 131.

3. Riddle *v.* Varnum, 20 Pick. (Mass.) 284; Macomber *v.* Parker, 13 Pick. (Mass.) 182; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; 13 Am. Dec. 449; Fuller *v.* Bean, 34 N. H. 290; Hurff *v.* Hires, 40 N. J. L. 581; 29 Am. Rep. 282; Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; Turley *v.* Bates, 2 H. & C. 200; Young *v.* Matthews, L. R., 2 C. P. 127.

Stone *v.* Peacock, 35 Me. 385; Ober *v.* Carson, 62 Mo. 209.

4. Thompson *v.* Conover, 32 N. J. L. 466.

5. Keeler *v.* Vandervere, 5 Lans. (N. Y.) 313.

6. Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255; Norrington *v.* Wright, 115 U. S. 188; Jones *v.* U. S., 96 U. S. 24; Bollman *v.* Burt, 61 Md. 415; Pope *v.* Porter, 102 N. Y. 366; Smith *v.* Brady, 17 N. Y. 173; Hill *v.* Blake, 97 N. Y. 216; Welsh *v.* Gossler, 89 N. Y. 540; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417; Mount *v.* Lyon, 49 N. Y. 552.

7. King Philip Mills *v.* Slater, 12 R. I. 82; 34 Am. Rep. 603.

A contract of sale was made on the 15th of January by the terms of which the seller was to furnish the buyer 200 tons of pig iron for the sum of $37 a ton, to be delivered in quantities of about eight tons per month. No deliveries of the iron were made with the exception of two small parcels in March. These were delivered on trial, and there was no evidence tending to show that that they were not of the kind and quality required by the terms of the contract. On the 12th of May the seller wrote a letter to the buyer in which he stated he was prepared to deliver iron for the month ending the 15th of May according to the agreement of the 15th of January. On the next day the buyer replied that as no deliveries had been made in February, March or

to make the other deliveries, the buyer is not bound to make a return or pay for what he may have received as a part performance.[1] But if the failure to fulfill the agreement was induced by an honest mistake of facts, or if he acted through ignorance or poverty or other force with which he could not contend, he may have back what the other party, after first being fully indemnified for the partial failure to perform, has gained over and above what would have been his gains from an exact and full doing.[2] It has been held, however, that a failure as to the time of delivery will not operate as a breach of a condition of the whole contract when the contract is separable and not entire.[3] Whether the contract is entire and indivisible must be determined from the intention apparent on its face.[4] If the buyer should delay the exercise of his right to rescind for an unreasonable length of time after the breach of the condition or accept any benefits under the contract, he will waive his right to rescind on account of a partial failure of delivery.[5]

d. PAYMENT—(1) *Generally.*—A sale on condition that the title is not to pass until the purchase-price is paid, does not vest the title in the buyer until the condition is performed.[6] If pay-

April, he had considered the contract null and void, and had so informed him some time before, and that he still so considered it. In an action by the seller to recover from the buyer for refusing to receive the iron in accordance with the contract, it was held that under the contract the buyer was entitled to receive 200 tons of iron, and to have it delivered in monthly instalments, and that he had a right to annul the contract on this ground, provided he gave due notice to the seller of his determination so to do. Bollman *v.* Burt, 61 Md. 415.

1. Catlin *v.* Tobias, 26 N. Y. 217; 84 Am. Dec. 183.

2. Bishop's Contracts, § 1445.

3. Scott *v.* Kittanning Coal Co., 89 Pa. St. 237; 33 Am. Rep. 753; Morgan *v.* McKee, 77 Pa. St. 228; Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351; Blackburn *v.* Reilly, 47 N. J. L. 290; 54 Am. Rep. 159.

4. Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218.

5. Morgan *v.* McKee, 77 Pa. St. 228; Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218; Scott *v.* Kittanning Coal Co., 89 Pa. St. 237; 33 Am. Rep. 753.

6. Dudley *v.* Abner, 52 Ala. 572; Lepman *v.* Warren, 53 Ala. 535; Ferguson *v.* Hetherington, 39 Ark. 438; Carroll *v.* Wiggins, 30 Ark. 402; Simpson *v.* Shackelford, 49 Ark. 63; Putnam *v.* Lamphier, 36 Cal. 151; Brown *v.* Fitch, 43 Conn. 512; Hine *v.* Roberts, 48 Conn. 267; 40 Am. Rep. 170; Boyd *v.* Lofton, 34 Ga. 494; Jowers *v.* Blandy, 58 Ga. 379; Rawls *v.* Saulsbury, 66 Ga. 396; Van Duzor *v.* Allen, 90 Ill. 499; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Bradshaw *v.* Warner, 54 Ind. 58; Forrest *v.* Hamilton, 98 Ind. 91; Bailey *v.* Harris, 8 Clarke (Iowa) 331; 74 Am. Dec. 312; Moseley *v.* Shattuck, 43 Iowa 540; Sumner *v.* McFarlan, 15 Kan. 600; Fleck *v.* Warner, 25 Kan. 492; Patton *v.* McCane, 15 B. Mon. (Ky.) 555; Vaughn *v.* Hopson, 10 Bush. (Ky.) 337; Tibbets *v.* Towle, 12 Me. 341; George *v.* Stubbs, 26 Me. 243; Sawyer *v.* Fisher, 32 Me. 28; Morris *v.* Lynde, 73 Me. 88; Hotchkiss *v.* Hunt, 49 Me. 219; Brown *v.* Haynes, 52 Me. 580; Bunker *v.* McKenney, 63 Me. 529; Rogers *v.* Whitehouse, 71 Me. 222; Walsh *v.* Taylor, 39 Md. 592; Curtis *v.* Gibney, 59 Md. 131; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; 13 Am. Dec. 449; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545; Sargent *v.* Metcalf, 5 Gray (Mass.) 306; 66 Am. Dec. 368; Burbank *v.* Crooker, 7 Gray (Mass.) 158; 66 Am. Dec. 470; Blanchard *v.* Child, 7 Gray (Mass.) 155; Deshon *v.* Bigelow, 8 Gray (Mass.) 159; Whitney *v.* Eaton, 15 Gray (Mass.) 225; Herschorn *v.* Canney, 98 Mass. 150; Booraem *v.* Crane, 103 Mass. 522; Benner *v.* Puffer, 114 Mass. 376; Salomon *v.* Hathaway, 126 Mass. 482; Smith *v.*

ment is to be made upon delivery, payment and delivery are concurrent conditions precedent and title will not pass until payment is made, even though possession be given to the purchaser.[1] Where the title to the property sold is not to pass until payment of the purchase price, its delivery to the vendee does not pass title to him so as to subject it to execution for his debts, although the creditors have no notice of the condition.[2] The seller may retake the property in case of non-performance of the condition.[3] If the buyer before paying for the property sells it to a third party, it may be replevied by the owner.[4] If, before the property is paid for, the seller agrees that the buyer may exchange it for other property belonging to some third person on condition that the title to the property exchanged shall vest in the seller, the transaction is good and the title will remain in the seller, even as against a bona fide purchaser, where there is no statute requiring the registration of conditional sales.[5] Where no time of pay-

Lozo, 42 Mich. 6; Fifield *v.* Elmer, 25 Mich. 48; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Couse *v.* Tregent, 11 Mich. 65; McClelland *v.* Nichols, 24 Minn. 176; Ketchum *v.* Brennan, 53 Miss. 596; Little *v.* Page, 44 Mo. 412; Ridgeway *v.* Kennedy, 52 Mo. 24; Wangler *v.* Franklin, 70 Mo. 659; Heinbockle *v.* Zugbaum, 5 Mont. 344; 51 Am. Rep. 59; Aultman *v.* Mallory, 5 Neb. 178; 25 Am. Rep. 478; Cardinal *v.* Edwards, 5 Nev. 36; Luey *v.* Bundy, 9 N. H. 298; 32 Am. Dec. 359; Holt *v.* Holt, 58 N. H. 276; Cole *v.* Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Kenny *v.* Planer, 3 Daly (N. Y.) 131; Herring *v.* Willard, 2 Sandf. (N. Y.) 418; Strong *v.* Taylor, 2 Hill (N. Y.) 326; Herring *v.* Hoppock, 15 N. Y. 409; Ballard *v.* Burgett, 40 N. Y. 314; Austin *v.* Dye, 46 N. Y. 500; Weeks *v.* Pike, 60 N. H. 447; Cole *v.* Mann, 62 N. Y. 1; Dows *v.* Kidder, 84 N. Y. 127; Boon *v.* Moss, 70 N. Y. 465; Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40; Clayton *v.* Hester, 80 N. Car. 275; Vasser *v.* Buxton, 86 N. Car. 335; Sanders *v.* Keber, 28 Ohio St. 630; Enlow *v.* Klein, 79 Pa. St. 488; Hartley *v.* Decker, 89 Pa. St. 470; Hineman *v.* Matthews, 138 Pa. St. 204; Skelton *v.* Manchester, 12 R. I. 326; Goodell *v.* Fairbrother, 12 R. I. 233; 34 Am. Rep. 631; Talmadge *v.* Oliver, 14 S. Car. 522; Bennett *v.* Sims, 1 Rice (S. Car.) 421; Price *v.* Jones, 3 Head (Tenn.) 84; Harding *v.* Metz, 1 Tenn. Ch. 610; Christian *v.* Bunker, 38 Tex. 234; West *v.* Bolton, 4 Vt. 558; Bigelow *v.* Huntley, 8 Vt. 151; Maxwell *v.* Briggs, 17 Vt. 176; Smith *v.* Foster, 18 Vt. 182; Buckmaster *v.* Mower, 22 Vt. 203; Root *v.* Lord, 23 Vt. 568; Burnell *v.* Marvin, 44 Vt. 277; Leavell *v.* Robinson, 2 Leigh (Va.) 161; McComb *v.* Donald, 82 Va. 903; Dodd *v.* Bowles, 3 Wash. Ter. 383; McGinnis *v.* Savage, 29 W. Va. 362; Hunter *v.* Warner, 1 Wis. 141; Goldie *v.* Roscony, 4 Montreal L. Rep. 313.

1. Osborn *v.* Gantz, 38 N. Y. Super. Ct. 148; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40; Parker *v.* Baxter, 86 N. Y. 586; Hammett *v.* Linneman, 48 N. Y. 399; Leven *v.* Smith, 1 Den. (N. Y.) 572; Smith *v.* Lynes, 5 N. Y. 41.

2. Dodd *v.* Bowles, 3 Wash. Ter. 383; Simpson *v.* Shackelford, 49 Ark. 63; McComb *v.* Donald, 82 Va. 903.

3. Gregory *v.* Morris, 1 Wyoming Ter. 213.

4. Ferguson *v.* Hetherington, 39 Ark. 438; Carroll *v.* Wiggins, 30 Ark. 402; Gould *v.* Howell, 32 Ill. App. 349; Sumner *v.* McFarlan, 15 Kan. 600; Hallowell *v.* Milne, 16 Kan. 65; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Tibbets *v.* Towle, 12 Me. 341; Pratt *v.* Burhans, 84 Mich. 487; 22 Am. St. Rep. 703; Holt *v.* Holt, 58 N. H. 276; McFarland *v.* Farmer, 42 N. H. 386; Brown *v.* Haynes, 52 Me. 581; Redgeway *v.* Kennedy, 52 Me. 24; Sage *v.* Sleutz, 23 Ohio St. 1; Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53; Bigelow *v.* Huntley, 8 Vt. 151; Smith *v.* Foster, 18 Vt. 182; Buckmaster *v.* Mower, 22 Vt. 203; Warner *v.* Roth, 2 Wyoming Ter. 63.

5. Perry *v.* Young, 105 N. Car. 463.

ment is mentioned it would be due on the delivery of the property sold under it; the delivery of the whole not being a condition precedent to payment, it would become due as fast as delivered.[1] The fact that the seller sold goods, under an agreement that the title of goods was to remain in him until full payment of the purchase price, sues for the balance unpaid is not an election that the title shall vest at once in the buyer.[2]

(2) *By Cash.*—Where goods are sold and delivered to the buyer on condition that cash payment be made, no title vests until the condition has been performed.[3] But if the delivery is unconditional, the title thereby vests, notwithstanding cash is not in fact paid.[4] Where, by a custom of trade, a purchase for cash is understood to mean payment in about ten days after purchase, the contract imports that the delivery is qualified and that the property in the goods does not pass until payment.[5]

(3) *By Check or Draft.*—Payment by check drawn by the purchaser on his bank is a mere mode of making cash payment and not the acceptance of security. Such payment is conditional, and if the check upon due presentation is dishonored, the vendor's right to take the goods from the purchaser remains in full force.[6] It is the duty of the seller, however, if he intends to hold the buyer, to present the check for payment within reasonable time, and if not paid notify the buyer of its dishonor.[7] Where the seller accepts a check or draft as an absolute payment, the payment as a matter of law is complete. Whether the delivery and receipt of a draft is effectual as a payment, depends upon the agreement and understanding of the parties, and that is so whether it is delivered simultaneously with the delivery of the

1. Talmage *v.* White, 35 N. Y. Super. Ct. 219.

2. Brewer *v.* Ford, 54 Hun (N. Y.) 116.

3. Bauendahl *v.* Horr, 7 Blatchf. (U. S.) 548; Hide, etc., Nat. Bank *v.* West, 20 Ill. App. 61; Paul *v.* Reed, 52 N. H. 136; Hammett *v.* Linneman, 48 N. Y. 399; Marston *v.* Baldwin, 17 (Mass.) 606; Dows *v.* Kidder, 84 N. Y. 127; Evansville, etc., R. Co. *v.* Erwin, 84 Ind. 457.

Upon a cash sale of property, where it is not the intention of the vendor to part with the possession of the property until he is paid the price agreed upon, in money, he will not lose title to the property by inadvertently allowing the purchaser to get possession thereof without payment. Miller *v.* Jones, 66 Barb. (N. Y.) 148.

On a contract for sale and shipment of coal for cash, to be paid on receipt of bill of lading, the defendant shipped the coal and sent the bill of lading to and requested payment of the plaintiff, who claimed an offset and offered the balance, which being refused, he offered his check for the full amount; it being after bank hours this was also refused, and the next day he tendered the cash. Held, that the plaintiff was in default, and the defendant discharged from the contract. Bass *v.* White, 7 Lans. (N. Y.) 171.

4. Foley *v.* Mason, 6 Md. 37; Henderson *v.* Lauck, 21 Pa. St. 359; Thompson *v.* Wedge, 50 Wis. 642.

5. Dows *v.* Dennistoun, 28 Barb. (N. Y.) 393.

6. Canadian Bank *v.* McCrea, 106 Ill. 281; Gould *v.* Howell, 32 Ill. App. 349; Hodgson *v.* Barrett, 33 Ohio St. 63; 31 Am. Rep. 527; Fleig *v.* Sleet, 43 Ohio St. 53; 54 Am. Rep. 800; Kermeyer *v.* Newby, 14 Kan. 164; Weddigen *v.* Boston Elastic Fabric Co., 100 Mass. 422.

7. Smith *v.* Miller, 43 N. Y. 173; 3 Am. Rep. 690; Hopkins *v.* Ware, L. R., 4 Ex. 268.

property or afterwards.[1] Where the check is simply indorsed by the buyer and the seller presents it to the bank for payment and sues upon it, he must be deemed to accept the check in satisfaction of the goods sold, and the buyer's liability is only on his indorsement.[2] If the payment is by the draft of a third party, the presumption is that it is received as conditional payment, unless there was an agreement that it was to be an absolute payment, and the burden of proving such an agreement is upon the debtor.[3]

(4) *By Note.*—If the sale is made on condition that the buyer shall give a note or some security for the price, the property in the goods does not vest until the thing is done by the purchaser.[4] If the purchaser takes the property without giving the security, an action for the price will lie before the term of credit expires.[5] But the mere giving of the note in satisfaction for goods will not of itself extinguish the indebtedness. The buyer has no title to the property until the payment by him of the note, unless there is an intention between the parties manifested either by an express agreement or by the attending circumstances that the note shall be taken as a complete and full satisfaction of the debt.[6] The

1. Hall *v.* Stevens, 40 Hun (N.Y.) 580.
2. Sellars *v.* Johnson, 65 N. Car. 104.
3. League *v.* Waring, 85 Pa. St. 244.
4. Young *v.* Kansas Mfg. Co., 23 Fla. 394; Herschorn *v.* Canney, 98 Mass. 150; Salomon *v.* Hathaway, 126 Mass. 482; Whitney *v.* Eaton, 15 Gray (Mass.) 225; Thorpe *v.* Fowler, 57 Iowa 541; Budlong *v.* Cottrell, 64 Iowa 234; Seed *v.* Lord, 66 Me. 580; Hotchkiss *v.* Hunt, 49 Me. 213; Osborn *v.* Gantz, 38 N. Y. Super. Ct. 148; Russell *v.* Minor, 22 Wend. (N. Y.) 659; Millhiser *v.* Erdman, 98 N. Car. 292; 2 Am. St. Rep. 334; Congar *v.* Galena, etc., Co., 17 Wis. 477.

Where goods were sold at auction, to be paid for in an approved note at six months, and were delivered, but the vendee refused to give the note—held, that the sale and delivery were conditional, and that, as the condition was not complied with, the vendor might treat the sale as an absolute one, and maintain an action for the goods forthwith. Corlies *v.* Gardner, 2 Hall (N. Y.) 345.

Where the condition of a sale was the delivery of a note with surety, and, upon objection made, the party offering the note altered it by inserting the words "with interest,"—held, that the surety was discharged, and therefore the vendee not complying with the condition, the title to the property did not pass. Kountz *v.* Hart, 17 Ind. 329.

A sold B a quantity of goods on condition of receiving B's note, indorsed by C. B evaded the giving the security until he had got the goods shipped, and then tendered his own note. Held, that the delivery was conditional only, and that the further removal of the goods might be enjoined by the chancellor. Bainbridge *v.* Caldwell, 4 Dana (Ky.) 211.

On a contract for the sale of printing presses, reciting that settlement should be made by notes within one year, with interest, and that a policy of insurance should be given as security for the payment made by note, and also that the title should remain in the seller "until the payment has been made or security given for the deferred payments as above agreed," the giving of notes alone without security is not sufficient to transfer the title. Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7.

Mortgage as Security.—Where a sale and delivery of personal property was made on condition that the buyer should give a mortgage on the property transferred as security, such a sale is conditional and the title does not pass until the execution of the mortgage. Thorpe *v.* Fowler, 57 Iowa 541.

5. Rice *v.* Andrews, 32 Vt. 691.

6. Hallowell *v.* Milne, 16 Kan. 65; Wiles *v.* Robinson, 80 Mo. 47; Watertown Steam Engine Co. *v.* Davis, 5 Del. 192; Archibald *v.* Argall, 53 Ill.

retention of title by the seller is not an absolute ownership but a mere security which the seller can waive and treat his claim as an ordinary debt of the purchaser.[1]

If the note is forged or worthless,[2] or is for a less amount than due,[3] or not what on its face it purports to be,[4] or the buyer becomes insolvent and refuses to pay the notes,[5] the seller may rescind the sale for failure of consideration, and recover the property.[6] But a party who sells property and takes the purchaser's notes for it upon the condition that the title is to remain in him until the notes are paid, cannot, while holding the notes, seize or sell the property in order to make the debt good.[7]

(5) *By Instalments*—(a) **Generally.**—A sale of property made upon condition that it be paid for in regular instalments, the

307; Coll *v.* Seymour, 40 Ohio St. 670; *Ex parte* Williams, 17 S. Car. 396; Heath *v.* White, 3 Utah 474; McGuire *v.* Bidwell, 64 Tex. 43. See Hintermister *v.* Lane, 27 Hun (N. Y.) 497.

When property is held as security for the payment of certain notes, the title to it is not changed so long as any of the notes remain unpaid. Hotchkiss *v.* Hunt, 49 Me. 213.

1. Tanner, etc., Engine Co. *v.* Hall, 89 Ala. 628.

Where goods are sold and delivered on condition that the purchaser gives his own notes on time therefor, indorsed by a third person, which he fails to perform, and the seller then takes the purchaser's own notes for the price, on demand, with warrant of attorney, to confess judgment thereon, this is a waiver of the condition, and an affirmance of the sale. Saunders *v.* Turbeville, 2 Humph. (Tenn.) 272.

If goods are sold on the condition that they shall be paid for by the promissory note of the purchaser "satisfactorily indorsed" by a third person, the taking of the note by the seller without indorsement, on the promise of the purchaser that the indorsement should be furnished, and making no subsequent demand for such indorsement, and failure to return the note, do not, as a matter of law, amount to a waiver of the condition. Kenney *v.* Ingalls, 126 Mass. 488.

2. See Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53. Where the seller receives in payment a note of a third person who is insolvent, and the fact of the insolvency of the maker is unknown to the parties, it was held that the plaintiff could recover his original debt. Roberts *v.* Fisher, 43 N. Y. 159; 3 Am. Rep. 680.

3. A horse was purchased for $80. Neither the property nor the possession was to pass until the purchaser had executed a note for the price. A note was for only $8.00 by mistake executed and delivered in pursuance of the contract. It was held that the property in the horse was not changed. Litterel *v.* St. John, 4 Blackf. (Ind.) 327.

4. If a person sells goods to another, who is the agent of an undisclosed principal, and takes the note of the purchaser, who is ignorant of such fact, the presumption that the note was taken in payment is rebutted and the seller may resort to the undisclosed principal. Lovell *v.* Williams, 125 Mass. 439.

Where a firm agreed to settle for merchandise with a note and after dissolution a partnership note is given by the remaining party, the other can repudiate his liability thereon, and if he is released, the vendor can treat the note as different from that agreed on, and it cannot then be regarded as payment. Goodspeed *v.* South Bend Chilled Plow Co., 45 Mich. 237.

5. Tuthill *v.* Skidmore, 124 N. Y. 148.

6. A vendor of a hay-press who has retained title until the payment of notes given for the purchase price may recover any balance remaining unpaid upon the notes after applying the proceeds of a resale of the press made by him upon the non-payment of one of the notes, where the contract of sale provides that nothing shall constitute a defense or offset to, or delay prompt payment of, the note in full at maturity. Dederick *v.* Wolfe, 68 Miss. 500.

7. Crabtree *v.* Segrist, 3 N. Mex. 378.

title to remain in the owner until the purchase money is all paid, does not pass title to the buyer until all the instalments are paid,[1] notwithstanding possession is given to the purchaser.[2] If the goods are to be manufactured or put into a deliverable state and to be paid for in instalments as the work progresses, the title remains in the seller until the work is completed and delivered.[3] The seller may upon the failure to pay the instalments according to the terms of the contract, rescind the contract and take possession of the property.[4] Where the failure to pay is due to some accident or oversight or is attended with facts and circumstances which are inconsistent with an intention to abandon the contract, the buyer will not forfeit the benefits of the sale if he makes a tender of the future instalments of payments.[5] But if an intention to abandon the contract is clearly indicated, as where the refusal to pay is wilful and not through a misunderstanding or accident, the entire contract will

1. Ketchum *v.* Brennan, 53 Miss. 596; Singer Mfg. Co. *v.* Bullard, 62 N. H. 129; Redewill *v.* Dillon, 4 N. Mex. 78; McGinnis *v.* Savage, 29 W. Va. 362; Goldie *v.* Rascony (Super. Ct.), 4 Montreal L. Rep. 313.

Upon a sale of several classes of property, the title to which remains in the vendor until paid for, a certificate by him that payments have been applied on one of such classes, the surplus to apply on the residue of the indebtedness, does not show that the title has passed to such class, in the absence of any agreement to that effect. Brewer *v.* Ford, 59 Hun (N. Y.) 617.

2. Lucas *v.* Campbell, 88 Ill. 447; Giddey *v.* Altman, 27 Mich. 206.

An owner of a machine agreed to sell it to another upon his paying a certain sum, to be paid by instalments, and leased him a mill in which it was. *Held*, that this did not pass the title to the vendee. Henry *v.* Patterson, 57 Pa. St. 346.

3. Williams *v.* Jackman, 16 Gray (Mass.) 514; Edwards *v.* Elliott, 36 N. J. L. 449; 13 Am. Rep. 463; Andrews *v.* Durant, 11 N. Y. 35; 62 Am. Dec. 55.

4. Sere *v.* McGovern, 65 Cal. 244; Wiggins *v.* Snow, 89 Mich. 476. Goldie *v.* Roscony (Super. Ct.), 4 Montreal L. Rep. 313.

Where a machine is sold on instalments, the title to remain in the vendor until full payment of the price, though the contract was silent in respect to possession, the vendee's right thereto depends on his payments as provided, and on default the vendor may recover possession. Wiggins *v.* Snow, 89 Mich. 476.

In *New Hampshire* a contract with a stipulation that when the purchase price of goods is fully paid in instalments they shall become the property of the buyer, is invalid against creditors without a written memorandum recorded as required by *New Hampshire* Laws of 1885, ch. 30, § 1. Gerrish *v.* Clark, 64 N. H. 492.

In *New Mexico* a transfer of personal property by an instrument called a lease, by which it is to be paid for in instalments, and remain the property of the seller until paid for, gives the purchaser no title before payment which he can convey to a subsequent purchaser with full knowledge of the contract. Redewill *v.* Gillen, 4 N. Mex. 78.

In *Louisiana*, where a sewing machine was sold on the instalment plan with the understanding that the instalments were to be considered rent until payment should be made and the instalments were not paid when due and the seller demanded the article and the buyer voluntarily gave it up, it was held that the buyer had no cause of action against the seller under *Louisiana* Acts, 1877, No. 62, which gives a right of action for removing sewing machines from the premises of purchasers who have not fully paid therefor. Jenks *v.* Howe Sewing Mach. Co., 34 La. Ann. 1241.

5. Hime *v.* Klasey, 9 Ill. App. 166; Winchester *v.* Newton, 2 Allen (Mass.) 492; Gill *v.* Benjamin, 64 Wis. 362; 54 Am. Rep. 619; Mersey Steel, etc., Co. *v.* Naylor, L. R., 9 App. Cas. 434; Midland R. Co. *v.* Ontario Rolling Mills, 10 Ont. App. 77.

be forfeited and the seller cannot thereafter be compelled to perform the contract.[1]

A forfeiture of the contract by reason of the non-payment of the instalments, involves also a forfeiture of the instalments of the price already paid.[2] This is the rule except where statutes[3] or courts of equity[4] allow only what is necessary as a measure of damages and as compensation for the use of the goods. Where notes are given as security for payment of the instalments and the property is surrendered after some of them are paid, the seller cannot maintain an action on the unpaid notes.[5] If the contract of sale is absolute and the buyer tenders back the property and states that he will make no further payments, the seller is not limited in his remedy to retake the property but may sue for the remaining instalments.[6] A stipulation that the property shall be kept at a certain place, and shall not be removed therefrom without the seller's written consent, is binding and the consent to removal to another place will not authorize a second removal to still another place.[7]

(b) **Waiver of Forfeiture for Failure to Pay Instalments.**—The right of the owner to resume the possession after default in payment of one of the instalments may be lost or waived by a subsequent receipt of an instalment.[8] But a waiver of one forfeiture is not evidence

1. Bradley *v.* King, 44 Ill. 339; Curtis *v.* Gibney, 59 Md. 131; Stephenson *v.* Cady, 117 Mass. 6; Rugg *v.* Moore, 110 Pa. St. 236.

2. Loomis *v.* Bragg, 50 Conn. 228; 47 Am. Rep. 638; Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57; Howe Mach. Co. *v.* Willie, 85 Ill. 333; Latham *v.* Sumner, 89 Ill. 233; 31 Am. Rep. 79; Fleck *v.* Warner, 25 Kan. 492; Brown *v.* Haynes, 52 Me. 578; Everett *v.* Hall, 67 Me. 497; Colcord *v.* McDonald, 128 Mass. 470; Knox *v.* Perkins, 15 Gray (Mass.) 529; Angier *v.* Taunton Paper Mfg. Co., 1 Gray (Mass.) 621; 61 Am. Dec. 436; Duke *v.* Shackleford, 56 Miss. 452; Haviland *v.* Johnson, 7 Daly (N. Y.) 297.

3. Rev. Sts. of *Missouri*, 879, § 2508; *Ohio* Act of 1885, p. 239, § 2. See Hall *v.* Tillman, 110 N. Car. 220.

A statute which makes it unlawful for one who has sold personal property, to be paid for in instalments, or let, hired or delivered subject to a condition that the title shall remain in him until the amount agreed is paid, to retake possession of it without tending or refunding to the purchaser the sum paid by him, after deducting a reasonable amount for the use of the property, is not invalid on the ground that the amount of such compensation is uncertain, and no method is provided for determining it. Weil *v.* State, 46 Ohio St. 450; 21 Ohio L. J. 392.

4. Snook *v.* Raglan (Ga. 1892), 15 S. E. Rep. 364; Guilford *v.* McKinley, 61 Ga. 230; Hine *v.* Roberts, 48 Conn. 267; 40 Am. Rep. 170; Johnston *v.* Whittemore, 27 Mich. 463; Minneapolis Harvester Works *v.* Hally, 27 Minn. 495; Third Nat. Bank *v.* Armstrong, 25 Minn. 530; Mott *v.* Havana Nat. Bank, 22 Hun (N. Y.) 354; Gleason *v.* Knapp, 26 U. C. C. P. 553.

The buyer of personal property, title to which is retained by the seller may, in case the seller takes possession of the property, recover an equitable proportion of such part of the purchase money as he may have paid. Simon *v.* Edmundson, 10 Pa. Co. Ct. Rep. 315.

5. Campbell Printing Press, etc., Co. *v.* Henkle, 19 D. C. 95.

6. Appleton *v.* Norwalk Library Corp., 53 Conn. 4.

7. Gibbons *v.* Luke, 37 Hun (N. Y.) 576.

8. Hill *v.* Townsend, 69 Ala. 286; Hutchings *v.* Munger, 41 N. Y. 155; Cushman *v.* Jewell, 7 Hun (N. Y.) 525; Blair *v.* Hamilton, 48 Ind. 32; Shepard *v.* Cross, 33 Mich. 96. *Compare* Hegler *v.* Eddy, 53 Cal. 597.

of a waiver of subsequent forfeitures.[1] Where the seller, instead of taking subsequent payments, brings suit ro recover the property and afterwards discontinues the suit and takes the property, the suit and attachment do not constitute a waiver of his right to retake the property.[2]

e. CONDITIONS AS TO TIME AND PLACE OF PERFORMANCE.—Where the conditions as to time and place of performance appear to be essential elements in a contract of sale a non-compliance with such provisions will give the party aggrieved a right to rescind the contract.[3] The purchaser is not bound to accept and pay for the goods unless the same have been delivered or tendered at the time specified.[4] But a purchaser who merely neglects to pay at the time specified does not thereby forfeit his right under the contract.[5] There must be a demand of payment or of the property before the omission to pay will operate as a forfeiture of the purchaser's rights.[6] Where payment is to be made within a reasonable time, if the purchaser fails to pay after repeated requests made after the lapse of a reasonable time, the property belongs to the seller and he may take it wherever he finds it.[7]

f. SALES TO ARRIVE.—Goods are frequently sold while at sea or while being shipped from one place to another. A sale of goods "to arrive" or "on arrival" is conditional, and if they do not arrive, either from the vessel being lost or other accident and without any fraud or fault of the seller, no title passes and no obligation on either side arises.[8] If the goods which do arrive are not of the kind and quality stipulated for, the contract is equally at an end.[9] But if the buyer receives a part of the quantity sold

1. Hill *v.* Townsend, 69 Ala. 286.

2. Matthews *v.* Lucia, 55 Vt. 308.

3. Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255; Norrington *v.* Wright, 115 U. S. 188; Hill *v.* Blake, 97 N. Y. 216; Welsh *v.* Gossler, 89 N. Y. 540; Simpson *v.* Crippen, L. R., 8 Q. B. Div. 14; Neill *v.* Whitworth, L. R., 1 C. P. 684.

Where a merchant agrees to sell and ship to the buyer a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms to the agreement. Where, under such an agreement, the seller ships part of the iron at the time appointed and the rest from time to time afterwards, the buyer is not bound to accept any part of the iron so shipped. Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255.

4. Jones *v.* U. S., 96 U. S. 24; Coon *v.* Spaulding, 47 Mich. 162.

5. Deyoe *v.* Jamison, 33 Mich. 94; see Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54.

6. Nattin *v.* Riley, 54 Ark. 30.

7. Proctor *v.* Tilton (N. H. 1889), 17 Atl. Rep. 638.

8. Shields *v.* Pettee, 2 Sandf. (N. Y.) 262; 4 N. Y. 122; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112; 20 Am. Dec. 670; Benedict *v.* Field, 4 Duer (N. Y.) 154; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Neldon *v.* Smith, 36 N. J. L. 154; Johnson *v.* Macdonald, 9 M. & W. 600; Stockdale *v.* Dunlop, 6 M. & W. 224; Lavatt *v.* Hamilton, 5 M. & W. 639. *Compare* Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515. See also SHIPS AND SHIPPING.

9. Shields *v.* Pettee, 2 Sandf. (N. Y.) 262; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Vernede *v.* Weber, 1 H. & N. 311; 38 Eng. L. & E. 277; *Compare* Simond *v.* Braddon, 2 C. B. N. S. 324; 40 Eng. L. & Eq. 285; 89 E. C. L. 324.

The goods must be of a merchantable quality independent of any express representations as to quality. Cleu *v.* McPherson, 1 Bosw. (N. Y.) 480; Hart *v.* Wright, 17 Wend. (N. Y.) 267; 18

and finds that they are not of a kind or quality which his contract entitles him to, he is not at liberty to retain such part and claim damages for the non-delivery of the entire quantity. He must either receive the article as it is or he must return the portion delivered and then enforce his claim for damages.[1] A sale of "a cargo" means the entire cargo, and the buyer is not required to accept less.[2] But when the capacity of the vessel is over estimated in the agreement to sell, the contract will be complied with by delivering at the port of discharge as much as the vessel, if seaworthy and in good order, can carry, though it does not equal the amount designated in the description and measure of the purchase.[3] If the parties to a contract of sale fix the time for the arrival of the goods, they must arrive within the time stipulated.[4] But where the time of sailing specified in a contract is not intended by the parties as a warranty, the buyer is, in the absence of fraud, bound by the contract, though the ship did not actually sail or the goods did not actually arrive until after the time designated.[5] If the goods are to be delivered at any time between two dates, the specification of the time is only a limitation fixing the period beyond which neither of the parties are bound by the contract, and not an agreement that the goods shall at all events be delivered by the specified day.[6]

g. NOTICE AS A CONDITION PRECEDENT.—Where property is sold to be delivered from time to time at seller's option upon notice, the giving of notice as agreed is a condition precedent to the right of the seller to deliver and to the obligation of the buyer to receive the property.[7] But where the delivery is to be made by instalments without any limit being expressly provided, it is presumed that the seller is authorized to supply the goods from time to time until he is notified by the buyer to discontinue the delivery of them.[8] So where the seller claims that the amount already paid is forfeited by the failure of the buyer to pay one of the instalments when due, it is his duty to notify the buyer of such claim in order that the latter may pay or tender such amount.[9]

5. Mutual or Concurrent Conditions.—Where it is stipulated in a sale of goods that the agreed price shall be paid upon delivery, delivery and payment are simultaneous or concurrent acts by the seller and buyer and payment is a condition precedent, upon which

Wend. (N. Y.) 449; Hargous *v.* Stone, 5 N. Y. 86; Chanter *v.* Hopkins, 4 M. & W. 399.

1. Shields *v.* Pettee, 2 Sandf. (N. Y.) 262.

2. Burrowman *v.* Drayton, 2 Exch. Div. 15. See Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173; Ireland *v.* Livingston, L. R., 2 Q. B. 199; L. R., 5 H. L. 395.

3. Pembroke Iron Co. *v.* Parsons, 5 Gray (Mass.) 589.

4. Alwyn *v.* Pryor, R. & M. 406.

5. Hawes *v.* Lawrence, 4 N. Y. 345; Rogers *v.* Woodruff, 23 Ohio St. 632; 13 Am. Rep. 276. See Johnson *v.* Macdonald, 9 M. & W. 600; Lavatt *v.* Hamilton, 5 M. & W. 639.

6. Russell *v.* Nicoll, 3 Wend. (N. Y.) 112; 20 Am. Dec. 670.

7. Stokes *v.* Brown, 2 Sweeny (N. Y.) 457.

8. Houston, etc., R. Co. *v.* Mitchell, 38 Tex. 85.

9. Cushman *v.* Jewell, 7 Hun (N. Y.) 525.

depends the passing of title.[1] Apart, however, from the question of ownership, the general rule in the case of all executory agreements for the sale of goods, where nothing is specified as to the time of payment, is that the obligation of the seller to deliver the goods and of the buyer to pay for them are mutual or concurrent conditions,[2] and neither party can enforce the contract against the other without showing on his part a performance or an offer or readiness to perform his promise.[3]

1. See *supra*, this title, *Payment* (as a condition of passing title)—*In Cash*.

2. These mutual concurrent conditions are in the nature of mutual conditions precedent. Benjamin on Sales (6th Am. ed.) 592.

"Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day and, in consideration thereof, B covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act, and this particularly applies in all cases of sale." Fifth Rule in notes to Pordage *v.* Cole, 1 Wm. Saund. 319, by Williams, Sergeant.

It is often a matter of great difficulty to ascertain the character of contracts in relation to the distinction of their being dependent or independent. The solution of the difficulty is only to be sought in the intentions of the contracting parties to be gathered from the terms used by them. Marcey, J., in Dox *v.* Dey, 3 Wend. (N. Y.) 360. To the general rule that, in order to determine whether conditions are concurrent and mutual and therefore dependent, they are to be construed according to the intent of the parties, and the good sense of the case, may be cited. Tompkins *v.* Elliot, 5 Wend. (N. Y.) 496; Tileston *v.* Newell, 13 Mass. 410; Johnson *v.* Reed, 9 Mass. 78; 4 Am. Dec. 36; Gardiner *v.* Corson, 15 Mass. 500; M'Crelish *v.* Churchman, 4 Rawle (Pa.) 26; Wright *v.* Smyth, 4 W. & S. (Pa.) 527; Davis *v.* Wiley, 4 Ill. 233; Lunn *v.* Gage, 37 Ill. 19; 87 Am. Dec. 233; Knight *v.* New England Worsted Co., 2 Cush (Mass.) 286.

The same rule applies to sales of land. Thus where it was agreed that the defendant "should have certain land in consideration of which he was to pay the plaintiff a certain sum of money in three instalments, the deed to be executed at the completing of the last payment," it was held that the agreement of the defendant to pay the two first instalments was independent, but that his agreements to pay the last instalment and of the plaintiff to execute and deliver the deed were mutually dependent and conditional. Kane *v.* Hood, 13 Pick. (Mass.) 281. See Hunt *v.* Livermore, 5 Pick. (Mass.) 395. In contracts for the sale of land, by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent unless a contrary intimation clearly appears. Bank of Columbia *v.* Hagner, 1 Pet. (U. S.) 455. As to conditions concurrent, in land sales, see VENDOR AND PURCHASER.

If, instead of absolute payment being a condition, security on the part of the purchaser is stipulated for, the same rule applies; delivery and the giving of security are concurrent and the seller is not obliged to part with his property until the security is given. Cornwall *v.* Haight, 8 Barb. (N. Y.) 327.

3. Thus, in Morton *v.* Lamb, 7 T. R. 125, which was an action for the non-delivery of corn, there was an agreement by which the defendant, in consideration that the plaintiff had bought of him a certain quantity of corn at a fixed price, undertook to deliver it to the plaintiff at a certain place within one month from the time of the sale. It was held that the plaintiff must aver the tender of the price, since the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time, and each must aver performance or an offer to perform his part before he can maintain an action against the other. Waterhouse *v.* Skinner, 2 B. & P. 447; King *v.* Reedman, 49 L. T. N. S. 473.

The word "tender," as used in connection with such a transaction, does not mean the same thing as when used in reference to the offer to pay money where it is absolutely due, but only the readiness and willingness to perform in case of the concurrent performance of

the other party with the present ability to do so, and notice to the other party of such readiness. Smith *v.* Lewis, 26 Conn. 110.

Again, where the defendant agreed to furnish plaintiff with sufficient wheat straw for the use of his stable between certain periods, to be paid for at a certain rate per load for each load delivered on his premises, it was insisted that these were two independent agreements; that no time was fixed for payment, and that the plaintiff could maintain his action against the defendant for not delivering, and leave the latter to his cross-action for payment. But it was held that the plaintiff's right was dependent on his readiness to pay for each load on delivery, and it being proved that he had refused to execute the contract according to this interpretation of it, he was non-suited. Withers *v.* Reynolds, 2 B. & Ad. 882; 22 E. C. L. 203.

The law is thus laid down in Dana *v.* King, 2 Pick. (Mass.) 156, by Parker, C. J.: "Where two parties contract to do each a certain thing to the other on the same day, and the thing to be done by the one is the consideration for that which is to be done by the other, the one who would compel a performance must show an offer and a readiness to do what is to be done on his part. This is analogous to the principles which regulate covenants which are mutual and dependent." In this case the defendant had agreed to buy of the plaintiff a certain number of shares in the United States Bank within a certain time, and the plaintiff agreed that he would sell those shares, the price to be paid when the shares should be transferred. "Here neither can maintain an action against the other without averring and proving that he had offered to do what belonged to him to perform; for the one shall not be held to part with his money without getting the stock, nor the other with his stock without getting the money." See also Howland *v.* Leach, 11 Pick. (Mass.) 151; Johnson *v.* Powell, 9 Ind. 566; Summers *v.* Sleeth, 45 Ind. 598; Jones *v.* Marsh, 22 Vt. 144; Smith *v.* Lewis, 26 Conn. 110; Simmons *v.* Green, 35 Ohio St. 104; Robison *v.* Tyson, 46 Pa. St. 286; Grandy *v.* McCleese, 2 Jones (N. Car.) 142; 64 Am. Dec. 574; Hough *v.* Rawson, 17 Ill. 588; Metz *v.* Albrecht, 52 Ill. 491; Stoolfire *v.* Royse, 71 Ill. 223; Allen *v.* Harfield, 76 Ill. 358; Dakin *v.* Williams, 11 Wend. (N. Y.) 67; Timmons *v.* Nelson, 66 Barb. (N. Y.) 594; Kelley *v.* Upton, 5 Duer (N. Y.) 336; Talmage *v.* White, 35 N. Y. Super. Ct. 219.

Any covenant or agreement might be treated as independent and an action brought on it, yet if that is not done until the party who might thus sue becomes bound on his part to perform some act under the contract, the two acts then become dependent acts and neither party can sue without first performing or tendering performance on his part. Gillum *v.* Dennis, 4 Ind. 417; Cunningham *v.* Gwinn, 4 Blackf. (Ind.) 341; McCullouch *v.* Dawson, 1 Ind. 413; Erwin *v.* Lee, 34 Ind. 319.

Where the buyer of cotton offered to receive and pay for it at the appointed place, a half hour before sunset of the last day on which he was entitled to demand delivery, it was held that the offer was sufficient if enough time intervened between such demand and midnight to make proper delivery without danger of loss of any of the cotton. Berry *v.* Nail, 54 Ala. 446.

Readiness to Perform.—In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale without averring an actual tender, but that defendant refused to deliver, etc. Rawson *v.* Johnson, 1 East 203; 6 Rev. Rep. 252. See also Jackson *v.* Allaway, 6 M. & G. 942; 46 E. C. L. 942, where it was held in an action upon an agreement for the delivery of iron that an averment that the plaintiff was ready and willing to deliver was sufficient, and that an allegation of tender was immaterial; Porter *v.* Rose, 12 Johns. (N. Y.) 209; 7 Am. Dec. 306; Topping *v.* Root, 5 Cow. (N. Y.) 404; Clark *v.* Crandall, 3 Barb. (N. Y.) 612; Parker *v.* Pettit, 43 N. J. L. 514; McIntyre *v.* Kline, 30 Miss. 361; 64 Am. Dec. 163; Shaw *v.* Grandy, 5 Jones (N. Car.) 56; McNaughten *v.* Cassally, 4 McLean (U. S.) 533.

So buyer is not bound to make a tender of the price where it is shown that the seller had already sold the goods contracted for to another party. Foster *v.* Leeper, 29 Ga. 294; Boies *v.* Vincent, 24 Iowa 387; Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271; Harriss *v.* Williams, 3 Jones (N. Car.) 483.

6. Conditions Subsequent—*a.* GENERALLY.—If the title is vested in the buyer with a condition annexed, which may defeat it, as where chattels are sold and delivered on condition that the purchaser shall pay over to the vendor the first money received on their resale, and if he fails to do so they shall be subject to his order, the condition is subsequent.[1] Any damage to the property or losses accruing from such a sale must fall on the purchaser.[2]

b. SALE OR RETURN.—Contracts of sale made on condition that the property may be returned at the option of the buyer are regarded by the courts as carrying the property absolutely to the buyer. The act of returning the goods is a condition subsequent which may, if performed, defeat the title vested.[3] If the right of return is not duly exercised and the property is retained, the right is forfeited and the sale becomes absolute like any other sale.[4] If the time for deciding whether to keep the goods has been fixed by the contract, the decision must be made and communicated to the seller within the time agreed upon. If this provision of the contract has not been complied with, the sale becomes absolute

On the part of the buyer notice that he is ready to take and pay for the goods bargained for at the place of delivery appointed is a sufficient tender of performance. Sears *v.* Conover, 34 Barb. (N. Y.) 330.

The buyer's duty is to appear at the time and place of delivery ready to receive the property, and, if payment and delivery are to be concurrent, to make payment, and if he fail to perform this duty the vendor may rescind the contract. Jones *v.* Marsh, 22 Vt. 144; Packer *v.* Button, 35 Vt. 188.

Cross Sales.—The same rule applies in the case of mutual agreements for cross sales. Thus where the defendant had bargained with the plaintiff for the purchase of certain cheviot fleeces and had agreed to sell him a number of coarse woolen cloths which upon a rise in price the defendant refused to deliver and the plaintiff brought an action averring independent agreements, it was held that the delivery of the fleeces was a condition precedent to his right to claim the cloth, and that he should have alleged his offer to deliver in his declaration. Atkinson *v.* Smith, 14 M. & W. 695.

Where there was a written agreement by which the plaintiff agreed to purchase certain land and coal mines from the defendant, and the latter agreed to purchase from the plaintiff all the coal that he might require from time to time at a fair market rate, in an action for damages against defendant for refusing to buy the coal, it was held that the agreements were not independent but were concurrent stipulations and judgment was given for the defendant on demurrer. Bankart *v.* Bowers, L. R., 1 C. P. 484.

1. Chamberlain *v.* Dickey, 31 Wis. 68.

2. Smith *v.* Dallas, 35 Ind. 255.

3. Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 118; Walker *v.* Blake, 37 Me. 373; Southwiek *v.* Smith, 29 Me. 228; Perkins *v.* Douglass, 20 Me. 317; Buswell *v.* Bicknell, 17 Me. 344; 35 Am. Dec. 262; Dearborn *v.* Turner, 16 Me. 17; 33 Am. Dec. 639; McKinney *v.* Bradlee, 117 Mass. 321; Martin *v.* Adams, 104 Mass. 262; Stevens *v.* Cunningham, 3 Allen (Mass.) 491.

In contracts called "contracts of sale, or return," the property in the goods passes to the purchaser, subject to his option to return them within a fixed time, or in a reasonable time, and, if he fails to return them within such time, the sale becomes absolute, and the price may be recovered in an action for goods sold and delivered. Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Perkins *v.* Douglass, 20 Me. 317.

4. Jones *v.* Wright, 71 Ill. 61; Ray *v.* Thompson, 12 Cush. (Mass.) 281; 59 Am. Dec. 187; Childs *v.* Odonnell, 84 Mich. 533. See Walker *v.* Blake, 37 Me. 373.

Where A purchased a horse to be returned at the end of two days, if he did not answer the description given

and the buyer becomes liable for the price.[1] The buyer has nevertheless until the end of the time to make his election.[2] The seller cannot maintain replevin of the property against the purchaser of the buyer's interest before the expiration of the time allowed in the contract for making his election.[3] If there is no time fixed for exercising the option of taking or returning the goods, the decision must be made within a reasonable time.[4] The jury must determine under all the circumstances of the case what is a reasonable time.[5]

Goods or chattels are sometimes taken on trial with an option to purchase. An option to purchase in such case is essentially different from a sale where the property is sold with an option to return the purchase. In the former case the condition is precedent and title to the goods does not pass to the buyer until he has accepted them in accordance with the provisions of the contract.[6] The conditions that property taken on trial may be returned if it does not prove satisfactory must be fully performed and the buyer satisfied. If the contract permits the buyer to decide himself whether the articles furnished are to his satisfaction, it is not for any one else to decide whether a refusal to accept is or is not reasonable.[7] But where a contract may be construed as binding the buyer to decide on fair and reasonable grounds, it seems that

of him, and the two days elapsed without the horse being returned, held, that the contract was absolute, and that A could not discharge himself of the liability by showing that the horse was not as good as was represented Moore *v.* Piercy, 1 Jones (N. Car.) 131.

1. Reese *v.* Beck, 24 Ala. 621; Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Hotchkiss *v.* Higgins, 52 Conn. 206; 52 Am. Rep. 582; Aiken *v.* Hyde, 99 Mass. 183; Quinn *v.* Stout, 31 Mo. 160; Curtiss *v.* Driggs, 25 Mo. App. 175; Jones *v.* Wright, 71 Ill. 61; Moore *v.* Piercy, 1 Jones (N. Car.) 131; Schlesinger *v.* Stratton, 9 R. I. 578; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528; Moss *v.* Sweet, 3 Eng. L. & Eq. 311; Beverley *v.* Lincoln Gas, etc., Co., 6 Ad. & E. 828; 33 E. C. L. 222; Bianchi *v.* Nash, 1 M. & W. 545.

2. Reese *v.* Beck, 24 Ala. 651.

3. Nutting *v.* Nutting, 63 N. H. 221.

4. Spickler *v.* Marsh, 36 Md. 222; Quinn *v.* Stout, 31 Mo. 160; Hickman *v.* Shimp, 109 Pa. St. 16; Washington *v.* Johnson, 7 Humph. (Tenn.) 468.

Six days—Held, a reasonable time for a conditional buyer of two horses to determine whether they suited him. Rohn *v.* Dennis, 109 Pa. St. 504.

5. Washington *v.* Johnson, 7 Humph. (Tenn.) 468.

6. Pitts Sons Mfg. Co. *v.* Poor, 7 Ill. App. 24; Mowbray *v.* Cady, 40 Iowa 604; Kahn *v.* Klabunde, 50 Wis. 238.

Goods left on trial under an agreement that if they prove satisfactory they shall be paid for by note due on a certain day or by cash that day, remain the seller's and at his risk until such date if not accepted before. Pierce *v.* Cooley, 56 Mich. 552.

7. Silsby Mfg. Co. *v.* Chico, 24 Fed. Rep. 893; Hallidie *v.* Sutter St. R. Co., 63 Cal. 575; Zaleski *v.* Clark, 44 Conn. 218; 26 Am. Rep. 446; Goodrich *v.* Van Nortwick, 43 Ill. 445; Brown *v.* Foster, 113 Mass. 136; 18 Am. Rep. 463; McCarren *v.* McNulty, 7 Gray (Mass.) 139; Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565; 45 Am. Rep. 57; Pierce *v.* Cooley, 56 Mich. 552; Gibson *v.* Cranage, 39 Mich. 49; 33 Am. Rep. 351; Hoffman *v.* Gallaher, 6 Daly (N. Y.) 42; Grant *v.* Burch, 26 Hun (N. Y.) 376; Heron *v.* Davis, 3 Bosw. (N. Y.) 336; Gray *v.* Central R. Co., 11 Hun (N. Y.) 70; Dustan *v.* McAndrew, 44 N. Y. 72; McCormick Harvesting Mach. Co. *v.* Chesbrown, 33 Minn. 32; McClure *v.* Briggs, 58 Vt. 82; 56 Am. Rep. 557; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218; 57 Am. Rep. 257.

Plaintiff, a sculptor, made a plaster

the dissatisfaction must be real in order to relieve the buyer from liability. In one case his decision cannot be reviewed, but it can be in the other.[1]

If the property does not prove satisfactory to the buyer after trial, he must return it to the seller or give notice of his dissatisfaction with it in order that he may be fully protected from liability for the price.[2] Where the contract allows the buyer a fixed time for testing the article sold, he is entitled to the full time specified.[3] If no time is fixed within which notice of the approval is to be given, the notice must be within a reasonable time,[4] unless there is a stipulation which relieves the buyer from such an obligation.[5] If the seller refuses to receive the property,

bust of the deceased husband of the defendant under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed, it was found that the bust was a fine piece of work, the correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject, and that the only fault found with it was that it did not have the expression of the deceased when alive, which was caused by no imperfection in the work but by the nature of the material. *Held*, that as the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable. Zaleski *v.* Clark, 44 Conn. 218; 26 Am. Rep. 446.

1. Robinson *v.* Bennett, 50 Mich. 565. See Daggett *v.* Johnson, 49 Vt. 345; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528; McClure *v.* Briggs, 58 Vt. 82; 56 Am. Rep. 557; Manny *v.* Glendinning, 15 Wis. 50.

2. Aultman *v.* Theirer, 34 Iowa 272; McCormick *v.* Basal, 50 Iowa 523; Prairie Farmer Co. *v.* Taylor, 69 Ill. 440; 18 Am. Rep. 621; Johnson *v.* McLane, 7 Blackf. (Ind.) 501; Furneaux *v.* Esterly, 36 Kan. 539; 43 Am. Dec. 102; Spickler *v.* Marsh, 36 Md. 222; Aiken *v.* Hyde, 99 Mass. 183; Paulson *v.* Osborne, 35 Minn. 90; Fisher *v.* Merwin, 1 Daly (N. Y.) 234; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Fairfield *v.* Madison Mfg. Co., 38 Wis. 348; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218; 57 Am. Rep. 257.

Where a machine is sold on a conditional warranty providing for testing within a certain time and for notice, if the purchaser would avail himself of the warranty he must render substantial compliance with the agreement. Furneaux *v.* Esterly, 36 Kan. 539.

3. Cole *v.* Common Council, 53 Mich. 438. See Argensinger *v.* Cline, 69 Iowa 57.

A reaping machine was sold with leave to test it by using it for a day. *Held*, that using it from two o'clock p.m. was not for a day, the rule that courts take no notice of fractions of a day having no application. Fuller *v.* Schroeder, 20 Neb. 631.

Where the test cannot be made within the time specified, as, for example, in the case of a furnace because there is no cold weather, the test is seasonably made if made afterwards. Richardson *v.* Hampton Independent Dist., 70 Iowa 573.

4. Hickman *v.* Shimp, 109 Pa. St. 16; Davey *v.* Erie, 14 Pa. St. 211.

Where a horse is sold conditionally, to be returned in the event the buyer should be dissatisfied with him on trial, the sale will become absolute by the buyer's keeping the horse beyond a reasonable time. Quinn *v.* Stout, 31 Mo. 160.

Where a cotton gin was sold in the spring of the year, upon condition that it should perform to the satisfaction of the purchaser when tried, there being no evidence to the contrary, it was held that the trial contemplated was to be after the commencement of the next cotton picking, and that notice given in October, by the purchaser, that he would not keep the gin, was in time. Hall *v.* Meriwether, 19 Tex. 224.

Fifteen years held to far exceed the reasonable time allowed a purchaser to accept an optional contract. Cooper *v.* Carlisle, 17 N. J. Eq. 525.

5. Smalley *v.* Hendrickson, 29 N. J. L. 371; Gibson *v.* Vail, 53 Vt. 476.

the buyer may retain it and recoup the damages for the defect from the amount of the recovery in an action by the seller for the price.[1]

Any loss or damage suffered to the property during the trial will fall on the seller.[2] But if by negligence of the prospective buyer the value of the goods has been materially impaired, the seller may recover damages,[3] and the buyer's right of rejection of the goods will be lost.[4] If the nature of the property is such that some of it must be consumed in order that a trial may be made, the sale will become absolute and the buyer will be liable for the price if he consumes more than is necessary in the trial of the goods.[5]

7. Waiver of Condition.—If the seller, in case of a contract to sell when some act is to be done by the purchaser at the time of the delivery of the goods, which is a condition precedent to the passing of the title in the goods to the purchaser, delivers the goods without requiring the performance of the condition, the law presumes that the condition is waived.[6] An absolute and unconditional delivery is regarded as a waiver of the condition.[7] But payment is not waived by a delivery of the property accompanied by the implied understanding that the delivery is made conditional upon payment.[8] If the seller after delivering the goods

1. Aultman *v.* Thierer, 34 Iowa 272.

2. Hunt *v.* Wyman, 100 Mass. 198.

3. Moss *v.* Sweet, 16 Q. B. N. S. 493.

4. Ray *v.* Thompson, 12 Cush. (Mass.) 281; 59 Am. Dec. 187.

5. See Lucy *v.* Mouflet, 5 H. & N. 229; Okell *v.* Smith, 1 Stark. 107; Elliot *v.* Thomas, 3 M. & W. 170.

6. Young *v.* Kansas Mfg. Co., 23 Fla. 394; Van Duzor *v.* Allen, 90 Ill. 499; Mich. Cent. R. Co. *v.* Phillips, 60 Ill. 193; Stone *v.* Perry, 60 Me. 48; Seed *v.* Lord, 66 Me. 580; Salomon *v.* Hathaway, 126 Mass. 484; Armour *v.* Pecker, 123 Mass. 143; Hirschorn *v.* Canney, 98 Mass. 150; Whitney *v.* Eaton, 15 Gray (Mass.) 225; Paul *v.* Reed, 52 N. H. 138; Osborn *v.* Gantz, 60 N. Y. 541; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40; Lang *v.* Rickmers, 70 Tex. 108; Summers *v.* Mills, 21 Tex. 77. See Thorpe *v.* Fowler, 57 Iowa 541.

7. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 193; Scott *v.* Wells, 6 W. & S. (Pa.) 357; 40 Am. Dec. 568; Marston *v.* Baldwin, 17 Mass. 606.

In Seed *v.* Lord, 66 Me. 580, it is held that absolute delivery of property sold to be paid for by note, is not necessarily a waiver of such condition, but such delivery may be controlled by other evidence. See also Thaxter *v.* Foster, 153 Mass. 151.

8. Gibson *v.* Tobey, 46 N. Y. 637; 7 Am. Rep. 387.

In Stone *v.* Perry, 60 Me. 50, it is held that the question whether delivery is absolute or conditional depends upon the intent of the parties. To establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms at the time of delivery and it is sufficient if the intent of the parties can be inferred from their acts or the circumstances of the case. Hammett *v.* Linneman, 48 N. Y. 399.

In other cases it is *held*, to constitute a waiver by a vendor of personal property for cash on delivery, of payment of the purchase price as a condition of the title passing, there must be not only an act of delivery, but an intent not to insist on immediate payment as a condition of the title passing. Globe Milling Co. *v.* Minnesota Elevator Co., 44 Minn. 153; State *v.* Green Tree Brewery Co., 32 Mo. App. 276.

If the property is delivered to the purchaser, without a compliance with the condition being insisted on, at the time, yet if it is insisted upon immediately afterwards, where a bill of sale is

claims that he did not waive his right to the performance of the condition by such delivery, it becomes a question of fact as to whether the delivery was subject to the condition or not, to be determined by the jury upon all the facts and circumstances.[1]

Where a contract of sale provides for the payment of the entire purchase price on delivery and the title shall not pass until the payment, the fact that the seller extended the time of payment to the buyer cannot be considered as a waiver of the time, title or right of possession.[2] The fact that the seller's agent advised a creditor of the purchaser to take a mortgage thereon is no waiver of the condition where the agent at the time claimed all that was due on the property, and it was not pretended that he had led the creditor to believe that title was in the purchaser, or that the seller's right to its lien was waived.[3] The condition is not waived by the seller's taking the purchaser's notes for the price,[4] or by the seller's attorney in ignorance of the terms of the contract taking a mortgage on the property from the purchaser to secure the unpaid part of the purchase money.[5] The buyer of goods may be presumed to assent to a waiver but cannot be presumed, by accepting the delivery apparently unrestricted to assent to a condition which lies in the undisclosed intent of the seller.[6]

Where a party entitled to exact performance either hinders or impedes the other party in fulfilling the condition,[7] or incapacitates himself in performing his own promise or absolutely refuses performance so as to render it idle or useless for the other to fulfill the condition, waiver is implied.[8] If a man

rendered, and the buyers fully recognize and acknowledge the condition as still subsisting and binding upon them, this is sufficient to uphold the condition. Draper *v.* Jones, 11 Barb. (N. Y.) 263.

1. Young *v.* Kansas Mfg. Co., 23 Fla. 399; Seed *v.* Lord, 66 Me. 580; Farlow *v.* Ellis, 15 Gray (Mass.) 299; Gorham *v.* Holden, 79 Me. 317.

An understanding or agreement entered into when the seller and buyer of goods commenced to take an inventory, that the inventoried goods should belong to the latter to do with as he pleased in respect to selling to customers, does not clearly imply a waiver of a stipulation in the written contract of sale that the title shall remain in the seller until the goods are paid for. Stone *v.* Waite, 88 Ala. 599.

2. Meeker *v.* Johnson, 3 Wash. 247.

3. Ames Iron Works *v.* Richardson, 55 Ark. 642.

4. Heinbockle *v.* Zugbaum, 5 Mont. 344; 51 Am. Rep. 59; Seed *v.* Lord, 66 Me. 580.

5. Jones *v.* Albin, 53 Ga. 585.

6. Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446.

7. Wolf *v.* Marsh, 54 Cal. 228.

8. Benj. on Sales, § 566.

Defendant purchased of plaintiff all the manure that should be produced during the ensuing year, upon plaintiff's place, for $30. No time of payment was mentioned. After the defendant had drawn away seven loads, the plaintiff's agent forbade him to take any more until he had paid for that previously drawn, and upon his attempting to take more, drove him away by force. *Held*, that this refusal of permission to the defendant to carry away any more manure until payment should be made for that already taken was a breach of the contract, and prevented a recovery by the plaintiff for any part of the manure. Timmons *v.* Nelson, 66 Barb. (N. Y.) 594.

offers to perform a condition precedent in favor of another, and the latter refuses to accept the performance or hinders or prevents it, this is a waiver and the latter's liability becomes fixed and absolute.[1]

8. Refusal to Perform Condition.—A positive absolute refusal by one party to carry out the contract, or such conduct on his part as incapacitates him from performance, is in itself a complete breach of contract on his part, such as dispenses the other party from the useless formality of tendering performance of the condition precedent.[2] But the mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise and must be treated and acted upon as such by the party to whom the promise was made, for if he afterwards continue to urge or demand compliance with the contract it is plain that he does not understand it to be at an end.[3] If the buyer refuses to perform the condition, the seller may recover the property by an action of replevin,[4] or the property may be sold again and a valid title to it passed by the original owner, and it is not necessary for him to take actual manual possession of it before he sells it.[5]

1. Hayden *v.* Reynolds, 54 Iowa 157; Follansbee *v.* Adams, 86 Ill. 13; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 439; Taylor *v.* Risley, 28 Hun (N. Y.) 141; Grove *v.* Donaldson, 15 Pa. St. 128. Pontifex *v.* Wilkinson, 1 C. B. 75; 50 E. C. L. 73; Armitage *v.* Insole, 14 Q. B. 728; 68 E. C. L. 727; Holme *v.* Guppy, 3 M. & W. 387; Laird *v.* Pim, 7 M. & W. 474; Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 79 E. C. L. 126; Russell *v.* Bandeira, 13 C. B. N. S. 149; 106 E. C. L. 148.

2. Smith *v.* Lewis, 24 Conn. 624; 63 Am. Dec. 180; Dwinel *v.* Howard, 30 Me. 258; Dodge *v.* Greeley, 31 Me. 343; Smith *v.* Foster, 18 Vt. 182; Sumner *v.* Parker, 36 N. H. 449; Webb *v.* Stone, 24 N. H. 282; Luey *v.* Bundy, 9 N. H. 298; Haines *v.* Tucker, 50 N. H. 307; 32 Am. Dec. 359; Lawrence *v.* Miller, 86 N. Y. 131; Clark *v.* Crandall, 3 Barb. (N. Y.) 612; Hill *v.* Hovey, 26 Vt. 109; Preble *v.* Bottom, 27 Vt. 249. See Green *v.* Bennett, 23 Mich. 465. Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127; 79 E. C. L. 126; Amory *v.* Broderick, 5 B. & Ald. 712; 7 E. C. L. 236; Short *v.* Stone, 8 Q. B. 358; 55 E. C. L. 358; Reid *v.* Hoskins, 4 E. & B. 979; 82 E. C. L. 979; 25 L. J., Q. B. 55; Avery *v.* Bowden, 5 E. & B. 714; 6 E. & B. 953; 85 E. C. L. 714; Franklin *v.* Miller, 4 Ad. & E. 599; 31 E. C. L. 148; Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 109 E. C. L. 711; Robson *v.* Drummond, 2 B. & Ad. 303; 22 E. C. L. 81.

The fact that one who had contracted to deliver cumbrous property to one person on a particular day, had contracted to deliver the same property to another person, did not authorize the person who first purchased to sue for breach of his contract, or dispense with performance on his part of every act, either precedent or concurrent, which devolved upon him by his agreement. Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271.

3. Smith *v.* Lewis, 24 Conn. 624; 63 Am. Dec. 180; Mill Dam Foundry Co. *v.* Hovey, 21 Pick. (Mass.) 417; Haines *v.* Tucker, 50 N. H. 311; De Peyster *v.* Pulver, 3 Barb. (N. Y.) 284; Phillpots *v.* Evans, 5 M. & W. 475; Danube, etc., R. etc., Co. *v.* Xenos, 11 C. B. N. S. 152; 103 E. C. L. 151; Avery *v.* Bowden, 5 E. & B. 714; 85 E. C. L. 714; Hochster *v.* De La Tour, 2 E. & B. 678; 75 E. C. L. 678; Ripley *v.* M'Clure, 4 Exch. 345.

4. Bauendah *v.* Horr, 7 Blatchf. (U. S.) 548.

5. Hubbard *v.* Bliss, 12 Allen (Mass.) 590.

9. Impossibility of Performance.—A party is excused from the performance of his promise when a legal impossibility supervenes.[1] But it must be a real impossibility, not merely a very great inconvenience, hardship, or impracticability.[2] If the thing promised be impossible in itself, it is no excuse that the promissor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfill a promise when he might have guarded himself by the terms of his contract.[3] But if the thing be physically impossible *quod natura fieri non concedit* or be rendered impossible by the act of God, the obligation is at an end.[4]

10. Rights of Third Parties—*a.* IN GENERAL.—Where property is sold and delivered on condition that the title is not to pass until it is paid for, a third person can acquire no right superior to the seller's right.[5] Such an agreement, in the absence of fraud, is

1. Baylies *v.* Fettyplace, 7 Mass. 325; Thomas *v.* Knowles, 128 Mass. 22; Kearon *v.* Pearson, 7 H. & N. 386; Barker *v.* Hodgson, 3 M. & S. 267; Brewster *v.* Kitchell, 1 Salk. 198; Davis *v.* Cary, 15 Q. B. 418; 69 E. C. L. 416; Doe *v.* Rugeley, 6 Q. B. 107; 51 E. C. L. 107; Brown *v.* Mayor, etc., of London, 9 C. B., N. S. 726; 99 E. C. L. 725; Wynn *v.* Shropshire Union R., etc., Co., 5 Exch. 420; Newington Local Board *v.* Cuttingham Local Board, 12 Ch. Div. 725; Newby *v.* Sharpe, 8 Ch. Div. 39; Bailey *v.* De Crespigny, L. R., 4 Q. B. 180.

2. Smoot's Case, 15 Wall. (U. S.) 36; Jones *v.* U. S., 96 U. S. 24; Oakley *v.* Morton, 11 N. Y. 25; 62 Am. Dec. 49. See Thompson *v.* Ray, 46 Ala. 224.

One who had contracted to manufacture and deliver a certain article within a specified time was not excused from the performance of the contract because the mill was destroyed by fire. It did not appear nor was it found as a fact that the burning of the mill prevented such performance. Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.

Where a contract to furnish lumber by a stated time is broken by non-delivery because of a drought which stopped all the saw-mills, the impracticability of furnishing the lumber was held no excuse. Eddy *v.* Clement, 38 Vt. 486.

3. Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 441. See School Dist. No. 1 *v.* Dauchy, 25 Conn. 530; 68 Am. Dec. 371; Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291; Eddy *v.* Clement, 38 Vt. 486; River Wear Com'rs *v.* Adamson, 1 Q. B. Div. 546; Arthur *v.* Wynne, 14 Ch. Div. 603; Nichols *v.* Marsland, 2 Exch. Div. 1.

4. Dickey *v.* Linscott, 20 Me. 453; 37 Am. Dec. 66; Knight *v.* Bean, 22 Me. 531; Tasker *v.* Sheperd, 6 H. & N. 575; Hall *v.* Wright, 27 L. J., Q. B. 145; Faulkner *v.* Lowe, 2 Exch. 595; Taylor *v.* Caldwell, 3 B. & S. 826; 113 E. C. L. 824; Rugg *v.* Minett, 11 East 210; Howell *v.* Coupland, L. R., 9 Q. B. 462. See also IMPOSSIBLE CONTRACTS, vol. 10, p. 176.

A coal company contracted with plaintiffs for the delivery of a large quantity of coal during the season. Before the time for delivery of a large part of the coal a flood swept away all the works of a navigation company with which the railroad was connected and which was indispensable for the transportation of its coal. The coal company was prevented from fulfilling their contract by reason of this flood. Held, that they were excused from compliance while they were so prevented. Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291.

Where a person has been prevented from fulfilling a contract by act of God, he may, nevertheless, recover for what he has done under such contract. White *v.* Allen, 133 Mass. 423; Leonard *v.* Dyer, 26 Conn. 172; 68 Am. Dec. 382.

5. Ames Iron-Works *v.* Richardson, 55 Ark. 642; Lewis *v.* McCabe, 49 Conn. 141; 44 Am. Rep. 217; Sumner *v.* Woods, 67 Ala. 139; 42 Am. Rep. 104; Dows *v.* Dennistoun, 28 Barb. (N.

good and valid as against third persons and as to the parties to the transaction, even though the delivery is accompanied by a permission to sell, provided the sale is to be made of the goods as the property of the vendor and the proceeds are to be held in trust for him.[1] This is the rule except where conditional sales are required by statute to be recorded. In those States where registration of conditional sales is required, a sale on condition that the title will not pass until the property is paid for is not valid as against attaching creditors or *bona fide* purchasers of the buyer unless the contract itself or written evidence thereof is recorded.[2]

Y.) 393; Budlong *v.* Cottrell, 64 Iowa 234; Frank *v.* Batten, 49 Hun (N. Y.) 91; Harbinson *v.* Tufts (Colo. 1891), 27 Pa. Rep. 1014; Shoshonetz *v.* Campbell, (Utah, 1890), 24 Pac. Rep. 672; Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53; Leath *v.* Uttley, 66 Tex. 82; Wadleigh *v.* Buckingham, 80 Wis. 230.

A soda fountain was sold and transferred to a drug store. The contract of sale was properly recorded and contained a stipulation that the title should remain in the vendor until the fountain was paid for. One of the vendees bought out his partner and gave a chattel mortgage on the stock in the fountain which provided "he might sell the stock without accounting for the proceeds." The mortgage was assigned, and on maturity the assignee attempted to foreclose and sell the fountain. Held, the mortgage was void as to the original vendor and that the last purchaser took no title as against him. Harbinson *v.* Tufts (Colo. 1891), 27 Pac. Rep. 1014.

A conditional sale of a machine, under the terms of which the title does not pass to the vendee until the payments provided for are made, will not enable the mortgagee of the house in which the machine is placed to sell the same at a foreclosure sale under a mortgage of the house and all the machinery therein, or to be thereafter placed therein, although he had no notice of the terms of the sale of the machine. Defiance Mach. Works *v.* Trisler, 21 Mo. App. 69.

A statute providing that if any person shall transact business as a trader or otherwise in his own name, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the house where the business is transacted, all the property used in the business shall be treated in favor of his creditors as his property—does not apply to the purchase of property under an agreement that the title is to remain in the seller until payment of the price, so as to entitle the successor of the purchaser to hold the property as against the seller. Van Range Co. *v.* Allen (Miss. 1890), 7 So. Rep. 499.

1. Baring *v.* Galpin, 57 Conn. 352; see Conable *v.* Lynch, 45 Iowa 84.

Where liquors are delivered by liquor merchants to a tavern-keeper, to be by him retailed at his bar, the title to remain in the liquor merchants until sold, the liquors are liable to be levied on, and sold under execution against the tavern-keeper. Bonesteel *v.* Flack, 41 Barb. (N. Y.) 435.

A conditional sale of a retail stock of goods, with an unlimited power in the vendee to sell, enables the latter to give to a *bona fide* sub-vendee a good title. Wilder *v.* Wilson, 16 Lea (Tenn.) 548.

2. See also RECORDING ACTS, vol. 20, p. 537.

Statutory Provisions.—In *Arizona* a copy of the sale or notice thereof must be acknowledged and recorded, to be valid as against creditors and purchasers.

Georgia.—Conditional sales are invalid as against third persons unless in writing executed, attested, and recorded as in the case of chattel mortgages. *Georgia* Code, § 1955a. See Gartrell *v.* Clay, 81 Ga. 327; Cohen *v.* Candler, 79 Ga. 427.

Relatively to subsequent creditors of the purchaser, a conditional sale of chattels, not duly recorded, is the same as an absolute sale. Steen *v.* Harris, 81 Ga. 681.

The written contract of a conditional sale must be recorded in the county where the vendee resides; and the record in another county will not suffice. Cohen *v.* Candler, 79 Ga. 427.

Where the sale of a chattel is conditional, the vendor reserving title, he

is under no duty to the vendee to record the contract of sale, or take other precautions against loss from any wrongful sale of the property which may be made by the latter. Chambers *v.* State, 85 Ga. 220.

Iowa.—No sale, contract, or lease, wherein the transfer of the title is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessor in actual possession thereof without notice, unless the same is in writing, executed by the vendor or lessor, acknowledged and recorded the same as a chattel mortgage. *Iowa* Code, § 1922. See Budlong *v.* Cottrell, 64 Iowa 234.

A bill of sale executed and recorded by the seller two months after the actual sale and delivery of possession of the property was, under this statute, held not to impart constructive notice to a purchaser, and the person having possession of the conditions upon which the sale was made. Pash *v.* Weston, 52 Iowa 675.

Kansas.—Any or all instruments in writing or promissory notes now in existence or hereafter executed evidencing the condition of the sale of personal property and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers or the creditors of the vendee unless the original instrument or a true copy thereof shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept subject to the law applicable to the filing of chattel mortgages, and any conditional verbal sale of personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value. Laws of 1889, ch. 355.

Maine.—No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid unless it is made and signed as a part of the note, nor when it is made and signed in a note for more than $30, unless it is recorded like mortgages or personal property. *Maine* R. S., ch. 111, § 5. See Boynton *v.* Libby, 62 Me. 253; Cunningham *v.* Trevitt, 82 Me. 145; Hill *v.* Metter, 82 Me. 199.

Minnesota.—A conditional sale is not good as against creditors, *bona fide* purchasers, and mortgagees, unless recorded. *Minnesota* Gen. Sts., 1878, ch. 31, § 15; see Kinney *v.* Cay, 39 Minn. 210. This statute is not operative to avoid such contracts, although not filed as prescribed, as to creditors of the vendee having actual notice of the state of the title at the time when a levy is made upon the property in behalf of such creditors. Dyer *v.* Thorstad, 35 Minn. 534.

Missouri.—Conditional sales of personal property must be evidenced by writing, executed, acknowledged and recorded as in case of chattel mortgages, otherwise a condition is voidable as to subsequent purchasers in good faith, and creditors. Missouri Rev. St., § 2505, ch. 2; see Tufts *v.* Thompson, 22 Mo. App. 564.

This statute applies to prior as well as subsequent purchasers. Collins *v.* Wilhoit (Mo. 1892), 18 S. W. Rep. 839.

Nebraska Comp. Sts., ch. 32, § 26, declares that no sale wherein the transfer of title or ownership of personal property is made to depend on any condition shall be valid against any purchaser or judgment creditor of the vendee in actual possession, obtained in pursuance of such sale without notice, unless the same be in writing, and a copy be filed for record; and, further, that all of such sales shall cease to be valid against purchasers in good faith or judgment or attaching creditors without notice at the end of five years, unless prior to the expiration of the five years from the date of the sale a new copy of the sale be filed for record.

A sale reserving title in the vendor, where the property is delivered to the vendee and a copy of the contract is not filed, is void under this statute as against attaching creditors as well as purchasers and general creditors. Peterson *v.* Tufts (Neb. 1892), 51 N. W. Rep. 297.

North Carolina.—Conditional sales of personal property are required to be registered in the county where the purchaser resides; if he resides out of the State, then in the county where the personal property, or some part thereof, is found. Act of March 3, 1891; Laws of 1891, ch. 240, p. 195.

As between the parties, a conditional sale is binding, although not reduced to writing or registered. The code, § 1275, only requires them to be reduced to writing and registered, as against creditors and purchasers for value. Butts *v.* Screws, 95 N. Car. 215. See Kornegay *v.* Kornegay, 109 N. Car. 188.

In an action by the seller against the buyer, a note for the purchase money may be put in evidence although it has not been registered. Kornegay *v.* Kornegay, 109 N. Car. 188. See Foreman *v.* Drake, 98 N. Car. 311.

New Hampshire.—A conditional sale to be good must be in writing and a written memorandum of the sale signed by the vendee and recorded in the town clerk's office of the town where the sale is made.

If an attaching creditor had full notice of a failure to record a memorandum of a conditional sale, it is immaterial whether the memorandum of sale was recorded or not. Batchelder *v.* Sanborn (N. H. 1890), 22 Atl. Rep. 535.

New Jersey.—Contracts for the conditional sale of goods are void as against subsequent purchasers unless the contract with its conditions and reservations is recorded in the register's office.

New York.—A conditional sale must be in writing and a true copy thereof filed in the several towns and cities where the vendees reside at the time of the execution of the contract. *New York* Laws of 1884, § 1, ch. 315. See Iden *v.* Sommers, 18 N. Y. Supp. 189; Campbell Printing, etc., Press, etc., Co. *v.* Oltrogge, 13 Daly (N. Y.) 247. If not filed as the statute requires, one who in good faith and without notice purchases from the buyer who is in possession, the rights of the original seller are cut off as against such purchaser. Moyer *v.* McIntyre, 43 Hun (N. Y.) 58. Unrecorded sale is good as against pledgee. Canton Surgical, etc., Co. *v.* Webb, 16 N. Y. Supp. 932.

The cases decided prior to the passage of this statute are hopelessly confused. Wait *v.* Green, 36 N. Y. 556; 35 Barb. (N. Y.) 585; Steelyards *v.* Singer, 2 Hilt. (N. Y.) 96; Dows *v.* Dennistoun, 28 Barb. (N. Y.) 293; Fleeman *v.* McKean, 25 Barb. (N. Y.) 474; Matthews *v.* Hobby, 48 Barb. (N. Y.) 167; Haggerty *v.* Palmer, 6 Johns. Ch. (N. Y.) 437; Grant *v.* Skinner, 21 Barb. (N. Y.) 581, are cases holding that a *bona fide* purchaser from a conditional vendee takes the property free from any claim of the original vendor. These cases were substantially overruled by a number of decisions, which applied the doctrine that on a conditional sale the property continues in the vendor as against *bona fide* purchasers. Ballard *v.* Burgett, 40 N. Y. 314; Boon *v.* Moss, 70 N. Y. 473; Austin *v.* Dye, 46 N. Y. 500; Puffer *v.* Reeve, 45 Hun (N. Y.) 480; Maynard *v.* Anderson, 54 N. Y. 641; Palmer *v.* Kelly, 56 N. Y, 637; Dows *v.* Kidder, 84 N. Y. 121; Parker *v.* Baxter, 86 N. Y. 587; Farwell *v.* Importers, etc., Nat. Bank, 90 N. Y. 483; Harkness *v.* Russell, 118 U. S. 663.

South Carolina.—Conditional sales of personalty are void as to third parties without actual notice unless they are recorded in the same manner as mortgages and other deeds requiring recording.

Texas.—Conditional sales of chattels where the vendee takes possession are treated as mortgages and must be registered as against creditors and innocent purchasers. *Texas* R. S. 1879, appendix, p. 15, §§ 1, 2, 3, 7; §§ 4341, 4342, note.

If the purchaser is permitted to take possession, and the seller's rights do not appear of record, subsequent creditors of the purchaser without notice may acquire rights in the property paramount to those of the seller. Sinker *v.* Comparet, 62 Tex. 470.

On receipt of $75 a piano was delivered by C to N under a writing reciting a hiring and promising quarterly payments of $50 each in addition so long as it should be kept, to return it on demand, not to remove it without C's consent and keep it insured; also stipulating that on further payment of $350 in equal monthly instalments the piano was to become N's. N sold the piano to a purchaser in good faith. Held, that the latter got title, the agreement not having been recorded. Knittel *v.* Cushing, 57 Tex. 354; 44 Am. Rep. 598.

Vermont.—No lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against the attaching creditors or subsequent purchasers without notice, unless the vendor takes a written memorandum signed by the purchaser witnessing such lien and causes it to be recorded in the proper office within the time limited. *Vermont* Liens Act, R. L., § 1992. See also Collender Co. *v.* Marshall, 57 Vt. 232.

A conditional sale should be recorded to prevent an attachment of the property sold by the vendee's creditor. Whitcomb *v.* Woodworth, 54 Vt. 544. Actual notice has the same effect as

These statutes requiring the registration of conditional sales are not retroactive and do not apply to transactions which occur prior to their passage.[1]

b. CREDITORS.—A sale of goods, the right, title and interest therein to remain in the seller until sold by the purchaser, does not pass the absolute title at once to the purchaser so as to render the property subject to levy and sale upon an execution in favor of the latter's creditors.[2] If the goods are taken under execution against the purchaser before they are paid for, they may be replevied by the seller.[3] If after the time for payment of the price has elapsed, the price not being paid, the creditor of the vendee attaches the property, he cannot defeat the vendor's right to sustain an action of trover against him for the property by tendering him the amount which the vendee agreed to pay and the interest thereon.[4] But a conditional sale colorable only and a mere device to hinder and delay the buyer's creditors in the collection of their debts, is not available as against his judgment creditors, and the title as to them will be deemed vested in the

the record thereby required would have if regularly made. Kelsey *v.* Kendall, 48 Vt. 24.

Virginia.—A conditional sale must be recorded to be good against creditors and *bona fide* purchasers. Code *Virginia*, § 2462. See Hash *v.* Lore, 88 Va. 716.

West Virginia.—In order that a conditional sale may be good as against third parties, notice thereof must be recorded in the office of the clerk of the county court of the county where the property is. *West Virginia* Code of 1887, ch. 74, § 3. See Baldwin *v.* Van Wagner, 33 W. Va. 293.

Wisconsin.—A contract for the conditional sale of property must be in writing, subscribed by the parties, and a copy thereof filed in the office of the clerk of the town, city or village where the property may be at the time of making the sale. R. S. *Wisconsin*, § 2317.

The conditions of such a contract signed only by the purchaser are void as against the creditors of the purchaser and the property may be subjected to their claim. Sheldon Co. *v.* Mayers, 81 Wis. 627.

Where the goods of a non-resident conditional purchaser were in transit from a foreign country when the contract was signed and the contract was a foreign contract, valid where made, it will be enforced though it was never filed as required by *Wisconsin* Rev. St., § 2317. Mershon *v.* Wheeler, 76 Wis. 502.

1. Bowen *v.* Frick, 75 Ga. 786; Moseley *v.* Shattuck, 43 Iowa 540; Kingsland Mfg. Co. *v.* Culp, 85 Mo. 548; Perry *v.* Young, 105 N. Car. 463; Harrell *v.* Godwin, 102 N. Car. 330.

2. The Marina, 19 Fed. Rep. 760; Forbes *v.* Marsh, 15 Conn. 384; Cooley *v.* Gillan, 54 Conn. 80; Nichols *v.* Ashton (Mass. 1892), 29 N. E. Rep. 519; Blanchard *v.* Child, 7 Gray (Mass.) 155; Dewes Brewery Co. *v.* Merritt, 82 Mich. 198; Leighton *v.* Stevens, 22 Me. 252; McFarland *v.* Farmer, 42 N. H. 386; Cole *v.* Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9; Strong *v.* Taylor, 2 Hill (N. Y.) 326; Goodell *v.* Fairbrother, 12 R. I. 233; 34 Am. Rep. 631; City Nat. Bank *v.* Tufts, 63 Tex. 113; Enlow *v.* Klein, 79 Pa. St. 488. *Compare* Murch *v.* Wright, 46 Ill. 487; 95 Am. Dec. 455; Lucas *v.* Campbell, 88 Ill. 447; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664.

A creditor of the purchaser of property, the title to which remains in the vendor until the price is paid, can subject such property to his debt only by paying the balance due thereon, or keeping good a tender thereof, or by applying to the courts for specific performance. Bingham *v.* Vandegrift, 93 Ala. 283.

3. Gould *v.* Howell, 32 Ill. App. 349. See Ridgeway *v.* Kennedy, 52 Mo. 24; Wadleigh *v.* Buckingham, 80 Wis. 230.

4. Buckmaster *v.* Mower, 22 Vt. 203; Brown *v.* Haynes, 52 Me. 581; Sage *v.* Slentz, 23 Ohio St. 1.

buyer.[1] So in States where the registration of conditional sales is required, the conditional vendor will not be protected against creditors of the purchaser unless the requirements of the statute have been complied with.[2] The fact that the officer levying an attachment against a conditional vendee has notice of the condition of the sale is not sufficient under such a statute to defeat the claims of such creditors.[3]

c. BONA FIDE PURCHASERS.—If the condition is one subsequent to the passage of the title and of possession so that the vendee acquires a valid title subject to be defeated only by the non-performance of the condition prescribed, a *bona fide* purchaser from him acquires a valid title which cannot be assailed by the conditional vendor, even though the result may work a fraud upon him.[4] But if the condition is precedent to the passage of the title, as where a sale and delivery of goods is made on condition that the title to the property is not to vest until the purchase money is paid or secured, the title to the goods, notwithstanding their delivery, remains in the vendor until the condition has been performed. The vendee who has not yet acquired title to the goods, by reason of the non-performance of the condition, can convey no right to a *bona fide* purchaser which can be enforced against the conditional vendor.[5] This rule, of course,

1. Frank *v.* Patten, 49 Hun (N. Y.) 91.

The attorney of W sold one half of a printing establishment and newspaper to C, who, at the time of the sale, owned the other half. C placed his name at the head of the paper as sole owner, and assumed exclusive possession and control thereof. The sale was made on condition that a part of the purchase-money should be paid in cash and the balance in instalments. Before these instalments were all paid, the property was sold at sheriff's sale and bought by M, a creditor of C. No claim to the property was made by W at the time of the sale. There was some evidence that C had agreed to rescind the contract of sale, which C denied. The latter also, at the time of the sale, informed M that he owned the property. W filed a bill in equity to compel M to account. Held, that under these circumstances creditors of C would be led to believe that C's title was absolute and unconditional, and W was estopped from setting up the conditions of the sale to defeat that title in a contest with *bona fide* creditors. Wylie's Appeal, 90 Pa. St. 210.

2. See *supra*, this title, *Rights of Third Parties.* Rawson Mfg. Co. *v.* Richards, 69 Wis. 643.

3. Thomas *v.* Richards, 69 Wis. 671.

4. Hotchkiss *v.* Higgins, 52 Conn. 205; 52 Am. Rep. 582; Hall *v.* Ætna Mfg. Co., 30 Iowa 215; Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Southwick *v.* Smith, 29 Me. 228; Buswell *v.* Bicknell, 17 Me. 344; 35 Am. Dec. 262; Perkins *v.* Douglass, 20 Me. 317; Hills *v.* Snell, 104 Mass. 173; 6 Am. Rep. 216; Martin *v.* Adams, 104 Mass. 262; McKinney *v.* Bradlee, 117 Mass. 321; Ray *v.* Thompson, 12 Cush. (Mass.) 281; 59 Am. Dec. 187; Schlesinger *v.* Stratton, 9 R. I. 578; Chamberlain *v.* Dickey, 31 Wis. 68; Moss *v.* Sweet, 16 Q. B. 493.

A sale of horses under a contract that the owner delivers them to the buyer on condition that he shall pay over to the owner the first money received on their resale, or if he does not do so, that they shall be subject to the vendor's order at any time, a valid title passes to the buyer and can be transferred to a purchaser. Chamberlain *v.* Dickey, 31 Wis. 68.

5. Homans *v.* Newton, 4 Fed. Rep. 880; Blackwell *v.* Walker, 5 Fed. Rep. 419; Thompson *v.* Walker, 2 McCrary (U. S.) 33; Harkness *v.* Russell, 118 U. S. 663; *In re* Binford, 3 Hughes (U. S.) 295; Truman *v.* Hardin, 5 Sawy. (U. S.) 115; Fosdick *v.* Schall, 99 U. S. 235;

Copland *v.* Bosquet, 4 Wash. (C. C.) 588; Dudley *v.* Abner, 52 Ala. 572; Fairbanks *v.* Eureka Co., 67 Ala. 109; Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165; Holman *v.* Lock, 51 Ala. 287; Simpson *v.* Shackelford, 49 Ark. 63; McRea *v.* Merrifield, 48 Ark. 160; McIntosh *v.* Hills, 47 Ark. 363; Carroll *v.* Wiggins, 30 Ark. 402; Sere *v.* McGovern, 65 Cal. 244; Hegler *v.* Eddy, 53 Cal. 597; Cardinell *v.* Bennett, 52 Cal. 476; Kohler *v.* Hayes, 41 Cal. 455; Putnam *v.* Lamphier, 36 Cal. 151; Cooley *v.* Gillan, 54 Conn. 80; Brown *v.* Fitch, 43 Conn. 512; Cragin *v.* Coe, 29 Conn. 51; Baring *v.* Galpin, 57 Conn. 352; Forbes *v.* Marsh, 15 Conn. 384; Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412; Sims *v.* James, 62 Ga. 260; Goodwin *v.* May, 23 Ga. 205; Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 325; Hodson *v.* Warner, 60 Ind. 214; Bradshaw *v.* Warner, 54 Ind. 58; Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31; 58 Am. Rep. 382; Baals *v.* Stewart, 109 Ind. 371; Dunbar *v.* Rawles, 28 Ind. 225; 92 Am. Dec. 311; Hanway *v.* Wallace, 18 Ind. 377; Plummer *v.* Shirley, 16 Ind. 380; Shireman *v.* Jackson, 14 Ind. 459; Thomas *v.* Winters, 12 Ind. 322; Thorpe *v.* Fowler, 57 Iowa 541; Warner *v.* Jameson, 52 Iowa 70; Moseley *v.* Shattuck, 43 Iowa 540; Baker *v.* Hall, 15 Iowa 277; Bailey *v.* Harris, 8 Iowa 331; 74 Am. Dec. 312; Lynds *v.* Winkler, 23 Kan. 697; Hall *v.* Draper, 20 Kan. 139; Sumner *v.* McFarlan, 15 Kan. 600; Owens *v.* Hastings, 18 Kan. 446; Hallowell *v.* Milne, 16 Kan. 65; Bunker *v.* McKenney, 63 Me. 529; Allen *v.* Delano, 55 Me. 113; 92 Am. Dec. 573; Brown *v.* Haynes, 52 Me. 578; Hotchkiss *v.* Hunt, 49 Me. 219; Sawyer *v.* Fisher, 32 Me. 28; Whipple *v.* Gilpatrick, 19 Me. 427; Sawyer *v.* Shaw, 9 Me. 47; Blanchard *v.* Cooke, 144 Mass. 207; Colcord *v.* McDonald, 128 Mass. 470; Salomon *v.* Hathaway, 126 Mass. 482; Burbank *v.* Crooker, 7 Gray (Mass.) 158; 66 Am. Dec. 470; Augier *v.* Taunton Paper Mfg. Co., 1 Gray (Mass.) 621; 61 Am. Dec. 436; Marquette Mfg. Co. *v.* Jeffery, 49 Mich. 283; Smith *v.* Lozo, 42 Mich. 6; Deyoe *v.* Jamison, 33 Mich. 94; Johnston *v.* Whittemore, 27 Mich. 463; Fifield *v.* Elmer, 25 Mich. 48; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224; 20 Am. St. Rep. 566; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Couse *v.* Tregent, 11 Mich. 65; Duke *v.* Shackleford, 56 Miss. 552; Ketchum *v.* Brennan, 53 Miss. 597; Mount *v.* Harris, 1 Smed. & M. (Miss.) 185; 40 Am. Dec. 89; Ridgeway *v.* Kennedy, 52 Mo. 24; Little *v.* Page, 44 Mo. 412; Parmlee *v.* Catherwood, 36 Mo. 479; Sumner *v.* Cottey, 71 Mo. 121; Heinbockle *v.* Zugbaum, 5 Mont. 344; 51 Am. Rep. 59; Clayton *v.* Hester, 80 N. Car. 275; Aultman *v.* Mallory, 5 Neb. 178; 25 Am. Rep. 478; Weeks *v.* Pike, 60 N. H. 447; King *v.* Bates, 57 N. H. 446; McFarland *v.* Farmer, 42 N. H. 386; Kimball *v.* Jackman, 42 N. H. 242; Porter *v.* Pettingill, 12 N. H. 299; Davis *v.* Emery, 11 N. H. 230; Luey *v.* Bundy, 9 N. H. 298; 32 Am. Dec. 359; Marvin's Safe Co. *v.* Norton, 48 N. J. L. 410; 57 Am. Rep. 566; Cole *v.* Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Redewill *v.* Gillen, 4 N. Mex. 78; Boon *v.* Moss, 70 N. Y. 473; Puffer *v.* Reeve, 35 Hun (N. Y.) 480; Ballard *v.* Burgett, 40 N. Y. 314; Hasbrouck *v.* Lounsbury, 26 N. Y. 598; Williams *v.* Merle, 11 Wend. (N. Y.) 80; 25 Am. Dec. 604; Austin *v.* Dye, 46 N. Y. 500; Andrews *v.* Dieterich, 14 Wend. (N. Y.) 31; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; Cardinal *v.* Edwards, 5 Nev. 36; Vasser *v.* Buxton, 88 N. Car. 339; Clayton *v.* Hester, 80 N. Car. 275; Parris *v.* Roberts, 12 Ired. (N. Car.) 268; 55 Am. Dec. 415; Ellison *v.* Jones, 4 Ired. (N. Car.) 48; Call *v.* Seymour, 40 Ohio St. 670; Sanders *v.* Keber, 28 Ohio St. 630; Sage *v.* Sleutz, 23 Ohio St. 1; Singer Mfg. Co. *v.* Graham, 8 Oregon 17; 34 Am. Rep. 572; Rosendorf *v.* Baker, 8 Oregon 240; Goodell *v.* Fairbrother, 12 R. I. 233; 34 Am. Rep. 631; Reeves *v.* Harris, 1 Bailey (S. Car.) 563; Bradshaw *v.* Thomas, 7 Yerg. (Tenn.) 497; Price *v.* Jones, 3 Head (Tenn.) 84; Harding *v.* Metz, 1 Tenn. Ch. 610; Buson *v.* Dougherty, 11 Humph. (Tenn.) 50; Gambling *v.* Read, Meigs (Tenn.) 281; City Nat. Bank *v.* Tufts, 63 Tex. 113; Sinker *v.* Comparet, 62 Tex. 470; Leath *v.* Uttley, 66 Tex. 82; Clark *v.* Wells, 45 Vt. 4; 12 Am. Rep. 187; Kent *v.* Buck, 45 Vt. 18; Armington *v.* Houston, 38 Vt. 448; 91 Am. Dec. 366; Child *v.* Allen, 33 Vt. 476; Davis *v.* Bradley, 24 Vt. 55; Buckmaster *v.* Mower, 22 Vt. 203; Grant *v.* King, 14 Vt. 367; Bigelow *v.* Huntley, 8 Vt. 151; De Saint Germain *v.* Wind, 3 Wash. Ter. 189; Mason *v.* Johnson, 27 U. C. C. P. 208; Walker *v.* Hyman, 1 Ont. App. 345; Mason *v.* Bickle, 2 Ont. App. 291; Tufts *v.* Mottashed, 29 U. C. C. P. 539; Stevenson *v.* Rice, 24 U. C. C. P. 245.

applies only in States where there are no statutes requiring conditional sales to be recorded. The rule has been so productive of fraud and so injurious to innocent purchasers, that in many States statutes have been passed requiring the conditional vendor to have the contract made in writing and some written evidence recorded thereof in the proper office within the time limited.[1] Some of the States independent of statutory authority have refused to apply the rule. There are many cases which hold that a conditional sale will not affect the title of the *bona fide* purchaser even though it be expressly stipulated by the parties that the ownership shall remain in the original vendor.[2]

A sold a certain mare to B, with the express agreement that, until the whole of the purchase money was paid over, the title should remain in A. Before payment of the purchase money due, and without the knowledge of A, B sold the mare. Held, that B had no vested right in the mare and could convey no title by sale; and A, being guilty of no laches, might reclaim the property from an innocent purchaser without notice. Little *v.* Page, 44 Mo. 412.

1. See *supra*, this title, *Rights of Third Parties.*

In *Arkansas*, *Connecticut*, *Florida*, *Kentucky*, *Maryland*, *Oregon*, *Nevada*, and *Tennessee* there are no statutes requiring recordation of conditional sales.

2. Dias *v.* Chickering, 64 Md. 348; 54 Am. Rep. 770; Hall *v.* Hinks, 21 Md. 406; Vaughn *v.* Hopson, 10 Bush. (Ky.) 337; overruling Patton *v.* McCane, 15 B. Mon. (Ky.) 555; Patchin *v.* Biggerstoff, 25 Mo. App. 534; Parker *v.* Baxter, 86 N. Y. 586; Wait *v.* Green, 36 N. Y. 556; Comer *v.* Cunningham, 77 N. Y. 391; Smith *v.* Lynes, 5 N. Y. 41; Forrest *v.* Nelson, 108 Pa. St. 481; Stadtfeld *v.* Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661; Dearborn *v.* Raysor, 132 Pa. St. 231; see Silver Bow Min., etc., Co. *v.* Lowry, 6 Mont. 288.

In *Colorado*, where property is sold on deferred payment, the title to remain in the vendor until full payment but no record is made of such contract, and it is known only to the parties thereto and the property is delivered to the vendee, the contract is void as to the vendee's creditors and the property may be attached and sold for the vendee's debts. George *v.* Tufts, 5 Colo. 162; Weber *v.* Diebold Safe & Lock Co. (Colo. 1892), 29 Pac. Rep. 747.

In *Pennsylvania*, where furniture was sold upon the written agreement of the purchaser to pay not less than $5 a week until the price was paid, the goods to remain the property of the seller subject to removal upon failure to make any or all of such payments, and the furniture was delivered to the purchaser, who failed to make any payment and sold it to a third person who had no knowledge of the agreement, it was held that the latter obtained a valid title. Stadtfield *v.* Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661.

Although a condition sale of chattels, followed by delivery of possession to the vendee, with a reservation of title in the vendor till payment of purchase price, is void as against *bona fide* purchasers from the vendee under the theory of law obtaining in Pennsylvania, yet if the purchase from the vendee is entirely completed within the State of New Jersey, where such purchases are held subject to the superior title of the conditional sale, the purchaser's rights will be determined by the law of New Jersey, and he will take no title, although the conditional sale itself was completed in Pennsylvania, and, as to the parties thereto, is governed by Pennsylvania law. Marvin Safe Co. *v.* Norton, 48 N. J. L. 410; 57 Am. Rep. 566.

In *Illinois*, a *bona fide* purchaser from a conditional vendee without notice has a valid title. See Hide, etc., Nat. Bank *v.* West, 20 Ill. App. 61; Harkness *v.* Russell, 118 U. S. 663; Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec. 476.

So liens which treat the seller of personal property, who has delivered possession of it to a purchaser, as the owner until the payment of the purchase money, are constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec.

The object of statutes requiring the recordation of conditional sales is to furnish to purchasers the means of ascertaining the condition of title. If the sale is not recorded in the manner prescribed, notice of the sale is necessary to render it valid against an innocent purchaser for value.[1] Where a purchaser from the conditional vendee has knowledge of the non-compliance with the terms and conditions of the contract between the original parties, he acquires no better title as against the original vendor than the first purchaser had and may be held liable to him for conversion.[2]

d. RIGHT TO RETAKE PROPERTY.—Where property is sold upon condition that the title shall not vest in the buyer unless he pays the price agreed upon by a specified time, the seller may retake the property if transferred to a third party before the condition has been performed.[3] He will, however, lose his right to retake the property as against one who buys from the conditional buyer *bona fide* without notice of the condition if he is guilty of laches in asserting his right, or if his conduct has been such as to waive performance of the condition.[4] In an action by the seller against the third person, who has acquired the property subject to his right, the measure of damages is the value of the property converted at the time and place of conversion with interest from that date.[5]

SALE, SHORT.—See GAMBLING CONTRACTS, vol. 8, p. 1004; ILLEGAL SALES, vol. 9, p. 927.

SALOON—(See generally INTOXICATING LIQUORS, vol. 11, p. 105; RESTAURANT).—A place of refreshment;[6] a hall of recep-

476; Ketchum *v.* Watson, 24 Ill. 591; McCormack *v.* Hadden, 37 Ill. 370; Murch *v.* Wright, 46 Ill. 487; 95 Am. Dec. 455.

1. Moline Plow Co. *v.* Braden, 71 Iowa 141.

2. Gerow *v.* Castello, 11 Colo. 560; 7 Am. St. Rep. 260.

The equities of a surety on a conditional sale, to whom the contract has been assigned, are superior to those of a subsequent vendee of the property with notice. Myres *v.* Yaple, 60 Mich. 339.

3. Brown *v.* Haynes, 52 Me. 581. See Pratt *v.* Burhaus, 84 Mich. 487; 22 Am. St. Rep. 703.

4. Robbins *v.* Phillips, 68 Mo. 100; Brown *v.* Haynes, 52 Me. 581; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545.

Where goods are delivered pursuant to a conditional sale, and the condition is not performed, if the vendor do not reclaim the goods, as his property, within a reasonable time after the delivery, he will be considered as having waived the condition and affirmed the sale. Marston *v.* Baldwin, 17 Mass. 606.

5. Colcord *v.* McDonald, 128 Mass. 470; Brown *v.* Haynes, 52 Me. 581.

Property to Be Paid for By Instalments.—Where the owner of property has transferred the possession thereof to another person with the agreement that it should become his property upon the payment of a certain sum in weekly instalments, brings an action against a third person for a conversion of the chattel after payment of some of the instalments and a failure to pay the remainder, the measure of damages is the whole value of the property with interest from the time of conversion. Colcord *v.* McDonald, 128 Mass. 470; Angier *v.* Taunton Paper Mfg. Co., 1 Gray (Mass.) 621; 61 Am. Dec. 436. See Everett *v.* Hall, 67 Me. 497.

6. Worcester's Dict. *followed* in Kitson *v.* Mayor, etc., of Ann Arbor, 26 Mich. 325.

tion; a large public room or parlor; an apartment for a specified public use,[1] as the saloon of a steamboat, a refreshment saloon or the like.

In common parlance, the word is used to designate a place where intoxicating liquors are sold, and this restricted meaning may be given to "saloon" where the context or other circumstances require it.[2] But while "saloon" may be given this confined signification, it has been frequently held that it does not necessarily import a place where liquors are sold.[3]

SALT LICK; SALT SPRING.—See LICK, vol. 13, p. 573.

An inclosed park of four acres and an uninclosed and uncovered platform for dancing are not a "saloon, house or building," within the *Connecticut* statute concerning the sale of intoxicating liquors, no liquors having been sold upon the platform. State *v.* Barr, 39 Conn. 41.

A saloon is supposed to be a place for obtaining refreshment; and a pool table belonging to it is not, as matter of law, exempt from execution as apparatus necessary to enable the saloon-keeper to carry on his business. Goozen *v.* Phillips, 49 Mich. 7.

1. Webster's Dict. *followed* in Clinton *v.* Grusendorf (Iowa, 1890), 45 N. W. Rep. 408. See also *Ex parte* Livingston, 20 Nev. 282.

2. McDougall *v.* Giacomini, 13 Neb. 434; Dewar *v.* People, 40 Mich. 401; 29 Am. Rep. 545; *Ex parte* Livingston, 20 Nev. 282. See also Cahill *v.* Campbell, 105 Mass. 40.

3. Kitson *v.* Mayor, etc., of Ann Arbor, 26 Mich. 328; Clinton *v.* Grusendorf (Iowa, 1890), 45 N. W. Rep. 407.

A saloon does not necessarily mean a house for retailing spirituous liquors. Springfield *v.* State (Tex. 1890), 13 S. W. Rep. 752; see also Early's Case, 23 Tex. App. 364.

A house or room used for retailing spirituous liquors is sometimes improperly called a saloon, but this improper use of the word cannot import to it any such improper legal signification. State *v.* Mansker, 36 Tex. 365.

Saloon Distinguished from Dram Shop.—An *Arkansas* statute made it a misdemeanor for the owner of a dram shop or saloon to allow a minor to play at a game of pool in such dram shop or saloon. It was held that it was not necessary that ardent liquors should be sold at a place in order to constitute it a saloon. The court, by Cockrill, C. J., said: "There is nothing in the act, nor in the evil it was intended to prevent, to indicate that the words 'dram shop' and 'saloon' are used as synonymous in meaning. Neither in accurate signification nor by common acceptance are they identical in meaning. A dram shop or place where spirituous liquors are sold by the drink, is commonly called a saloon, but the latter word has a much broader meaning. To constitute a saloon, it is not necessary that ardent spirits should be offered for sale, or that it should be a business requiring a license under the revenue laws of the State." Snow *v.* State, 50 Ark. 561.

Saloon Purposes.—A *Michigan* statute provides that where a place used for the unlawful manufacture and sale of intoxicating liquors is declared a nuisance, the court shall order the same to be securely closed "against the use and occupation of the same for saloon purposes." It was held that "the term 'saloon,' though often differently applied, as used in this statute, has reference to places that are nuisances by reason of the unlawful manufacturing, selling, or occupying for sale, of intoxicating liquors;" and that premises used for the manufacture of beer were within the statute. Craig *v.* Werthmueller, 78 Iowa 598.

Saloon and Bar.—See BAR, vol. 2, p. 121.

Saloon-Keeper—(See also MERCHANT, vol. 15, p. 306).—In Cahill *v.* Campbell, 105 Mass. 40, it was held that the term "saloon-keeper," when applied to a business carried on in a country town, was sufficiently definite to sustain the certificate of a married woman, under a statute requiring a married woman to file a certificate containing a description of any business proposed to be done by her on her separate account.

SALVAGE—(See also GENERAL AVERAGE, vol. 8, p. 1303; LOGS AND LUMBER, vol. 13, p. 1039; MARITIME LIENS, vol. 14, pp. 436, 442; SEAMAN; SHIPPING; TOWAGE; WRECKS).

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I. DEFINITION.—Salvage is defined as an allowance to persons by whose assistance a ship or boat, or the cargo of a ship or the lives of the persons belonging to her, are saved from danger or loss, in cases of shipwreck, derelict, capture, or the like.[1]

II. NATURE OF THE SERVICE—1. Generally.—To make a case of salvage, the labor performed must constitute a salvage service. In determining this, certain elements are to be considered which are: first, enterprise in the salvors in going out in tempestuous weather to assist the vessel in distress, risking their lives to save life and property;[2] second, the degree of danger and distress from which the property is rescued; third, the degree of labor and skill shown; fourth, the time occupied; fifth, the value of the property and the success of their efforts.[3] When all these

1. Weeks *v.* The Catharine Maria, 2 Pet. Adm. 424; Lea *v.* Alexander, 2 Paine (U. S.) 466; Sonderburg *v.* Ocean Tow-Boat Co., 3 Woods (U. S.) 146; The H. B. Foster, Abb. Adm. 222; 6 N. Y. Leg. Obs. 223; McConnochin *v.* Kerr, 15 Fed. Rep. 545; The Old Natchez, 9 Fed. Rep. 478; Adams *v.* The Island City, 1 Cliff. (U. S.) 210; The Hyderabad, 11 Fed. Rep. 749; 11 Biss. (U. S.) 112; Evans *v.* Ship Charles, Newb. Adm. 329; The Fannie Brown, 30 Fed. Rep. 215; The Kate Collins, 21 Fed. Rep. 409; Stone *v.* The Jewell, 41 Fed. Rep. 103; The Brandow, 29 Fed. Rep. 878; Maude & Pollock on Merch. Ship, ch. 10; James on Sal., ch. 1; The Lee, 24 Fed. Rep. 47.

The term "salvage" is used to express the service rendered, the property saved and the remuneration payable to those who have received it. In the latter sense, and the only one in which it has to be considered here, it may be shortly described as an allowance for saving a ship or goods or both from the dangers of the seas, fire, pirates, or enemies. See Lea *v.* The Alexander, 2 Paine (U. S.) 466.

2. Union Tow-Boat Co. *v.* Bark Delphos, Newb. Adm. 419; The Narragansett, Olc. Adm. 390; The Merique, 3 Hagg. Adm. 117; Schooner Emulous, 1 Sumn. (U. S.) 207.

3. Ship Henry Ewbank, 1 Sumn. (U. S.) 412; The Blendenhall, 1 Dods. 414; The Waterloo, 2 Dods. 433;

concur, a large reward should be given; where none, or scarcely any, the compensation can hardly be termed a salvage compensation, but it is little more than remuneration *pro opere et labore*.[1]

The property must be susceptible of salvage service,[2] and the service must be voluntary and not owed to the property or to the owner;[3] but the service, however, need not necessarily be rendered upon the high seas. It is enough, in respect to locality, that it be within the admiralty and maritime jurisdiction, and that comprehends as well the high seas as the sea coast, navigable rivers as high as where the tide ebbs and flows, although it should be within the body of a county.[4]

Baker *v.* Hemenway, 2 Low. (U. S.) 501; Bowley *v.* Goddard, 1 Low. (U. S.) 154.

Risk of life is not a necessary element of salvage service where such risk is incurred in saving property. It will, however, place the salvors in a higher position of merit and entitle them to get more liberal compensation for services than would otherwise be accorded. The Charles Avery, 1 Bond (U. S.) 119; see also the Pericles, Br. & L. 80; The Bomarsund, Lush. 77; The Norden, 1 Spinks 185; The Burns, 24 L. T. N. S. 232; The Emblem, Dav. 61.

1. The Clifton, 3 Hagg. Adm. 117; The Mary, 1 W. Rob. 448; The Nimrod, 7 N. of Cas. 570; The Persia, 1 Spinks 166; The City of Edenburgh, 2 Hagg. Adm. 333.

2. Cope *v.* Valette Dry Dock Co., 119 U. S. 625; *affirmed* 16 Fed. Rep. 924.

A floating dry dock is not the subject of salvage services. Salvor Wrecking Co. *v.* Section Dry Dock Co., 2 Cent. L. J. 640; Cope *v.* Valette Dry Dock Co., 10 Fed. Rep. 142.

A dismantled steamboat not fitted up for navigation but used as a restaurant, is not the subject of the admiralty lien for salvage. The Hendrick Hudson, 3 Ben. (U. S.) 419. *Compare* The Old Natchez, 9 Fed. Rep. 478.

Nor is a raft of logs adrift in the Susquehanna river, a subject of salvage service. Gastrel *v.* A Cypress Raft, 2 Woods (U. S.) 213; Raft of Cypress Logs, 1 Flip. (U. S.) 543; Tome *v.* Cribs of Timber, Taney (U. S.) 543.

But in Muntz *v.* Raft of Timber, 15 Fed. Rep. 557, it was held that a raft adrift in the Mississippi was the subject of the salvage lien.

So, in Fifty thousand feet of timber, 2 Low. (U. S.) 64, it was held that salvage service may be rendered to a raft of timber found derelict, and the lien therefor enforced in admiralty.

Any vessel in any way connected with commerce or transportation, or the parts of such a vessel or of its cargo, is the subject of salvage service; such as a barge adrift, 7 Coal Barges, 2 Biss. (U. S.) 297; Box of Bullion, 1 Sprague (U. S.) 57; a ferry boat, The Cheesman *v.* Two Ferry Boats, 2 Bond (U. S.) 363; a lighter, The General Cass, 4 Chic. Leg. News 89; and the saving of the cargo of a vessel wrecked and ashore, A Raft of Spars, 1 Abb. Adm. 291; Schooner Emulous, 1 Sumn. (U. S.) 207. See Gastrel *v.* A Cypress Raft, 2 Woods (U. S.) 213.

Pulling boilers out of a navigable river into which they had fallen from a wreck of a steamboat, held, a salvage service. The Silver Spray, Brown Adm. 349.

A derrick-boat sunk in the channel of a public navigable river and raised may be the subject of a libel for salvage. Maltby *v.* Steam Derrick-boat, 3 Hughes (U. S.) 477.

Bills of Exchange.—The court can allow no salvage for saving from a wreck bills of exchange or other papers the evidence of a debt, or of title to property. The Emblem, Dav. 69.

3. Thus where vessels come into collision, no claim for salvage arises because one renders service afterwards to the other. Upon a collision either vessel is bound to render any aid which may be in her power, necessary to the safety of the other; and this is so even though she is not in fault for the collision. The Clarita & The Clara, 23 Wall. (U. S.) 1.

4. Baker *v.* Hoag, 7 N. Y. 555; 59 Am. Dec. 431; The Cheesman *v.* Two Ferry Boats, 2 Bond (U. S.) 363.

2. Degree of Peril.—The owners of a ship will not be liable for salvage in the absence of the existence of risk, injury or danger.[1] It is held, however, that the distress need not be imminent and absolute. It will be sufficient if, at the time the assistance was rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.[2] If the vessel is within reason-

In this country, it is clear that salvage compensation may be obtained in admiralty for services rendered within the ebb and flow of the tide without regard to location, whether on the high seas or *inter fauces terræ*. The John Gilpin, Olc. Adm. 77.

In salvage cases on our rivers, the precedents of courts administering admiralty law on the ocean cannot safely be adopted in regard to the amount of compensation. The Pontiac, 1 Newb. Adm. 130.

1. The Brandow, 29 Fed. Rep. 880; Seven Coal Barges, 2 Biss. (U. S.) 301; The Union, 3 Ir. Jur. N. S. 462; The Henrietta, 3 Hagg. Adm. 345 n.

2. Stone *v.* The Jewell, 41 Fed. Rep. 103; The Plymouth Rock, 12 Fed. Rep. 634; Long *v.* The Tampico, 16 Fed. Rep. 491; McConnochie *v.* Kerr, 9 Fed. Rep. 50; The Dolcoath, 16 Fed. Rep. 264; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Murray *v.* Schooner Charming Betsey, 2 Cranch (U. S.) 64; The Saragossa, 1 Ben. (U. S.) 551; Talbot *v.* Ship Amelia, 4 Dall. (U. S.) 34; The Giacomo, 3 Hagg. Adm. 344; The Mary E. Long, 14 Phila. (Pa.) 598; The Cornelius Cornell, 26 Law Rep. 677; The Charlotte, 3 W. Rob. 68; *compare* McGinnis *v.* The Pontiac, 5 McLean (U. S.) 357; The H. B. Foster, Abb. Adm. 230; Schooner Emulous, 1 Sumn. (U. S.) 107; The Delphos, Newb. Adm. 419.

In The Albion, Lush. 282, where the vessel proceeded against, being on a dangerous coast in unsettled weather with insufficient ground-tackle and her windlass and hawse-pipe disabled, was towed into port, the learned judge held the service to be one of salvage, observing: "The ship was certainly not in any imminent danger, but, on the other hand, she was on a most perilous coast, the weather was unsettled, and if a gale had set on to the shore, must have been in considerable danger from the want of sufficient ground-tackle, and the disabled condition of her hawse-pipe and windlass."

The peril has been held grave enough to justify salvage compensation in the following cases:

A vessel dismasted in a gale lying at anchor on a bank in the open sea, The Independence, 2 Curt. (U. S.) 350; or found in a storm without a rudder, Norris *v.* Island City, 1 Cliff. (U. S.) 219; or grounded upon a reef and leaking badly, where a change of wind might create sufficient wind to break her up, The Athenæum, 3 Fed. Rep. 248.

Where some barges broke from their moorings and floated down the river, the current being rapid and the river high and some danger was incurred by the libelants in rescuing them, although at the time of the rescue the owners of the barges were descending the river independent of the libelants, Hubbard *v.* Seven Coal Barges, 3 Am. L. T. N. S. 109; a vessel upon a reef abandoned, The Independence, 2 Curt. (U. S.) 351; The Versailles, 1 Curt. (U. S.) 353; or abandoned and floating in the sea, The Ida L. Howard, 1 Low. (U. S.) 3; The Lovett Peacock, 1 Low. (U. S.) 143.

A vessel in point of fact for several hours in a condition where her instant destruction was menaced and the lives on board greatly jeoparded, is in a condition to have salvage services. The John Gilpin, Olc. Adm. 77.

So, where a barge without a small boat, provisions, or other means of propulsion was adrift upon Lake St. Clair, although she had come to anchor and the weather was good, The Union Express, 1 Brown Adm. 516; or a small ferry boat or a barge adrift on the Ohio river and in peril, is a proper subject for salvage service. The Cheesman *v.* Two Ferry Boats, 2 Bond (U. S.) 363; Seven Coal Barges, 2 Biss. (U. S.) 297.

A claim for salvage was filed in behalf of a steamboat for saving a sloop which had been abandoned, but to which the crew were returning at

able apprehension of actual danger, the assistance rendered to her under such circumstances, will be of the nature of salvage service, though she had sustained no real damage.[1]

The degree of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commences.[2] This may be shown better by the facts of the case, such as the vessel's position, the state of the tide, course and strength of the winds, and the knowledge or ignorance of the dangers of the locality on the part of those in charge than by the opinions of witnesses, whose judgments are often warped by interest.[3] And where the crew of the vessel proceeded against, receives strange hands on board, keeps them there, and takes the benefit of their services, that fact will be some evidence of the vessel being in distress.[4]

3. Services Must be Beneficial.—If the services of the alleged salvors do not contribute immediately to the rescue or preservation of the property in peril, no salvage can be claimed.[5] If the property is not in fact saved by their instrumentality, no salvage can be allowed however benevolent may have been their intentions or heroic their conduct.[6] The reason is obvious, viz., that

the time of her rescue from a perilous position, was allowed, although the crew of the sloop and others testified that in their opinion, the vessel would have been saved by her own crew even if the steamboat had not gone to her aid. Holmes *v.* The Joseph C. Driggs, 1 Ben. (U. S.) 81.

1. The Mira A. Pratt, 31 Fed. Rep. 572. In the case of The Aztecs, 21 L. T. N. S. 797, Sir Robert Phillimon, said: "It certainly is a mistake as to the law of salvage to suppose that in order to constitute a salvage service, a vessel must be in actual danger at the time when the services are rendered to her. The danger may be probable or imminent which may warrant the court, according to the varying circumstances of each case, in awarding a salvage remuneration." See The Phantom, L. R., 1 A. & E. 58; The Raikes, 1 Hagg. Adm. 246. See also Holmes *v.* The Joseph C. Griggs, 1 Ben. (U. S.) 80.

2. McGinnis *v.* Steamboat Pontiac, 5 McLean (U. S.) 359.

3. See Hand *v.* The Elvira, Gilp. (U. S.) 60.

4. The Bomarsund, Lush. 77.

5. The John Wurts, Olc. Adm. 462; Montgomery *v.* The T. P. Leathers, Newb. Adm. 421; Emerson *v.* Proceeds of The Pandora, Newb. Adm. 438; The Whitaker, 1 Sprague (U. S.) 282; The Blackwall, 10 Wall. (U. S.) 1; Santipore, 1 Spinks 231; The E. U., 1 Spinks 63; The Atlas, Lush. 518; The Albion Lincoln, 1 Low. (U. S.) 76; The Avoca, 39 Fed. Rep. 567.

A steamer, disabled by the breaking of her propeller shaft, made signals of distress, which were observed by another steamer which took her in tow, and, after towing her twelve hours, voluntarily cast off the hawser, without communication with her and under no stress of weather, and left her in no better position in any respect than when she found her. *Held*, neither a salvage nor a towage service, for which any compensation should be made. The Algitha, 17 Fed. Rep. 551.

6. The Charles Avery, 1 Bond (U. S.) 119; Blagg *v.* Bicknell, 1 Bond (U. S.) 270; Schooner Emulous, 1 Sumn. (U. S.) 216; The Zephyrus, 1 W. Rob. 329; see The Ranger, 9 Jur. 119; The Undaunted, Lush. 90; The Edward Hawkins, Lush. 515; The Chetah, 38 L. J. Adm. 1; Clark *v.* The Dodge Healy, 4 Wash. (U. S.) 651; Montgomery *v.* The T. P. Leathers, Newb. Adm. 421; The Brandow, 29 Fed. Rep. 878; The Edward Hawkins, 31 L. J. Adm. 46; 15 Moore P. C. 486; The Lockwood, 9 Jur. 1017; Barden *v.* The William Penn, 2 Hughes (U. S.) 144. See The Fields *v.* The Sailor's Bride, 17 Leg. Intel. 245; The Blackwall, 10 Wall. (U. S.) 1; The John Wurts, Olc. Adm. 462; Clarke *v.* The Dodge

salvage reward is for benefits actually conferred, and not for services attempted to be rendered,[1] and that reward always bears a proportion to the skill and knowledge required and shown, the degree of skill and knowledge expected being according to the station in life of the salvors.[2]

The general rule that there can be no claim where the efforts to save have not been attended with success, applies only to salvors who volunteer services and not to those who are engaged. There is a broad distinction between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labor unsuccessfully, they are entitled to nothing. The effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labor and service may not prove beneficial to the vessel.[3] And if a vessel in distress accepts the services of strange hands, such services are in the nature of salvage, even though the work done may be of no great difficulty or importance.[4]

The courts look with considerable indulgence on the efforts of persons offering their services to vessels in distress where there are no other individuals on the spot capable of rendering more efficient assistance; but different considerations apply to the conduct of individuals assuming the character of salvors when there are other persons at hand more competent to discharge those duties,[5] and although no salvage is due unless assistance is actually rendered, circumstances may justify the court in directing the expenses of parties, attempting to render a service, to be paid by the ship which had been in danger; as, for instance, where the danger has been incurred by neglect, and such neglect has involved risks to the parties attempting to render assistance.[6]

If part of a salvage service is performed, the salvors are entitled to reward *pro tanto*, though others complete it, as in the case of

Healy, 4 Wash. (U. S.) 651; Emerson *v.* Proceeds of The Pandora, Newb. Adm. 438; Montgomery *v.* The T. P. Leathers, Newb. Adm. 421; The Whittaker, 1 Sprague (U. S.) 282; The Algitha, 17 Fed. Rep. 551; Anderson *v.* The Edam, 13 Fed. Rep. 135; The Tolomeo, 7 Fed. Rep. 497.

1. The Zephyrus, 1 W. Rob. 329; The India, 1 W. Rob. 408.

2. The Lockwood, 9 Jur. 1017.

3. The Undaunted, Lush. 92; The Bomarsund, 1 Lush. 77; see Allen *v.* The Canada, Bee Adm. 90; The J. G. Paint, 2 Ben. (U. S.) 147; The Underwriter, 4 Blatchf. (U. S.) 94; The Alpha, Lush. 518; The Charlotte, 3 W. Rob. 71; Stone *v.* The Jewel, 41 Fed. Rep. 103; The Queen of the Pacific, 21 Fed. Rep. 459; The Veendam, 46 Fed. Rep. 489.

Where the owners of a vessel telegraphed to a place where a steamer was lying, requesting her master to go to the relief of the vessel, which was in peril and needed assistance—held, that a compliance with the request and the performance of valuable services entitled the steamer to salvage. Adams *v.* The Island City, 1 Cliff. (U. S.) 210.

4. The Louisa Jane, 2 Low. (U. S.) 295.

5. The Dygden, 1 N. of Cas. 115.

6. The Ranger, 9 Jur. 119.

persons rendering assistance to a ship on a sand bar subsequently towed off by a steamer;[1] and this even, although the part they took, standing by itself, would not in fact have effected the salvage.[2] But a claim of salvors will, however, be disallowed on the ground that they had quitted the vessel, leaving the salvage service uncompleted.[3] If the peril arises from disabled machinery, and temporary repairs are made while salvage service is rendered, the salving vessel is not required to attempt to hold possession, unnecessarily, of the other vessel or to persist in attending her into port to the manifest embarrassment and possible danger of both, merely to preserve the right of compensation for what has been already earned.[4]

4. Services Rendered by Request.—If the master of a vessel in distress, requests the assistance of salvors by a signal of distress, or otherwise, and they render assistance in compliance with such request, they are entitled to salvage remuneration.[5] If they

1. Muntz *v.* Raft of Timber, 15 Fed. Rep. 555; The Samuel, 15 Jur. 407.

Where a derelict was found at sea by salvors, who were incapable of performing the attempted service but remained by the wreck until a second set of salvors came up, who dispossessed these first and brought it into port, the court allotted to the first set a sufficient sum to cover the expenses to which they had been put. The Magdalen, 31 L. J. N. S. Adm. 22.

2. Muntz *v.* Raft of Timber, 15 Fed. Rep. 555; The Atlas, Lush. 518. See The Jonge Bastiaan, 5 Rob. 323.

Where three vessels, at different times, rendered valuable services to a vessel in a continuous peril, it was held that each was entitled to salvage, although the separate services of each alone would not have saved the vessel. Adams *v.* The Island City, 1 Cliff. (U. S.) 210.

Salvors made great exertions to save a ship and cargo but were at length with her crew compelled to abandon her. She was afterwards found and saved by a steamer. *Held*, that the original salvors were entitled to salvage under the circumstances. The E. U., 1 Spinks 63. See also The Rosalind, 12 L. T. 553; The Genessee, 12 Jur. 401.

A valuable vessel having got upon the Church Rocks off Falkestone, received assistance from some small boats which were unable to get her off, a tug steamer having also tried in vain to tow her off. A large passenger steamer was sent from Falkestone harbor and succeeded in moving her from the rocks, and towing her for a few minutes, when her hawser, having broken, she drifted ashore and became a wreck. The cargo was saved. *Held*, that the boat's crew as well as the steamer's, were entitled to participate in the salvage award. See The Magdalen, 31 L. J. Adm. 22; The Coromandel, Swab. 205; The Atlas, Lush. 518.

3. The India, 1 W. Rob. 406; see The John Wurts, 1 Olc. Adm. 462; Ship Henry Eubank, 1 Sumn. (U. S.) 400.

There can be no recovery for services rendered to a derelict, however meritorious the services may be, where the derelict is abandoned by the salvors before reaching a place of safety. The Aberdeen, 27 Fed. Rep. 479.

A lighter lying near a pier loaded with cotton, which had taken fire, was towed by two tugs as far as the mouth of the slip where in some way she got adrift. The tugs paid no further attention to her, but devoted their whole attention to a burning steamship. The lighter drifted into another slip, where the fire department played water upon her, and other tugs towed her to a place where the fire was finally extinguished. *Held*, that the tugs lost all right to claim salvage compensation by abandoning the lighter when the hawser parted, thereby leaving her to drift into a position of greater peril than she was in at the place where she was taken. The Angeline Anderson, 34 Fed. Rep. 925.

4. The Veendam, 46 Fed. Rep. 492.

5. The New Orleans, 23 Fed. Rep. 909; The Young America, 20 Fed. Rep. 926; Gould *v.* U. S., 1 Ct. of Cl. 184.

incur danger, expense, or labor in compliance with such request and their aid is refused, they have a right to some compensation, at least, if the vessel ultimately comes to a place of safety.[1] Any services accepted by a ship in distress from and performed by strangers, will be salvage services,[2] notwithstanding that the danger be not imminent and absolute,[3] or that the work done is neither difficult nor important.[4]

If the service be rendered without any express demand or express acceptance, salvage will be awarded, unless the vessel only indirectly received a benefit from the service. It will be sufficient if, under the circumstances, no prudent man would have refused the services.[5] The ship's agent has the right to refuse the assistance, and if he does, no salvage will be payable.[6] The owners and master, of course, have the same right.[7] Salvors will not be allowed compensation for services rendered against the will and protest of the boat salved.[8] And where persons assum-

See Gibson *v.* The Alice Clark, 63 Fed. Rep. 621. If a vessel in need of salvage assistance makes a signal for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service is one of salvage. The James T. Abbott, 2 Sprague (U. S.) 101.

When a dispute arises as to whether a signal hoisted was for a tow or a signal of distress, the fact is to be determined by the state of the vessel itself at the time, and the court will consider the state of the vessel in order to determine whether such a signal was a signal for a tow or for assistance. The true question is: What was the condition of the ship? The character of the signal hoisted is only one part of the evidence bearing on the question. The Mira A. Pratt, 31 Fed. Rep. 572.

1. The Susan, 1 Sprague (U. S.) 499.

2. Stone *v.* The Jewell, 41 Fed. Rep. 103; The Alpha, Lush. 518; The Undaunted, Lush. 90.

3. Stone *v.* The Jewell, 41 Fed. Rep. 103; The Charlotte, 3 W. Rob. 68.

4. The Bomarsund, Lush. 77.

5. The Woburn Abbey, 21 L. T. 707; The Vandyck, 7 P. D. 42; The Annapolis & The Golden Light, Lush. 357.

6. The Samuel, 15 Jur. 407.

7. Newson on Salvage, 3. The Dantzic Packet, 3 Hagg. 383; The Glasgow Packet, 2 W. Rob. 306; 8 Jur. 674; 3 N. of Cas. 107.

8. The Chouteau, 4 Woods (U. S.) 71; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Davison *v.* Sealskins, 2 Paine (U. S.) 324.

Salvors cannot force themselves upon a vessel in distress against the will of the master, but it is at his option to accept their services or not. The Susan, 1 Sprague (U. S.) 499.

The lighter S, loaded with oil barrels, and in charge of the tug C, in the North river, got into difficulty by shipping considerable water in heavy swells from a passing steamer. The C was competent to take care of her, and was bound to do so. The tug H came up, and against the protest of the master of the lighter, but through the evident collusion of the C, succeeded in getting the lighter in her own charge, and towed her to the dock, and pumped her out, and thereupon refused for three days to deliver her to the owners, claiming salvage compensation on the false ground that the lighter had been abandoned and rescued by the H. In towing her she was negligently run against the wharf, causing some damage. *Held*, that the case was one of officious intermeddling with the duties of the C; that the case was not one of salvage, and that no compensation for pumping should be allowed, as it was more than offset by the injury for a groundless claim of abandonment and salvage, and detention of the lighter from her owners; and that the H should pay for the damage her negligence had caused the lighter. The J. W. Husted, 36 Fed. Rep. 604.

Whether the forcible taking possession of a vessel exposed to danger

ing to be salvors are able to judge from the circumstances under which the vessel was abandoned that their services were not desired, and they take possession with the intent of supplanting the master and owners in giving her relief, they have no claim for compensation.[1]

5. Advice May Constitute Salvage Service.—Advice may, in certain circumstances, constitute a salvage service.[2] But the mere giving of information concerning the locality even if needed is no salvage service.[3]

III. Who May be Salvors—1. Generally.—A salvor is a person who without any particular relation to the ship in distress, proffers useful service and renders it without any pre-existing contract making the service a duty.[4] All persons, therefore, giving personal assistance in saving property[5] who are not bound by any obligation or duty to do the service may be salvors.[6] The

against the will of the commander, can entitle the persons so acting to the merit and reward of salvors although they should contribute to save the vessel is however questioned in Clarke *v.* Brig Dodge Healy, 4 Wash. (U. S.) 651.

1. Bark Cleone, 6 Fed. Rep. 517. See The Hyderabad, 11 Fed. Rep. 749; Bryan *v.* U. S., 6 Ct. of Cl. 128.

2. See Beebe *v.* The Wisconsin, 32 Fed. Rep. 111.

A vessel ran on shore by mistaking her course, and being in danger, hoisted a signal of distress. A pilot's cutter came up and hailed the vessel to adopt certain measures. The vessel acted accordingly and came off the shore. *Held*, that the service so rendered by the cutter was in the nature of salvage. The Eliza, Lush. 536.

3. The Little Joe, Lush. 88.

4. The Neptune, 1 Hagg. Adm. 326; The Wave *v.* Hyer, 2 Paine (U. S.) 131; *reversed*, Blatchf. & H. Adm. 235; 7 N. Y. Leg. Obs. 97; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; Lea *v.* Alexander, 2 Paine (U. S.) 472; The Clarita & The Clara, 23 Wall. (U. S.) 1; The Acorn, 3 Ware (U. S.) 99; The Ida L. Howard, 1 Low. (U. S.) 2; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259.

5. The Ottawa, 1 Low. (U. S.) 274.

A bark in a sinking condition met a brigantine in mid ocean without any one on board who could navigate her. The bark's people thereupon boarded the brigantine, and the bark's master navigated the brigantine to port. *Held*, that he was entitled to salvage, but that his crew were entitled to nothing. The F. I. Merryman, 27 Fed. Rep. 313.

6. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; The Aroma Mills, 2 Hughes (U. S.) 41; The Columbine, 2 W. Rob. 186; Bell *v.* The Ann, 2 Pet. Adm. 278; The Two Friends, 1 Rob. 271.

The officers and crew of a foreign vessel of war may be salvors. Talbot *v.* Seeman, 1 Cranch (U. S.) 1; The Huntess, 4 Pa. L. J. 510.

And persons in public employment on a man of war. U. S. *v.* Schooner Armistad, 15 Pet. (U. S.) 518; The Aroma Mills, 2 Hughes (U. S.) 40; The Wilsons, 1 W. Rob. 172; The Thetis, 3 Hagg. Adm. 14.

And a revenue officer who seized a vessel and thereby saved it for the owners was held to be a salvor. Case of Le Tigre, 3 Wash. (U. S.) 567.

The fact that the salvor held a mortgage upon the vessel, not due, the mortgagor being the owners and in possession, does not deprive him of this preference. He cannot be considered in the light of an owner. The Barney Eaton, 1 Biss. (U. S.) 242.

The fact that the libelant for salvage on a schooner, being a partner in a firm to whom the schooner was consigned, was also interested in a lighter company, in no way affected his good faith or right to recover. The R. D. Bibber, 33 Fed. Rep. 55.

An agreement whereby an owner of some blocks lets them at a rate per day, to owners of a wrecked vessel to be used in hauling her off, the vessel to be responsible for the hire and safe return of the blocks, does not entitle the owner of the blocks to any salvage compensation, nor create any hypothecation of the vessel for the hire of the

fact that the salvors are women,[1] or that their names appear in the warrant issued for the arrest of the ship, will not deprive them of a claim to salvage remuneration.[2]

2. Master and Crew.—In case of salvage services rendered by one ship to another or its cargo, the master and all the members of the crew of the salving ship will be entitled to salvage remuneration, although only part of the crew may be actually employed in performing the services.[3] But the master and crew of the vessel

blocks, which can be enforced in admiralty. Squire *v.* One Hundred Tons of Iron, 2 Ben. (U. S.) 21.

A person whose oxen are used in a salvage service does not thereby become a salvor. Owners of vessels whose crews perform salvage service share the salvage compensation, not because their vessels are used, but as an encouragement to permit their use or the use of the men. Ottawa, 1 Low. (U. S.) 274.

Day Watchman.—A day watchman on the ship may claim salvage, if the fire occurs at night when his duties are over. The Florida, 22 Fed. Rep. 617.

Corporations.—Corporation may recover salvage in virtue of services of the vessel owned and employed by the corporation, if she was well manned and equipped for such service. The Blackwall, 10 Wall. (U. S.) 1.

Corporations owning vessels are as much entitled to salvage remuneration as are individual owners. Remuneration for salvage service is awarded to the owners of vessels, not because they are present or supposed to be present when the service is rendered, but on account of the danger to which the service exposes their property, and the risk which they run of loss in suffering their vessels to engage in such perilous undertakings. The Camanche, 8 Wall. (U. S.) 448.

Services rendered by a steam tug owned by a corporation engaged in the wrecking business in rescuing a vessel in distress, held to be a salvage service, and salvage compensation awarded to the corporation, in respect to its interest, in a suit brought by it alone against the vessel in admiralty. The Birdie, 7 Blatchf. (U. S.) 238. *Compare* the J. F. Farland, 3 Ben. (U. S.) 206; The Stratton Audley, 3 Ben. (U. S.) 241.

Firemen.—Firemen belonging to the fire department of the city who extinguish fire on a ship lying at a wharf, are not salvors, although there is no law or ordinance of the city especially making it their duty to extinguish fires. Davey *v.* Frost, 2 Woods (U. S.) 306.

The fact that members of a fire department co-operated in the service did not defeat the claim of those in charge of the steam tug to salvage. The Blackwell, 10 Wall. (U. S.) 1.

Shipmaster.—In disaster the shipmaster is agent of the cargo as well as of the ship, and he is but fulfilling his legal duty in providing for the safety of such of the cargo as can be saved, and is not entitled to salvage compensation therefor. The Aguan, 48 Fed. Rep. 320.

Underwriters.—Underwriters cannot make any claim for salvage property in the admiralty, unless the property has been abandoned to them and accepted by them. Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Schooner Boston, 1 Sumn. (U. S.) 328.

Wrecking Company. — An incorporated wrecking and salvage company may be granted salvage awards as liberally as natural persons so engaged. The Kimberley, 40 Fed. Rep. 289; see The Aroma Mills, 2 Hughes (U. S.) 30; Scott *v.* Four Hundred and Forty Tons of Coal, 39 Fed. Rep. 285; Murphy *v.* Durham, 38 Fed. Rep. 503.

1. The Jane & Matilda, 1 Hagg. Adm. 187.

2. The John Bryant, 5 Ir. Jur. 233.

3. Newson on Salv. 28; The Mountaineer, 2 W. Rob. 7; The Sarah Jane, 2 W. Rob. 110; The Baltimore, 2 Dods. 132; see McGinnis *v.* The Pontiac, 5 McLean (U. S.) 359; Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. Rep. 261.

When a vessel, in the course of a voyage, falls in with a wreck, the master is authorized, by the general customs and usages of the sea, to employ his own vessel and crew in saving it. In such a case, all the crew who are ready and willing to engage in the service are entitled to a share of the reward, although they may not have gone on board the wreck. The Centurian, 1 Ware (U. S.) 477.

rescued being bound by their contracts to do their utmost to save the ship and cargo in case of danger or wreck, cannot be considered salvors.[1] Admiralty, however, recognizes some exceptions to this general rule.[2] When the master or crew, after having been discharged from the obligation of their contracts, render valuable service in saving a vessel from danger, they are treated as strangers with the same rights as volunteers.[3] And where a seaman in time of great peril performs services in the spirit of gallantry, utterly above the fair requirements of his contract, although this may be still subsisting and in force, remuner-

If the owners of a vessel, which has performed a salvage service, make a settlement with the owners of the property saved, and receive the salvage, the crew may recover from them a due share of the reward, by libel in admiralty. So held, although the owners testified that they did not consider the services of the crew in making the settlement. Studley *v.* Baker, 2 Low. (U. S.) 205.

1. Two Catherines, 2 Mason (U. S.) 335; Newman *v.* Walters, 3 B. & P. 612; The Joseph Harvey, 1 Rob. 306; The Wave *v.* Hyer, 2 Paine (U. S.) 140; B. & H. Adm. 235; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; Miller *v.* Kelly, Abb. Adm. 564; The John Perkins, 21 Am. Law Rep. 87; The Governor Raffles, 2 Dods. 14. See The Two Friends, 1 Rob. 271; The Beaver, 3 Rob. 292; The Holder Borden, 1 Sprague (U. S.) 144; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259.

A master's relation to his vessel will not permit him to become a salvor for any ordinary services he may render in saving it. Kent's Com. 246; 1 Conkling's Adm. 274; The Pontiac, 1 Newb. Adm. 130.

No salvage will be claimed by those of the crew who rescue it from mutineers. The Governor Raffles, 2 Dods. 14.

Where a whale ship, owned in Fall River, was wrecked near to a very small and low sand island in the Pacific Ocean, uninhabited, and at a great distance from any other land, and the crew, with great labor, rescued a part of the oil from the water and placed it on the island, and it afterwards came to a place of safety, held, that the crew were not salvors. The Holder Borden, 1 Sprague (U. S.) 144.

No claim for salvage can be maintained by the crew of a vessel upon the ground that by their services she is brought through a storm into port, sound in hull. Miller *v.* Kelly, 1 Abb. Adm. 564.

Naval Vessel Crew.—Where the officers and crew of a vessel of war of the United States, agreeably to the general instructions of the Secretary of the Navy to all the naval vessels of the government and under the direction of the commander of the vessel, rendered services in towing into port an American merchant vessel, found abandoned at sea 140 miles distant from the port of New York, but no unusual peril was encountered, and only a delay of two days occasioned, held, that the crew were not entitled to salvage. The Josephine, 2 Blatchf. (U. S.) 322.

Stevedore's Crew.—The relations of a stevedore's crew engaged in loading a vessel are not different from those of sailors and passengers in a vessel in distress, and they are not entitled to salvage. Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259.

2. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Ship Two Catherines, 2 Mason (U. S.) 319; The Neptune, 1 Hagg. Adm. 227; The Massasoit, 1 Sprague (U. S.) 97; *compare* Taylor *v.* Ship Cato, 1 Pet. Adm. 48.

3. The Agruan, 48 Fed. Rep. 320; The Warrior, Lush. 476; The Olive Branch, 1 Low. (U. S.) 286; The Antelope, 1 Low. (U. S.) 130; Miller *v.* Kelly, Abb. Adm. 564; Phillips *v.* McCall, 4 Wash. (U. S.) 1; Parsons on Shipp. & Adm., vol. 2, p. 266; Jones on Salvage, p. 22; Marvin on Wreck and Salvage, p. 161; The John Perkins, 19 Am. Law Rep. 490; Cartwell *v.* Ship John Taylor, Newb. Adm. 141.

Where a vessel is in actual peril, and one is requested to take charge of her as master and save her if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage. McGinnis *v.* The Pontiac, 4 McLean (U. S.) 359.

ation in the nature of salvage will be allowed.[1] If the contract between the owners and the crew be terminated by the abandonment of the vessel, the crew may become entitled to salvage reward for the services they subsequently render towards the preservation of the ship or cargo.[2] Capture by a belligerent dissolves or suspends the connection between the seamen and their vessel, and the seamen no longer constitute the crew of the vessel, but become prisoners of war. It is no part of their duty to attempt a rescue, and if they do rescue the vessel from the enemy, they are entitled to salvage.[3]

3. Passengers.—As a general rule passengers on board the vessel rescued cannot, any more than the crew, claim salvage for any assistance they may give in preserving the vessel.[4] They will not be entitled to salvage in the event of their voluntarily remaining on board and doing anything to save the ship.[5] This rule is based upon the ground that where there is a common peril, it is the duty of all to contribute to the common safety.[6] But passengers will be entitled to salvage or remuneration for extraordinary exertions beyond their duty.[7] Thus, for instance,

1. Ship Two Catherines, 2 Mason (U. S.) 319; Clayton *v.* The Harmony, 1 Pet. Adm. 70; The Dawn, Dav. (U. S.) 121; Cartwell *v.* Ship John Taylor, Newb. Adm. 341.

Where the crew were abandoned by the master, near the home port, and the vessel was soon afterwards stranded, and there was no mate, and the men got the ship off the shore and saved her with considerable difficulty and danger, held, that they were salvors. The Olive Branch, 1 Low. (U. S.) 286.

2. The Agruan, 48 Fed. Rep. 320. The Umatilla, 29 Fed. Rep. 252; The Olive Branch, 1 Low. (U. S.) 286; The Antelope, 1 Low. (U. S.) 130; The R. D. Bibber, 33 Fed. Rep. 55; Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 423.

If all the seamen but one desert the ship in peril, and he remains aboard and brings her safe to port, he may claim salvage. Hobart *v.* Drogan, 10 Pet. (U. S.) 122; The Olive Branch, 1 Low. (U. S.) 286; The Triumph, 1 Sprague (U. S.) 428; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

An abandonment to operate as a dissolution of a contract must, however, be *bona fide* and final. The Florence, 16 Jur. 572. See Taylor *v.* Ship Cato, 1 Pet. Adm. 48.

Where a vessel inclosed in the ice in a harbor, was deserted during a gale by all of her crew except one, who remained, thinking it less dangerous than the attempt to reach the shore, but the others intended to return when the gale should abate, held, that none of the crew were absolved from their contract or duty to the ship, and, therefore, that no exertions for the safety of the vessel by the seaman who remained on board, could constitute him a salvor thereof. The John Perkins, 21 Am. Law Rep. 87; *reversing* 19 Am. Law Rep. 490; 3 Ware (U. S.) 87.

3. The Two Friends, 1 Rob. 271; Phillips *v.* M'Call, 4 Wash. (U. S.) 141; Williams *v.* Suffolk Ins. Co., 3 Sumn. (U. S.) 270; Clayton *v.* The Harmony, 1 Pet. Adm. 70; The Beaver, 3 Rob. 292.

4. The Brabo, 33 Fed. Rep. 884; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259; Anastasia, 1 Ben. (U. S.) 166; Beane *v.* Mayurka, 2 Curt. (U. S.) 78; Brady *v.* The American S. S. Co., 1 Am. L. T. N. S. 402; 10 Phila. (Pa.) 283; The Branston, 2 Hagg. Adm. 3, n.; *compare* Bond *v.* Brig Cora, 2 Wash. (U. S.) 80.

Soldiers transported on a vessel under a contract with the government, are not passengers, and are entitled to salvage for their services in saving the vessel. The Merrimac, 1 Ben. (U. S.) 201.

5. The Brabo, 33 Fed. Rep. 884; The Vrede, Lush. 322; 30 L. J. Adm. 209.

6. The Connemara, 108 U. S. 352.

7. Candee *v.* Sixty-eight Bales of Cotton, 48 Fed. Rep. 479; Hobart *v.*

should they assist in recapturing the ship from an enemy, such salvage will be awarded them, although their ship may be a foreign ship.[1]

Passengers on board the salving vessel are entitled to share with the crew in any salvage remuneration, if they have joined with the crew in rendering the services to the ship in distress.[2]

4. Shipowners.—The owners of the salving vessel will be entitled to salvage as well as the master and crew,[3] and they will not be deprived of their claim merely because some of them were also part owners of the vessel through the negligence of which the services were rendered necessary.[4] Should both the salving and salved vessels belong to precisely the same owners, the owners will be entitled to salvage remuneration from the

Drogan, 10 Pet. (U. S.) 108; Newson on Salvage, p. 35; The Brabo, 33 Fed. Rep. 884.

A ship, towed by a steam tug down a river came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awakened by a smell of smoke arising from a fire which had broken out in part of the cargo stowed in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crew of the ship and of the tug; and he and the officers, crew and passengers of the tug, working together, and by means of a steam-pump and hose upon the tug, and unaided by the officers or crew of the ship, put out the fire in twenty minutes. In giving judgment in this case, the court by Gray, J., observes: "Evers, the passenger on the Connemara, was also entitled to share in the salvage. A passenger cannot, indeed, recover salvage for every service which could support a claim by one in nowise connected with the ship. In the case of a common danger, it is the duty of every one on board the ship to give every assistance he can, by the use of all ordinary means of working and pumping the ship, to avert the danger. Yet a passenger is not, as the officers and crew are, bound to stand by the ship till the last; he may leave her at any time and seek his own safety; and for extraordinary services, and the use of extraordinary means, not furnished by the equipment of the ship herself, by which she is saved from imminent danger, he may have salvage. Newman *v.* Walters, 3 B. & P. 612; The Branston, 2 Hagg. Adm. 3, n.; The Salacia, 2 Hagg. Adm. 262; The Vrede, Lush. 322; The Pontiac, 5 McLean (U. S.) 363; The Great Eastern, 11 L. T. N. S. 516; 3 Kent's Com. 246. The services of Evers were of peculiar value, and involved the use of means outside the ship. His promptness and vigilance gave the alarm, which, by the supineness and neglect of the officers and crew of the ship, might not otherwise have been given in time to save her. This might not of itself have entitled him to reward; but beyond this he exerted himself, as if he had been one of the officers and crew of the tow-boat, in the use of the steam-pump and hose on board her, by which the fire on the ship was effectually subdued." The Connemara, 108 U. S. 352.

So in the case of The Charles Henry, 1 Ben. (U. S.) 8, it was held that passengers who are bold to undertake the salvage service on a derelict, and active to assist in performing it, are entitled to an increased share in the proceeds on that account. But passengers who refuse to assist when solicited are not entitled to share in the award.

1. The Two Friends, 1 Rob. 271.

2. Newson on Salv. 35; Newman *v.* Walters, 3 B. & P. 612; The Salacia, 2 Hagg. Adm. 262.

3. The Haidee, 1 N. of Cas. 598.

The owners of a salving ship have a just claim to share in the salvage compensation, not merely as an indemnity for the risk of their property, but as an inducement to them to permit their captains to render such services and also as a check on the latter from deserting the owner's interest for his own. Evans *v.* Ship Charles, Newb. Adm. 329.

4. The Glengaber, L. R., 3 A. & E. 534.

owners of the cargo on board the disabled vessel,[1] unless the salved vessel was unseaworthy at the commencement of her voyage.[2]

The owner of a vessel and not the freighter is entitled to salvage, unless he releases the owner of the vessel from his responsibility to carry the cargo safely.[3] If the stoppage and deviation are authorized by the shipper of the cargo, he is entitled to salvage earned on the voyage. Under other circumstances his only remedy for any loss occasioned by the stoppage and deviation is against the master and owner.[4] If the owner is not personally present, he cannot recover salvage compensation as such, but he may have an equitable compensation for the use of his vessel.[5] Where no risk has been incurred by the vessel rendering the assistance, it is not the usual custom to give to the owners any large portion, which more properly belongs to the individual whose services have effected the safety and preservation of the ship.[6] If the salving vessel has either been diverted from her proper employment or has experienced a special mischief, occasioning the owners any inconvenience or loss for which an equitable compensation could be reasonably claimed,[7] or where officers or men have left her for the purpose of assisting a vessel that had become shorthanded, the owner is entitled to share in the reward.[8]

5. Pilots.[9]—By the general maritime law, pilots are bound to render their assistance and can claim no more than the rates of pilotage, except in cases of extraordinary services.[10] But a pilot is not bound to give his services to a vessel disabled and in distress, for mere pilotage.[11] Whenever he performs salvage services

1. The Miranda, L. R., 3 A. & E. 561.

2. The Glenfruin, 10 P. D. 103; 52 L. T. 769; Newson on Salvage, p. 35.

3. Bond *v.* Brig Cora, 2 Wash. (U. S.) 80; 2 Pet. Adm. 361.

4. Ship Nathaniel Hooper, 3 Sumn. (U. S.) 543.

A vessel was delayed by rendering a salvage service. *Held*, that the owners of her cargo had no claim for salvage, nor persons on board to look after the cargo who took no part in the salvage service. The Persian Monarch, 23 Fed. Rep. 820.

5. The Morning Star, 6 Blatchf. (U. S.) 154; The Jack Jewett, 2 Ben. (U. S.) 353; The Arlington, 2 Ben. (U. S.) 511; The Haidee, 1 N. of Cas. 598.

Where it is shown that at the time the salvage services were rendered the salving ship was under charter and in possession of the charterer, the charterer, not the owner, is entitled to salvage. The New Orleans, 23 Fed. Rep. 909.

6. The Nicolina, 2 W. Rob. 175.

The owners have generally but a slight claim, grounded only on the danger incurred by their property. The San Bernardo, 1 Rob. 170.

7. The Vine, 2 Hagg. Adm. 1; The Charlotte, 3 W. Rob. 68.

When smacksmen are employed in a salvage service, the owners of the smacks have a right to sue for remuneration for the detention, even when the service is not dangerous. The Nordon, 1 Spinks 185.

8. The Janet Mitchell, Swab. 111; The Nicolina, 2 W. Rob. 175.

9. See PILOT, vol. 18, p. 454.

10. Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Anastasia, 1 Ben. (U. S.) 166. See The Persia, 1 Spinks 166; McDonald *v.* The Resolute, 38 Fed. Rep. 923. See also The Elizabeth, 8 Jur. 365; The Cumberland, 9 Jur. 191.

11. Flanders *v.* Tripp, 2 Low. (U. S.)

beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor, that is, with a title to compensation to the extent of the merit of his services.[1] But whenever he is permitted to become such, public policy requires that he should first be held strictly to the discharge of his duty as a pilot.[2]

Most of the States in pursuance of an act of Congress authorizing them to make their own pilotage laws, have passed statutes making it a part of the duty of a pilot to assist vessels in distress, and in some instances have given the rate of extra compensation to be awarded.[3] Such services are, therefore, generally considered as extra pilotage services, and not as salvage; and this has been so held even where there is no statute law applicable to the case.[4]

6. Tugs and Steamers.—There are indeed frequent cases where although towage is the dominant feature of the services rendered, yet the ship towed was in a situation of greater or less danger when taken in tow. When such is the case, the services will be regarded as salvage and not towage services.[5] If a ship

15; The Susan, 1 Sprague (U. S.) 501; 12 Law Rep. N. S. 531; The Wave *v.* Hyer, 2 Paine (U. S.) 131; B. & H. Adm. 235; Hope *v.* The Dido, 2 Paine (U. S.) 243; Lea *v.* Alexander, 2 Paine (U. S.) 466; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Richmond, 3 Hagg. Adm 431; The Hebe, 2 W. Rob. 146, 247; The Frederick, 1 W. Rob. 16; The Jouge Andries, Swab. 226; 11 Moore P. C. 313; Hand *v.* The Elvira, Gilp. (U. S.) 60; Love *v.* Hinckley, Abb. Adm. 436. And see Chapman *v.* Lucerne, 39 Hunt's Mer. Mag. 332.

1. Hobart *v.* Drogan, 10 Pet. (U. S.) 108; Hand *v.* The Elvira, Gilp. (U. S.) 60; Dulany *v.* Ship Peragio, Bee Adm. 212; Case of LeTigre, 3 Wash. (U. S.) 567; see The Alexander, 2 Paine (U. S.) 466; The Galatea, Swab. 349; McDonald *v.* The Resolute, 38 Fed. Rep. 923.

Regularly authorized and licensed pilots are entitled to compensation for salvage, where their services are extraordinary, and beyond the strict line of their professional duty. Bean *v.* The Grace Brown, 2 Hughes (U. S.) 112.

Whenever a vessel has been run aground upon a shoal, on the high seas, in charge of her officers, and she is relieved from imminent peril by other persons, it presents a case for salvage, whether the service has been rendered by pilots or by other persons. Lea *v.* Alexander, 2 Paine (U. S.) 466.

The contract of a pilot with the boat on which he is employed, is virtually dissolved when the boat, being on fire, is surrendered by the master to the master of another boat to save her. After such surrender the pilot may become a salvor. Montgomery *v.* The T. P. Leathers, 3 Newb. Adm. 421.

2. Hope *v.* The Dido, 2 Paine (U. S.) 243; Lea *v.* The Alexander, 2 Paine (U. S.) 446; see The Cachemire, 38 Fed. Rep. 518.

3. Jones on Sal., p. 36.

A pilot aiding an unnavigable vessel is not bound by *New Jersey* Laws 1846, § 16,—as to compensation for extraordinary services,—and his services may be those of a salvor. The Wisconsin, 30 Fed. Rep. 846; 32 Fed. Rep. 111.

4. 2 Parsons on Shipp. 271; Love *v.* Hinckley, Abb. Adm. 436.

5. The Egypt, 17 Fed. Rep. 370; The Strathnaver, 1 App. Cas. 58; The Harbinger, 16 Jur. 729; The Swiftsure, 29 Fed. Rep. 462; The H. B. Foster, Abb. Adm. 222; Bywater *v.* A Raft of Piles, 42 Fed. Rep. 917; The Carrie, 5 Hughes (U. S.) 445; The Allegiance, 6 Sawy. (U. S.) 68. See Bartley *v.* The William A. Taylor, 47 Fed. Rep. 70.

After a barge at anchor in Delaware Breakwater collided with another vessel

is disabled in her hull or rigging, or is aground, or if the performance of the towage service is necessarily attended with danger or extraordinary labor or risk to the salving vessel, the services will be considered to be salvage services.[1] Where tugs protect vessels from fire by towage they are entitled to recover salvage for such services.[2] The master of a tug is not bound to incur extra-

she was held by a tug while her anchors were being raised, and was then towed further in, the time consumed being five or six hours. The sea was rough, and there was some danger of the barge going ashore. *Held*, that this was a salvage service. The Wallace, 41 Fed. Rep. 894.

The schooner E went ashore, and, failing in its efforts to get off, sent for the tugs C & B. The master of C, which first arrived, refused to do anything because of the danger, but promised to come with the other tug the next morning. Both tugs came down, and the E having again made efforts to get off and failed, was towed into deep water, and into port. The weather was calm during the whole time, and the E was not in imminent danger, but a gale would have exposed her to great danger. The tugs were at no time in danger. The E was valued at $16,000, and her cargo at $4,000, and the tugs at $20,000 and $15,000 respectively. *Held*, that this was salvage service, and the tugs were each entitled to $300, to be assessed *pro rata* on the vessel, cargo, and freight. Congdon *v.* Eleanor, 42 Fed. Rep. 543.

1. Hall *v.* The Lucy P. Miller, 48 Fed. Rep. 121; Spreckels *v.* The Jessomene, 47 Fed. Rep. 903; New England Terminal Co. *v.* The M. Vandercook, 45 Fed. Rep. 262; The Joseph Laughlin *v.* The Jas. Rumsey, 40 Fed. Rep. 909; The Wallace, 41 Fed. Rep. 894; The Young America, 20 Fed. Rep. 926; The Cyclone, 16 Fed. Rep. 486; The Henry Frank, 4 Woods (U. S.) 127; The Princess Alice, 3 W. Rob. 138; 6 N. of Cas. 584; The Sophia Hanson, 16 Fed. Rep. 144; The Hesper, 18 Fed. Rep. 692; The Mary N. Hogan, 30 Fed. Rep. 381; The Swiftsure, 5 Hughes (U. S.) 228; The Cassandra Adams, 30 Fed. Rep. 379; The Taylor Dickson, 33 Fed. Rep. 886; The Cachemire, 38 Fed. Rep. 518; The Underwriter, 4 Blatch. (U. S.) 94; The M. B. Stetson, 1 Low. (U. S.) 119; The Maggie Ellen, 19 Fed. Rep. 221; Laverty *v.* The Dennis Valentine, 47 Fed. Rep. 664.

2. The Carondelet, 36 Fed. Rep. 714; The New York, 34 Fed. Rep. 922; The Lone Star, 34 Fed. Rep. 807; 35 Fed. Rep. 793; Millard *v.* The Rahway, 46 Fed. Rep. 809; The Kenilworth, 41 Fed. Rep. 523; The Connemara, 108 U. S. 352; Murphy *v.* The Suliote, 5 Fed. Rep. 99; The Suliote, 4 Woods (U. S.) 19; The Cyclone, 16 Fed. Rep. 486; The Blackwall, 10 Wall. (U. S.) 1; The Eastern Monarch, Lush. 81; The Tees, Lush. 505; The Rosalie, 1 Spinks 188; Weeks *v.* The Catharine Maria, 2 Pet. Adm. 424; Baltimore, etc., R. Co. *v.* The Holland, 44 Fed. Rep. 362; The S. B. Baker, 23 Fed. Rep. 109; The Florida, 22 Fed. Rep. 617; The Marie, 39 Fed. Rep. 501; The Alice M. Minot, 30 Fed. Rep. 212; The Rose, 31 Fed. Rep. 176; The Tornado, 109 U. S. 110; Howard *v.* The Rose and Cargo, 34 Fed. Rep. 928; The Rio Grande, 22 Fed. Rep. 914; The S. B. Baker, 23 Blatchf. (U. S.) 389; 25 Fed. Rep. 771; The O. M. Hitchcock, 25 Fed. Rep. 777; The Indiana, 22 Fed. Rep. 925; The Cherokee, 31 Fed. Rep. 167; The Avoca, 39 Fed. Rep. 567; Wilmington Transp. Co. *v.* The Old Kensington, 39 Fed. Rep. 496. See The S. W. Downs, The Storm, 1 Newb. Adm. 458; The Labrador, 39 Fed. Rep. 503; Wilson *v.* Winchester, 30 Fed. Rep. 204; The Louisiana, 34 Fed. Rep. 663; The Bessie Whiting, 35 Fed. Rep. 79.

Where a tug pulls a schooner loaded with case oil from the danger of a fire near by out into the stream, it is entitled to recover salvage for such service. Wilson *v.* Winchester, 30 Fed. Rep. 204.

The same is true of services rendered by two tugs towing a bark on fire, loaded with naptha, into a stream, and extinguishing the fire at some personal risk to the crews owing to the naptha. The Cyclone, 16 Fed. Rep. 486. See The Oregon, 27 Fed. Rep. 871.

A tug towed two barges from a wharf into a stream; they were imperiled from fire. *Held*, that the service was a salvage service of a low degree. which was fairly compensated by $65. Fulmer *v.* Patterson, 14 Phila. (Pa.) 527.

ordinary risk to tow a vessel or to rescue it from danger of wreck, and when he does so, he is entitled to compensation therefor as a salvor.[1]

Where a tug enters into an agreement to tow a ship from one place to another, the tug is bound by that agreement to do all that is necessary to facilitate the safe voyage of the ship.[2] If

While a steamer was discharging a cargo of saltpeter into a lighter, and after about 100 tons had been delivered, the saltpeter on the latter took fire, and spread with such rapidity as to compel the men to abandon the lighter, which was at once cast loose, and drifted under the port water of the steamer. The flames rose very high, but the wind blew them from the steamer, which was an iron built one. There still remained on board the latter about 550 tons of saltpeter. While in this situation, the libelant's tug made fast to the lighter, and pulled her out of the slip, into the river, where she burned to the water's edge in about 40 minutes after first taking fire. *Held*, that the libelant was entitled to salvage. The Straits of Gibraltar, 32 Fed. Rep. 297.

A tug, responding to the towage signal of a ship drifting in the vicinity of a conflagration caused by an exploded oil tank, hailed the mate: "You tell the captain that I will take him out for $1,000." A reply came back: "Give him a line." The line was made fast, and ship towed across the river. *Held*, a salvage (not a towage) service for which $300 was a sufficient allowance. The Young America, 20 Fed. Rep. 926.

Persons who, while a tug on fire and loose from the wharf was in danger of escaping beyond the reach of the firemen, secured her and aided in extinguishing the fire, were held entitled to salvage. The Cloud, 29 Fed. Rep. 272.

Boats Rigged With Pumps for Extinguishing Fire.—Boats rigged in this way for the purpose of extinguishing fire are just as important to the shipping interest as fire engines are to a city. They contribute as much in saving loss to the people and to insurance companies as do the fire engines, and it is part of the policy of the law to encourage those in charge of it. So where a tug provided with a steam pump extinguishes a burning vessel, the tug is entitled to salvage although larger pumps and the city fire engines may render greater service. Gaynor *v.* The Gler, 31 Fed. Rep. 425; The Cyclone, 16 Fed. Rep. 486; The James A. Garfield, 31 Fed. Rep. 175; The Lone Star, 34 Fed. Rep. 807; The Suliote, 4 Woods (U. S.) 19; Spreckles *v.* The Brussels, 38 Fed. Rep. 524; The Vanloo, 39 Fed. Rep. 570.

The A, a lighter loaded with cotton, was, with other vessels, lying at a pier, when fire broke out on one vessel, and communicated to the others. The fastenings of the vessels burned off, and two tugs came into the slip, played water on the vessels, and commenced to tow them. After this, no more water was thrown on the A, and after she was outside the slip the hawser parted, and she was left adrift, more exposed to the wind than before, with the fire on her unextinguished, and was carried by the tide into an adjoining slip, where the fire was got under control by the city fire department. Two other tugs then took her in tow, throwing water on her and extinguishing the fire. The two former tugs were not prevented from again assisting her after she was left adrift by greater perils or unforeseen circumstances, but voluntarily abandoned her to assist the other vessels. *Held*, that the services of the two former tugs were not part of a continuous salvage service culminating in the extinguishment of the fire. Ross *v.* The Angeline Anderson, 35 Fed. Rep. 796.

1. Roff *v.* Wass, 2 Sawy. (U. S.) 394; The Wave, 2 Paine (U. S.) 131; B. & H. Adm. 235; The Alexander, B. & H. Adm. 466; Case of Le Tigre, 3 Wash. (U. S.) 567; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The H. B. Foster, Abb. Adm. 222; The Emily B. Souder, 3 Ben. (U. S.) 159; The Charlotte, 3 W. Rob. 68; The Reward, 1 W. Rob. 174; The Charles Adolphe, Swab. 153.

2. The Galatea, Swab. 349. See The Lady Egidia, Lush. 513; The Arthur, 6 L. T. N. S. 556; Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. Rep. 261; The Wasp, 34 Fed. Rep. 222.

some material circumstance is concealed,[1] or if by stress of weather the completion of the undertaking is rendered impossible, the agreement is set aside and subsequent services may be in the nature of salvage.[2] But an agreement to tow a vessel will not be set aside because the tug breaks down in the progress of the service, and the towage is completed by other tugs belonging to the same company.[3] It is not necessary that a tug under a contract to tow, should incur risk in order to earn salvage.[4] Risk may be important in determining an implied contract where no express contract is made, but it is not a necessary element of salvage. If the circumstances were ordinary, the usual towage contract may be inferred, otherwise, if the case is quite out of the ordinary course.[5]

A steamer usually employed at remunerative pay in towing about a harbor, does not stand precisely on the same footing in respect to salvage as a vessel kept on purpose for saving life and property, nor as a merchant or passenger steamer deviating from an important voyage to give aid.[6] It is the policy of the law to encourage effective service by steamers, because their services are often particularly useful from their comparative independence of wind and tide.[7] Services thus performed by a steamer to a

1. The Kingalock, 1 Spinks 263.

2. The Galatea, Swab. 349; The White Star, L. R., 1 A. & E. 68.

3. The Lady Flora Hastings, 3 W. Rob. 118; The Annapolis, Lush. 355; The Golden Light, Lush. 355; The Lady Egidia, Lush. 513; The Pericles, B. & L. 80; The Minnehaha, 15 Moore P. C. 133; 30 L. J. Adm. 211.

A brig in distress agreed upon a price for which the tug A agreed to take her into port, and to furnish a second tug if necessary. They started, and the tug's hawser broke, whereupon she signaled to tug B, and the two tugs together towed the brig in. The tug A might have done it alone. *Held*, that the service rendered by the tug B was a towage, not a salvage service. The Raven, 27 Fed. Rep. 470.

4. The Pericles, Br. & L. 80.

5. The M. B. Stetson, 1 Low. (U. S.) 122.

6. The M. B. Stetson, 1 Low. (U. S.) 123; The H. B. Foster, Abb. Adm. 222.

7. The Saragossa, 1 Ben. (U. S.) 553; The Colon, 18 Blatchf. (U. S.) 285; The Raikes, 1 Hagg. Adm. 246. See also The Brooks *v.* The William Penn, 1 Am. L. Reg. 584; The Alfen, Swab. Adm. 189; The Gallego, 30 Fed. Rep. 271.

A steamer laden with freight and passengers broke her shaft nine hundred miles from port, and was taken in tow by another vessel until her machinery was repaired. She then steamed ahead and reached port without further assistance. In rendering judgment in this case, the court by Brown, J., observed: "Upon the special facts of each case, the amount should be fixed with reference to these two controlling principles, viz., compensation must be sufficiently liberal to induce valuable ocean steamers to turn aside willingly and without hesitation to aid vessels in distress, but not so large as to lead disabled steamers to run unjustifiable risks of life and property rather than incur the cost of salvage assistance. And so when a salvage service has been properly sought and rendered, no encouragement should be given to any unreasonable termination of the services by the assisted vessel before reaching port, or to her incurring unjustifiable hazards for the purpose of reducing the salvage reward to a minimum by denying a full and fair measure of compensation for all that the salvor has done." The Veendam, 46 Fed. Rep. 494. See Murphy *v.* Suliote, 5 Fed. Rep. 101; The Daniel Steinman, 19 Fed. Rep. 918; The Alaska, 23 Fed. Rep. 597.

disabled vessel, can never be considered as mere towage.[1] And to estimate a salvage service, all the circumstances must be taken into consideration in a combined view. If towage leads to the rescue of a vessel from danger, it should be remunerated as salvage.[2]

If the service is merely one of ordinary towage, as a general rule, only the usual towage compensation is to be given.[3] Mere towage service is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.[4] A sailing vessel may earn salvage by towing a vessel in distress,[5] and the fact that a steamer could do it with more safety to herself than a sailing vessel, will render it no less a salvage service when performed by a steamer.[6]

Whether the circumstances in each particular case are sufficient to turn towage into salvage, must be a subject of great doubt,

1. The Charles Adolphe, Swab. 153; see South Carolina Steamboat Co. *v.* The Nellie Floyd, 39 Fed. Rep. 221; The D. W. Vaughan, 9 Ben. (U. S.) 26; The Daniel Steinman, 19 Fed. Rep. 918; The Leipsic, 20 Blatchf. (U. S.) 288; The Rebecca Clyde, 5 Ben. (U. S.) 98; The Myra A. Pratt, 31 Fed. Rep. 572; The Erin, 36 Fed. Rep. 712.

2. The Isabella, 3 Hagg. Adm. 428; The Marie Anne, 5 Hughes (U. S.) 462; The Pomona, 37 Fed. Rep. 444; The California, 36 Fed. Rep. 563; The Albany, 42 Fed. Rep. 64.

The steamship E, when about fifty miles north of the east end of the Island of Cuba, lost her propeller key, and was deprived of motive power. The weather was fine, and the vessel was in the track of ships, but there was not wind enough to enable her to stem a current which there sets towards the rocky coast at the rate of one to two and a half knots. A signal of distress set by the E, was observed by the steamship S, which altered her course, and bore down to the E, and the masters agreed in writing that the E should be towed into port, and the compensation left to the agents of the vessels, either at New York or Boston. The S thereupon put out a hawser to the E, and with some difficulty towed her safely to her destination, a distance of 240 miles. The S was not damaged in any way by the towage, but was delayed one day in her arrival at her destination. Her value was $50,000. The E, with her stores, was worth $26,000. *Held*, that the service was a salvage service, and $4,000 a proper award. The Erin, 36 Fed. Rep. 712.

The steamship I became disabled at sea by the breaking of her tunnel shaft, and in such condition was towed for 750 miles to the port of New York, by the steamship G, both vessels being of large value, and having valuable cargoes and many passengers on board. *Held*, that the G was entitled to $25,000 as salvage award for her services. The Italia, 42 Fed. Rep. 416.

3. The Harbinger, 20 Eng. L. & Eq. 641; The Princess Alice, 3 W. Rob. 138; The Albion, 2 Hagg. Adm. 180, n.

4. The Reward, 1 W. Rob. 173.

5. The Harriet, 1 Spinks 180.

6. 2 Parsons on Ship. 275; The Kingalock, 1 Spinks 263; 26 Eng. L. & Eq. 596; The Medora, 1 Spinks 17; The United Kingdom, 3 Hagg. Adm. 401, note; The Meg Merriles, 3 Hagg. Adm. 346; The London Merchant, 3 Hagg. Adm. 394; The Traveller, 3 Hagg. Adm. 370; The Isabella, 3 Hagg. Adm. 427; The Earl Gray, 3 Hagg. Adm. 363; The Kilby, 26 Eng. L. & Eq. 596, note; The Reward, 1 W. Rob. 177; The Charles Adolphe, Swab. 152; The Martin Luther, Swab. 287; The Paris, 1 Spinks 289; The St. Nicholas, Lush. 29; The Ellora, Lush. 550; The Independence, 2 Curt. (U. S.) 350; Hennessey *v.* Ship Versailles, 1 Curt. (U. S.) 353; Virden *v.* The Brig Caroline, 6 Am. Law Reg. 222; The H. B. Foster, Abb. Adm. 222; The Joseph C. Griggs, 1 Ben. (U. S.) 80.

but it is well settled that if the danger from which the ship has been rescued is attributable to the fault of the tug, if the tug, whether by willfulness, misconduct, or by negligence or by want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, she can have no claim to salvage.[1]

7. Consorts.—Compensation will be granted for keeping company with a distressed vessel at the earnest request of her captain,[2] but not in cases where they sail as consorts and under an agreement to render mutual assistance.[3] Even if no such agreement is made by ships sailing in consort, a considerable reward will not be made to a ship assisting her consort. So the fact that two vessels sailing in company and under the same orders and the fact of mutual benefit having been rendered and received by the salvors, will tend to reduce the salvage in respect of services rendered by one vessel to the other.[4]

IV. Different Sets of Salvors.—Salvors may be divided into two classes; those who are requested or employed by the owner or master of the vessel in distress, and those who may be termed finders or volunteers. Those who are employed by the owners or master to undertake to save property in peril, are under the direction and control of the master, and may be discharged by him with or without good cause upon being compensated for what they have already done, or without such immediate compensation if their lien is not in danger.[5] Those whom he employs are bound to obey his orders,[6] and if other sailors dispossess those whom the master has employed and force their own services upon him, the court will refuse to award them any remuneration.[7] The master's authority in this respect is not affected by the circumstance that he and his crew leave the vessel

1. The Annapolis, Lush. 355. In this case, the court said: "When it is remembered how much, in all cases—how entirely in many cases—a ship in tow is at the mercy of the tug; how easily, with the knowledge which the crew of such boats usually have of the waters on which they ply, they may place any ship in their charge, in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it; their lordships are of the opinion that such cases require to be watched with the closest attention and not without any degree of jealousy."

2. Allen *v.* The Canada, Bee Adm. 90.

3. The Trelawney, 4 Rob. 223.

Of such an agreement each ship enjoys the benefit; for the one that renders assistance has the assurance that if any calamity should happen to her she would reap the benefit of a mutual stipulation. The Zephyr, 2 Hagg. Adm. 43.

4. The Waterloo, 2 Dods. 423; The Ganges, 1 N. of Cas. 87; The Two Friends, 8 Jur. 1011.

5. The Ida L. Howard, 1 Low. (U. S.) 3; The Dantzic Packet, 3 Hagg. Adm. 383; The Champion, Br. & L. 69; The Effort, 3 Hagg. Adm. 165.

6. The Glasgow Packet, 2 W. Rob. 306; The Martha, Swab. 489; The Champion, Br. & L. 69; The Effort, 3 Hagg. Adm. 165; The Dantzic Packet, 3 Hagg. Adm. 383.

7. The Fleece, 3 W. Rob. 278; The Susan, 1 Sprague (U. S.) 499; 12 Law Rep. N. S. 531; The Blendenhall, 1 Dods. 414; The Mary, 2 Wheat. (U. S.) 123; The John Gilpin, Olc. Adm. 77.

for the purpose of procuring assistance, as between the masters and sailors, unless the vessel is absolutely derelict and the master's authority is at an end, he is entitled to resume charge of the ship, to employ whom he pleases, and to take what measures he thinks proper for the preservation of the ship. The occupying salvors are entitled to reward for the services they have actually rendered and no more.[1] The finders, on the other hand, take possession primarily by right of discovery and cannot be dispossessed afterwards by the owner or master.[2] They being in possession under no contracts may abandon their enterprise if their exertions have not diminished the chances of ultimate safety, and this, without waiting for any such danger of life or apparent hopelessness of the enterprise, as would alone justify salvors in abandonment. Both classes, however, are under an implied obligation to use good faith, honesty, skill, and energy in what they do undertake.[3] Where there are different sets of salvors acting independently of each other, the misconduct of one set will not affect the claims of the other, if they had no participation in it.[4] In the event of more than one set of salvors being held entitled to participate in the sum awarded, the apportionment between them rests in the discretion of the court, and will mainly depend upon the nature of the exertions made, the danger incurred, and the extent of the benefit conferred upon the vessel saved.[5]

1. Of Derelicts.—When property is left derelict on the high seas, those who first find and take possession of it, with the intention of saving it, acquire a right to the exclusive possession which others who afterwards discover it, have no right to disturb.[6] To

1. McGinnis *v.* The Pontiac, 5 McLean (U. S.) 359; The Champion, Br. & L. 69.

2. Lewis *v.* The Elizabeth & Jane, 1 Ware (U. S.) 41.

3. The Ida L. Howard, 1 Low. (U. S.) 3.

Respondent, a well equipped vessel, found a vessel in distress, and abandoned by her crew, about six to ten miles from shore. Respondent's master discerning no signs of the crew, who were ashore at a life-saving station, and there being no sign when the vessel was abandoned, except a live dog, took her in tow. During the following night the tow-lines parted in a gale, and the crew placed on the distressed vessel were forced to abandon her. She was afterwards found adrift and taken to port. *Held*, that the respondent, having acted in good faith, with reasonable expectation of saving the vessel, was not a trespasser, or liable for the injury caused by the gale that compelled her abandonment. The Ann L. Lockwood, 37 Fed. Rep. 233.

4. The Neptune, 1 W. Rob. 297.

In the case of joint salvors, though plunder by one does not forfeit the shares of the others, yet any consent or connivance on the part of those others works a forfeiture of their share, without regard to the amount of the plunder. Island City, 1 Black (U. S.) 121.

5. The Endeavour, 6 N. of Cas. 56.

6. The Amethyst, Dav. (U. S.) 20; The Bee, 1 Ware (U. S.) 332; The Maria, Edw. Adm. 175.

A tug, seeing cotton floating near the Narrows, which had been dumped from a lighter in New York Bay the day before, put out with a boat and secured twenty-three bales at some risk and with some danger to the vessels from ice. *Held*, that this was a salvage service, that the circumstances warranted the belief that the property was abandoned notwithstanding the appearance of another tug claiming to be

constitute a case of derelict, the vessel must be abandoned by her master and crew. The abandonment must be final without hope of recovery, or intention to return.[1] The mere fact of a vessel being found at sea without anyone on board her, is not sufficient to constitute her a legal derelict. She must not only have been deserted at sea, but deserted *sine spe recuperandi*. If the master and crew have only left the ship to obtain assistance with which they intend to return, she is not derelict.[2] The finders of such a vessel have a right, however, to bring her in and to be paid a liberal salvage, even though it should afterward appear that the crew had only gone for assistance, and therefore, that she was not derelict.[3]

sent by the owners to pick up the cotton, and that salvors had not forfeited their right to compensation by refusing to surrender the cotton to the persons demanding it, or by immediately libeling it to recover salvage. Twenty-three Bales of Cotton, 9 Ben. (U. S.) 48.

Where a vessel picks up goods of an enemy thrown overboard during a chase, such vessel is entitled to the goods as captor, and not as salvor. The Victory, 2 Sprague (U. S.) 226.

The rescuing a raft of timber found adrift in a harbor, and floating out to sea unaccompanied by any person, is in its nature a maritime salvage service, for which salvage compensation may be awarded. A Raft of Spars, 1 Abb. Adm. 291.

1. Tyson *v.* Prvor, 1 Gall. (U. S.) 133; The Bee, 1 Ware (U. S.) 332; The Aquila, 1 Rob. 37; Bean *v.* The Grace Brown, 2 Hughes (U. S.) 112; Schooner Boston, 1 Sumn. (U. S.) 328. See Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Island City, 1 Black (U. S.) 121.

The definition given by Sir Leoline Jenkins, when he says that derelicts are "boats or other vessels forsaken or found on the seas, without any person in them," is pronounced by Mr. Justice Story the true definition in its most broad and accurate sense. The Fairfield, 30 Fed. Rep. 700; Rowe *v.* The Brig, 1 Mason (U. S.) 374.

Quasi Derelict.—Where a vessel at sea is not abandoned, but those on board are both physically and mentally incapable of doing anything for their safety, this constitutes a case of *quasi* derelict, and calls for a liberal compensation to salvors, especially if life as well as property has been saved. Sturtevant *v.* Geo. Nicholaus, Newb. Adm. 449.

2. The Island City, 1 Black (U. S.) 121; The Aquila, 1 Rob. 37 per Lord Stowell; The Hercules, 8 Ir. Jur. 412; Heathorn *v.* Darling, 1 Moore P. C. 5; Clark *v.* Chamberlain, 2 M. & W. 78; The Cosmopolitan, 6 N. of Cas. Supp. 17; The Minerva, 1 Spinks 273; The Sarah Bell, 4 N. of Cas. 144; The Barefoot, 14 Jur. 841; The Champion, Br. & L. 69.

Where a steamer went to the assistance of a vessel in distress, and her master, finding his coal nearly consumed and that the crew of the vessel were destitute of provisions, concluded to go ashore after supplies, and the officers and crew of the vessel decided also to go ashore on the steamer, it being fully understood that all should return to the vessel at the earliest practicable moment, held, that the vessel was not derelict when found by another vessel in their absence. Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221.

Where a stranded vessel was left by the captain, who placed an agent in charge, and who intended to return, as he in fact did, to save the cargo, held, that there was no such abandonment as to entitle a person to salvage who had taken possession of the vessel with knowledge of the facts. The Cleone, 7 Sawy. (U. S.) 77.

A captain whose vessel was on fire surrendered her into the hands of salvors, to save her if they could, but was present with his crew when the services were performed. *Held*, that this was not such an abandonment as would make it a case of derelict. The Delphos, 1 Newb. Adm. 412. See The T. P. Leathers, 1 Newb. Adm. 421.

3. The Island City, 1 Black (U. S.) 121; The Clarisse, Swab. 121.

A schooner was run into by another on Lake Michigan out of sight of land, and was so seriously injured that her master and crew feared that she would

A vessel found at sea in a position of peril and without having anyone on board, is *prima facie* a derelict. And the *onus* of proving the intention to return rests upon the owner.[1] The intention by which they were actuated at the time of the abandonment has greater weight in determining whether a vessel has or has not become a derelict, than the actual state of things when the desertion took place. If a master and crew leave their vessel for the safety of their lives, a mere intention of sending a steamer to look after her, does not take away from the vessel its character as a legal derelict.[2]

2. First Salvors Favored in Law.—The law favors the first salvors and does not allow others to share with them in the enterprise and compensation unless and only so far as there is a necessity for it.[3] If the first salvors find their means ineffective and others offer to assist with better means, it is their duty to yield them possession.[4] And although the *onus* of proving the incompetency of those already in possession to complete the salvage, is put upon the second salvors, yet they are not ordinarily required to make out a very strong case. Second salvors have

sink, and left on the schooner that ran into her. Their intention was, immediately on reaching land, to get a tug and try to find their schooner again and save her. During their absence a steam barge worth, with her tow, $58,000, came along and took possession. The risk was slight. The master and crew of the schooner in due time came up with a tug. The schooner, with her cargo, was worth $17,500 when shore was reached. *Held*, that the service was a salvage service, without regard to the question of whether, technically, the schooner was derelict, and that $1,750 was properly awarded as salvage. The Hyderabad, 11 Biss. (U. S.) 112.

1. The Cosmopolitan, 6 N. of Cas. Supp. 17.

A vessel at least six miles from shore, submerged from midships to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, forecastle and galley full of water, a distress flag set, and deserted by her crew, who had left no signs of an intention to return, and were not visible, is *prima facie* derelict and abandoned, though she was anchored, and her master was intending to return to save her, and had telegraphed for a wrecking vessel to assist him. The Ann L. Lockwood, 37 Fed. Rep. 233.

2. The Coromandel, Swab. 205; The Laura, 14 Wall. (U. S.) 336.

A schooner ran aground on an exposed bank, six miles from Hilton Head, and beginning to pound heavily, was abandoned by master and crew. On the next day she was found by another vessel eleven miles out to sea, drifting seaward with hatches open and in danger of filling. On a libel for salvage she and her cargo of rice were sold for $2,051. *Held*, that she was a derelict, although her master had been compelled by the crew to go ashore, and intended to return to her; and that $500 was a proper allowance for salvage. The Fairfield, 30 Fed. Rep. 700.

3. Millard *v.* The Rahway, 46 Fed. Rep. 809; The Ida L. Howard, 1 Low. (U. S.) 2; Cohen's Adm. 82; The Blendenhall, 1 Dods. 414. See The John Gilpin, Olc. Adm. 77; Hand *v.* The Elvira, Gilp. (U. S.) 60.

4. The Cairnsmore, 20 Fed. Rep. 519. See Montgomery *v.* T. P. Leathers, Newb. Adm. 421; Hand *v.* The Elvira, Gilp. (U. S.) 60.

A bark went ashore on Clatsop Beach, Oreg., in a thick fog, and was deserted by her crew and master, who, within two days sold her for the benefit of whom it might concern; but meanwhile she was taken possession of by M, who with his skiff proceeded to save her apparel and cargo. *Held*, that M was entitled to maintain possession for purposes of salvage, until, finding his means therefor ineffective, others offered to assist with better means; whereupon it was his duty to yield them possession. The Cairnsmore, 20 Fed. Rep. 519.

been held entitled to participate under circumstances where it was possible that the original salvors unassisted could have completed the service.[1] So, where the assistance of the second salvors was beneficial rather than absolutely necessary, they have been awarded salvage.[2] The court, although it protects salvors against improper interference, at the same time requires them to avail themselves of further assistance whilst the success of their efforts remains doubtful, and where they improperly refuse that assistance the court will award to them a less sum than it otherwise would have given.[3]

3. Abandonment by First Salvors.—If the enterprise is abandoned by the first of two sets of salvors without any intention of resuming it, and is afterwards brought to a successful issue by the other set, they will be entitled to the whole salvage.[4] If the vessel is left by the first set merely for the purpose of procuring assistance and without the intention of abandoning the undertaking, they may be awarded salvage for anything they may have done beneficial to the vessel, or which might have rendered the salvage easier or more practicable to those who subsequently completed the services.[5]

4. Distribution Between Rival Salvors.—Where salvors fall into distress, and are, together with the salved property, saved by another vessel, the second salvors in such a case are entitled to a portion, but not the whole, of the salvage reward.[6]

V. CONTRACTS FOR SALVAGE.—An agreement as to the amount of salvage made in good faith, free from fraud or mistake, is valid and binding upon the parties, and the compensation, although still salvage, is limited to the amount stipulated.[7] Such con-

1. The Pickwick, 16 Jur. 669.

2. The Charlotte, 2 Hagg. Adm. 361.

3. The Glory, 14 Jur. 676. See The Berlin. 3 Ir. Jur. N. S. 34. The Elizabeth, 8 Ir. Jur. 340; The Gudrun, 5 Ir. Jur. N. S. 361; The Cambria, Prit. Adm. Dig. 774.

4. The India, 1 W. Rob. 406. See The Clarisse, Swab. 129; The Cosmopolitan, 6 N. of Cas. Supp. 17; The John Wurts, Olc. Adm. 462.

5. The E. U., 1 Spinks 63; The Cleone, 7 Sawy. (U. S.) 77.

Where one vessel attempts a salvage service and renders important assistance, and then for want of power leaves the work to a steamer which she has sent for, which renders further valuable service, and which in its turn leaves the imperiled vessel to coal, and during her absence a third, ignorant of what has been done, comes and tows her to port, all three are entitled to salvage for the rescue from one continuous peril. Island City, 1 Black (U. S.) 121.

6. Ship Henry Ewbank, 1 Sumn. (U. S.) 400.

A bark having been abandoned in the ice, some of the crew of a bark imbedded in the ice near by visited the abandoned bark to bring stores from her. The ice broke up, and prevented their return to their own vessel. With the aid of a third vessel the abandoned bark was saved. *Held*, that the service rendered by these men was a salvage service, although not one of a high degree of merit. The Mabel, 22 Fed. Rep. 543; 10 Sawy. (U. S.) 501.

7. The H. B. Foster, Abb. Adm. 222; Bondies *v.* Sherwood, 22 How. (U. S.) 214; The Camanche, 8 Wall. (U. S.) 448. See the William Lushington, 7 N. of Cas. 361; The True Blue, 2 W. Rob. 176; The Mulgrave, 2 Hagg. Adm. 77; The Helen & George, Swab. 368; The Firefly, Swab. 240; The Africa, 1

tracts are binding, not only on the masters of the two ships, but also on the owners, unless it be either fraudulently or subsequently canceled by mutual consent.[1] There must be a clear understanding of the nature of the agreement, and it must be made with fairness and impartiality to all concerned. The parties to it must also be competent to form a judgment as to the obligations to which they are binding themselves.[2] If fairly made and no advantage be taken of ignorance or distress,[3] and neither fraud

Spinks 299; The Repulse, 2 W. Rob. 396; The Samuel, 15 Jur. 407; The Henry, 15 Jur. 183; The Arthur, 6 L. T. N. S. 556.

Subcontractors Bound By Contract.— A person hired by the salvor to assist him, with knowledge that his employer is operating under a contract, is also limited in the amount of his recovery by the contract price; and the fact that he is misinformed as to the terms of the contract creates no additional liability on the part of the property or its owners. The Silver Spray's Boilers, 1 Brown Adm. 349; The Marquette, 1 Brown Adm. 364.

So one who declines to assist a stranded vessel when requested by her master, but who subsequently, without any such invitation, joins in the undertaking at the request of one who, for a fixed price, has undertaken the work, with a full knowledge of the relations of the parties, and the terms of their agreement, must look to the contractor, and not to the vessel or her proceeds, for payment. The G. Barber, 29 Fed. Rep. 269.

A vessel is not liable to a party for salvage services performed merely by permission of another wrecking company, in possession of the vessel, with the understanding that the other company was to be responsible. The B. & J. Baker *v.* The Tros, 10 Phila. (Pa.) 223.

1. Newson on Salvage 52; Andrews *v.* Wall, 3 How. (U. S.) 568.

When work was performed by a company of wreckers, in landing property from a wreck, and an agreement was made with D, one of the wreckers, that they should be paid $75, this was held to be binding on them all, although they gave D no formal authority to make a contract in their behalf; the circumstances showing that they were all temporarily associated together for a common purpose, with D for their head and spokesman, and that they acquiesced in the agreement. Anchors, Sails, etc., of The D'Alberti, 1 Ben. (U. S.) 77.

2. The True Blue, 2 W. Rob. 176. See The R. D. Bibber, 33 Fed. Rep. 55; The Graces, 2 W. Rob. 294; The William Lushington, 7 N. of Cas. 361.

A contract to be binding need not necessarily be in writing. The Firefly, Swab. 240. But whilst a *viva voce* agreement, if sufficiently proved, is binding, the court will be unwilling to act upon it unless it consists of more than loose conversations, The Salacia, 2 Hagg. Adm. 262, and depend upon something more than the recollection of what occurred in the course of such conversation. The Jane Anderson, 3 Ir. Jur. 293; The Briton, 5 Ir. Jur. 170.

If the agreement should be unjust or inequitable towards the salvors the court will refuse to recognize it. The Phantom, L. R., 1 A. & E. 58. See The True Blue, 2 W. Rob. 176; The Enchantress, 30 L. J. Adm. 15; The British Empire, 6 Jur. 608; The Firefly, Swab. 240; The Helen and George, Swab. 368; The Resultatet, 17 Jur. 353.

3. Spreckels *v.* The Jessomene, 47 Fed. Rep. 903; Schooner Emulous, 1 Sumn. (U. S.) 207; Bondies *v.* Sherwood, 22 How. (U. S.) 214; Scott *v.* Four Hundred and Forty-Five Tons of Coal, 39 Fed. Rep. 285; The A. D. Patchin, 1 Blatchf. (U. S.) 414; The Independence, 2 Curt. (U. S.) 350; Bearse *v.* 340 Pigs of Copper, 1 Story (U. S.) 314; Harley *v.* 467 Bars of Railroad Iron, 1 Sawy. (U. S.) 2; The Delambre, 9 Fed. Rep. 775; The H. B. Foster, Abb. Adm. 222; N. Y. Leg. Obs. 223; The Whitaker, 1 Sprague (U. S.) 280; Parker *v.* Whittaker, 8 L. R. N. S. 497; The Silver Spray's Boilers, 1 Brown Adm. 349; The Henry, 2 Eng. L. & E. 564; The True Blue, 4 Moore, P. C. N. S. 96; The Mulgrave, 2 Hagg. Adm. 78; The Enright, 12 Fed. Rep. 157; Collins *v.* Fort Wayne, 1 Bond (U. S.) 476.

nor oppression is shown, though it be contingent and be for a sum much less than the court would have awarded, the terms of the agreement will be adhered to.[1] The emergency may be so imminent as to prevent time for due consideration, but it is no argument against the validity of the contract, that, in the first instance, it is entered into under the impression that the services would be light, that, in consequence of a change of weather or other circumstances of that nature, it subsequently becomes more onerous. Parties entering into engagements of this nature take the risk of any change of circumstances which may in effect alter the extent of the stipulated services.[2] So the agreement will be binding, and the full amounts stipulated for will be payable, in spite of the services being easier to perform than the parties expected.[3] But courts will not award the contract rate if clearly exorbitant or excessive.[4]

An agreement, made in distress at sea, respecting salvage is void. Cowell *v.* The Brothers, Bee Adm. 136; Schultz *v.* Ship Nancy, Bee Adm. 139.

When Contract Will Bar Claim to Salvage.—To bar a claim to salvage compensation as such on the ground that the services were rendered under a special contract, a claimant must show a binding engagement either to pay a given sum for the services to be rendered or to pay at all events whether successful or unsuccessful in the enterprise, and the defense must be set up in the answer. The Independence, 2 Curt. (U. S.) 350; Potomac Steamboat Co. *v.* Baker Salvage Co., 123 U. S. 40; The Camanche, 8 Wall. (U. S.) 448; Collins *v.* Fort Wayne, 1 Bond (U. S.) 476; Adams *v.* Island City, 1 Cliff. (U. S.) 216; The H. B. Foster, Abb. Adm. 222; The Versailles, 1 Curt. (U. S.) 353; The Centurion, 1 Ware (U. S.) 477; Cromwell *v.* Island City, 1 Cliff. (U. S.) 223; The Susan, 1 Sprague (U. S.) 499; The Louisa Jane, 2 Low. (U. S.) 295; The Whitaker, 1 Sprague (U. S.) 229; The William Lushington, 3 N. of Cas. 361; The Mulgrave, 2 Hagg. Adm. 278; The White Star, L. R., 1 A. & E. 68; The Phantom, L. R., 1 A. & E. 58; The Saratoga, 1 Lush. 318. See Coffin *v.* The John Shaw, 1 Cliff. (U. S.) 230; Gould *v.* U. S., 1 Ct. of Cl. 184; Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. Rep. 261. *Compare* The Patchin, 1 Blatchf. (U. S.) 414.

An agreement to pay a definite sum as salvage for saving a vessel does not bar a proceeding *in rem* for the recovery of it. Frame *v.* The Ella, 5 Hughes (U. S.) 125.

An agreement between salvors and the agents of a vessel in distress that the salvors shall proceed to save the cargo and vessel, if possible, the compensation to be subsequently fixed by arbitration or the court, at the option of the vessel, will not bar the salvor's right to receive a meritorious award. The Kimberley, 40 Fed. Rep. 289.

1. Blackburn *v.* The Wellington, 48 Fed. Rep. 475; Bowley *v.* Goddard, 1 Low. (U. S.) 154; Harley *v.* 467 Bars of R. R. Iron, 1 Sawy. (U. S.) 1; The Catherine, 6 N. of Cas. 43; Bondies *v.* Sherwood, 22 How. (U. S.) 214; The A. D. Patchin, 1 Blatchf. (U. S.) 414; The Enchantress, Lush. 93; The Helen & George, Swab. 368; The British Empire, 6 Jur. 608; The Mulgrave, 2 Hagg. Adm. 78.

An agreement for a specific sum dependent upon success does not alter the nature of the service as a salvage service, but only furnishes a rule of compensation. Such an agreement will not be set aside, and a commensurate salvage awarded, because it proves to be a hard one for the salvor. The Silver Spray's Boilers, 1 Brown Adm. 349. *Compare* The Marquette, 1 Brown Adm. 349.

2. The True Blue, 2 W. Rob. 176.

3. The Nuova Loanese, 17 Jur. 263; The Resultatet, 17 Jur. 354; The True Blue, 2 W. Rob. 176; 2 N. of Cas. 413.

4. Speckles *v.* The Don Carlos, 47 Fed. Rep. 746; Sweeting *v.* The Tennasserim, 47 Fed. Rep. 119; Schooner Emulous, 1 Sumn. (U. S.) 207; The A.

An agreement by the master of a vessel in distress will be upheld when just and fair.[1] But if the agreement was made in fraud of the owners securing an excessive award to the salvors for their services it will not be enforced.[2] So an agreement made by the master will not bind the crew if made without their concurrence.[3] Even if made with the consent of some of the crew it will not bind the others,[4] for no person is legally bound by a contract unless he has himself made it personally, or through a duly authorized agent, or has by his own acts subsequently ratified the contract.[5] The consent of a third person, given without the authority or in the absence of the salvors, to a compensation for salvage services, will not bind the salvors.[6] But where a fair and equitable agreement has been entered into by the masters of the two ships, the crew of the salving ship shall not bring a salvage action; should they do so, they would probably be condemned in the costs of the action.[7] An agreement for the salvage of a ship in distress, irrespective of the cargo on board, will be inoperative.[8]

VI. AMOUNT AWARDED.—Salvors should not only be remunerated for the risk of life and property and for the labor, privations, and

D. Patchin, 1 Blatchf. (U. S.) 414; Williams *v.* Barge Jenny Lind, Newb. Adm. 443; Cowell *v.* The Brothers, Bee Adm. 136; Schutz *v.* Ship Nancy, Bee Adm. 139; Mesner *v.* Suffolk Bank, 1 Am. Law Rep. 249; Two Hundred and Two Tons of Coal, 7 Ben. (U. S.) 343; The J. G. Paint, 1 Ben. (U. S.) 545; The Homely, 8 Ben. (U. S.) 495; The Young America, 20 Fed. Rep. 926; The C. & C. Brooks, 17 Fed. Rep. 548; The Theodore, Swab. 351.

1. Collins *v.* The Fort Wayne, 1 Bond (U. S.) 476; The Lady Flora Hastings, 3 W. Rob. 120; The True Blue, 4 Moore P. C. N. S. 96; The Africa, 1 Spinks 299; The Arthur, 6 L. T. N. S. 556.

If the owner be at hand at the time, and the salvage agreement is made without the authority of the owner, he will not be bound by it. The Elise, Swab. 436.

2. Schooner Emulous, 1 Sumn. (U. S.) 510; Post *v.* Jones, 19 How. (U. S.) 160; The A. D. Patchin, 1 Blatchf. (U. S.) 414; The J. G. Paint, 1 Ben. (U. S.) 550; The Silver Spray's Boilers, 1 Brown Adm. 354; The Theodore, Swab. 351; The Crus, Lush. 583; The Generous, L. R., 2 Adm. 57. See The Repulse, 2 W. Rob. 396; Houseman *v.* Schooner North Carolina, 15 Pet. (U. S.) 40; The Ship James, Marvin 232.

The master's act in compromising or referring to arbitrators a claim for salvage will not bind the owners, unless it is made in good faith and under stringent necessity of immediate action and is fair and equal. In case of reference, it must be shown that the referees were suitable persons and their proceedings fair. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40.

Where it was arranged between the master of a vessel and the libelants that if they would assist him in getting his vessel off a shoal, where it was stuck fast and in great peril, that the matter of compensation should be left to referees, and they then went to work and performed valuable service, held, that their failure to refer was no bar to their suit for salvage, and could only be taken into consideration as evidence to reduce the amount they were entitled to receive. Coffin *v.* The John Shaw, 1 Cliff. (U. S.) 230.

3. The Sarah Jane, 2 W. Rob. 110; The Britain, 1 W. Rob. 40; The William Lushington, 7 N. of Cas. 361.

4. The Sansone, 3 Ir. Jur. 258; Newson on Salvage 54.

5. The Charlotte, 3 W. Rob. 68; 6 N. of Cas. 279.

6. Newson on Salvage 54.

7. The Nasmyth, 10 P. D. 41.

8. The Westminster, 1 W. Rob. 230.

hardships encountered, but the reward should be such as to furnish a sufficient incentive to similar exertions by others.[1]

In estimating the amount of salvage remuneration, the first consideration is the danger from which the ship has been saved, and the danger to which the other ship has been exposed.[2] This consideration extends to the risk of life and death both to the salvors and to the persons rescued.[3] But the court, however, has no power to decree salvage for saving life,[4] unless it can be connected with the preservation of property.[5] If the danger was great, the reward may be large and liberal. If inconsiderable, the award should be commensurately meager.[6] A salvage service which hardly exceeds ordinary towage, will be remunerated on a different scale from a heroic rescue from imminent destruction.[7]

1. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Barden *v.* The William Penn, 2 Hughes (U. S.) 144; 1 Am. L. Reg. 584; The Arendal, 14 Fed. Rep. 580. See The Connemara, 108 U. S. 352; The C. W. Ring, 2 Hughes (U. S.) 499; The John Gilpin, Olc. Adm. 77; Sonderburg *v.* Ocean Tow-boat Co., 3 Woods (U. S.) 146; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. Rep. 127; 20 Blatchf. (U. S.) 557; The Katie Collins, 21 Fed. Rep. 409; The Egypt, 17 Fed. Rep. 359; The Flower City, 16 Fed. Rep. 866; The Saragossa, 1 Ben. (U. S.) 553; Warder *v.* The La Belle Creole, 1 Pet. Adm. 31; The Coulon *v.* The Neptune, 2 Pet. Adm. 356; Union Tow-boat Co. *v.* Bark Delphos, Newb. Adm. 412; Eads *v.* Steamboat H. D. Bacon, Newb. Adm. 274; The Sandringham, 10 Fed. Rep. 556.

The allowance for salvage should be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam vessels sufficiently powerful to make the assistance effective; but not so out of proportion to the services actually rendered as to cause vessels in situations in which it was expedient that they should quickly accept the assistance to hesitate or to decline to receive it because of its ruinous cost. Ehrman *v.* Steamship Swiftsure, 4 Fed. Rep. 463; 5 Hughes (U. S.) 228.

The allowance given to salvors for salvage services on a long and dangerous seaboard should be large. Baker Salvage Co. *v.* The Mary E. Dana, 5 Hughes (U. S.) 362; The Mary E. Dana, 17 Fed. Rep. 353; The Susan, 1 Sprague (U. S.) 499; The Taylor Dickson, 33 Fed. Rep. 886; The Fannie Brown, 30 Fed. Rep. 215.

2. Weeks *v.* The Catherine Maria, 2 Pet. Adm. 424; Barrels of Oil, 1 Sprague (U. S.) 91; The Narragansett, 1 Blatchf. (U. S.) 211; The Blackwall, 10 Wall. (U. S.) 1; The Egypt, 17 Fed. Rep. 359; The Annie Henderson, 15 Fed. Rep. 550; The J. F. Farlan, 8 Blatchf. (U. S.) 207; The Cassandra Adams, 30 Fed. Rep. 379; The Mary N. Hogan, 30 Fed. Rep. 381; Sharpley *v.* The Calvin S. Edwards, 46 Fed. Rep. 815.

3. Newson on Salvage 62. Risk to the salvor, while it enhances the amount of the award, is not an essential element of salvage. The Fannie Brown, 30 Fed. Rep. 215.

4. The Zephyrus, 1 W. Rob. 229.

5. The Emblem, Davies 61; Sturtevant *v.* The George Nicholaus, Newb. Adm. 449; The Aid, 1 Hagg. Adm. 83; Barrels of Oil, 1 Sprague (U. S.) 91.

6. The Fannie Brown, 30 Fed. Rep. 220. See Gibson *v.* The Alice Clark, 39 Fed. Rep. 621; The Benison, 36 Fed. Rep. 793; McDonald *v.* The Resolute, 38 Fed. Rep. 923.

7. Newson on Sal. 62. See The Rialto, 15 Fed. Rep. 124; Mattingly *v.* 357 Bales of Cotton, 2 Flip. (U. S.) 288; Howard *v.* The Manhattan No. 12, 20 Fed. Rep. 391.

A schooner, worth, with her cargo, $2.500, leaking but not derelict, not far from New York harbor, but drifting seaward, was towed into port by a tug under a contract to pay $1,000. *Held*, that the amount was unconscionable, and that $250 and costs were allowable. The C. & C. Brooks, 17 Fed. Rep. 548.

The next consideration is the value of the property saved,[1] the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.[2] Where the value of the property saved is small, a higher proportion will be awarded, and a smaller proportion in cases where the value is large.[3] The risk the salvors always run of getting nothing at all by reason of the failure of their efforts to save,[4] the accidents and expenses incurred,[5] the labor and time expended by the salvors, and the promptitude, skill and energy displayed are also matters to be considered in fixing the amount of salvage remuneration.[6] The rule in regard to losses extends to those voluntarily incurred by the salvors in performing the services; such as injuries received to the vessel,[7] and losses for

1. The Blackwall, 10 Wall. (U. S.) 1; Barrels of Oil, 1 Sprague (U. S.) 91; Baker Salvage Co. *v.* The Excelsior, 19 Fed. Rep. 436; The Egypt, 17 Fed. Rep. 359; Anderson *v.* The Edam, 13 Fed. Rep. 135; Baker *v.* Hemenway, 2 Low. (U. S.) 501; Rutter *v.* The Ferris, 4 Phila. (Pa.) 38; Hand *v.* The Elvira, Gilp. (U. S.) 60.

2. The Blackwall, 10 Wall. (U. S.) 1; The Egypt, 17 Fed. Rep. 371; Newson on Salv. 62; The Ida L. Howard, 1 Low. (U. S.) 3; The Lovett Peacock, 1 Low. (U. S.) 143.

3. The Blendenhall, 1 Dods. 421; The Mary Stenhouse, 8 Ir. Jur. N. S. 58; Smith *v.* The Stewart, Crabbe (U. S.) 218; The United Kingdom *v.* Syrian, 14 L. T. N. S. 833; The Waterloo, 2 Dods. 433; Tyson *v.* Prior, 1 Gall. 133. *Compare* Earl of Eglinton, Swab. 8.

A very large steamship, worth, with her cargo, $1,041,000, broke her rudder six hundred miles from New York, and was towed to that port by a steamship, worth with her cargo and freight $325,000. *Held*, that two and one-half per cent. of the $1,041,000 constituted a proper salvage award. The Alaska, 23 Fed. Rep. 597.

4. The Egypt, 17 Fed. Rep. 371; The Blackwall, 10 Wall. (U. S.) 1.

Not only the actual toil and expenses are to be considered in a case of salvage, but also the imminent contingency that the services might prove unavailing by the breaking up of the vessel before any amount of property could be saved. The John Gilpin, Olc. Adm. 77.

The risk incurred by salvors is important only as enhancing the compensation due them. The Sandringham, 10 Fed. Rep. 556.

In cases of salvage, the court has no authority to allow a reward for saving life. This is a common duty of humanity. But when the saving of life is connected with the saving of property, the court may consider it in fixing the amount of salvage. The Emblem, Dav. 61.

5. Laurty *v.* The Dennis Valentine, 47 Fed. Rep. 664; The Maggie Willett, 27 Fed. Rep. 519; The De Bay, 8 App. Cas. 559; 52 L. J. P. C. 57; 49 L. T. 414; 5 Asp. M. C. 156; The Sunniside, 8 P. D. 137; 52 L. J. Adm. 76; 49 L. T. 401; The City of Chester, 9 P. D. 182; 53 L. J. P. 90; 51 L. T. 485. See The Rebecca Clyde, 5 Ben. (U. S.) 98; The Mira A. Pratt, 31 Fed. Rep. 572; The Benison, 36 Fed. Rep. 793.

When a vessel employed in transporting part of the cargo of a wrecked vessel from the place where it was safely landed to a port, was lost, held, that her owner was not entitled to her value in his claim for salvage. Stephens *v.* Bales of Cotton, Bee Adm. 170.

6. The Blackwall, 10 Wall. (U. S.) 1; Newson on Salv. 62; The Rose, 31 Fed. Rep. 176; The Alice M. Minot, 30 Fed. Rep. 212; The Cherokee, 31 Fed. Rep. 167; The O. M. Hitchcock, 25 Fed. Rep. 777; The Alamo, 28 Fed. Rep. 312; The Vandercook, 24 Fed. Rep. 472; The Maggie Willett, 27 Fed. Rep. 519; McGinnis *v.* Steamboat Pontiac, 5 McLean (U. S.) 368.

7. Sunniside, 8 P. D. 137; 52 L. J. Adm. 76; 49 L. P. 401; The City of Chester, 9 P. D. 182; 53 L. J. P. 90; 51 L. T. 485; The De Bay, 8 App. Cas. 559; 49 L. T. 414.

The salvors used a boat belonging to one of them, in order to reach a derelict vessel. *Held*, that the use of the

delay and loss of employment[1] or forfeitures of insurance caused by deviation.[2] But the owners of the ship or property salved will not be liable to any extent beyond the value of the property salved.[3] The cost of repairs will for this purpose be taken at their actual value or at the cost price and not at the trade price.[4] Where the loss or damage is not necessarily incident to the performance of the salvage service, but results from a struggle carried on with another vessel desiring to assist in the salvage, the amount of such loss or damage will not be recoverable from the owners of the vessel salved.[5] The injury or loss will be presumed to have been caused by the necessities of the service and not by any act or negligence on the part of the salvors. Should it be alleged that the damage or loss was caused by the salvor's act or negligence, the *onus probandi* will be on the defendants.[6]

And with regard to the risk to the salved vessel, the rule is that a lower rate of remuneration will be awarded where its position is not one of personal danger, but a case of urgency, and the lowest rate where the vessel is disabled from proceeding, and there exists a possible contingency of serious consequences; as, for instance, in the case of a steamship in want of fuel.[7]

Subject to these general rules, the sum or proportion to be awarded as salvage compensation rests in the sound discretion of the court, to be exercised in view of all the circumstances of each individual case.[8] It rarely happens that the decision in one case

boat, and injury to it, were fully compensated for by payment to the owner of its full value, and that he could not claim, on account of it, any other sum beyond what the other salvors had. Hawkins *v.* Avery, 32 Barb. (N. Y.) 551.

A vessel was wrecked on Charleston Bar, and her cargo of cotton, etc., cast ashore on the islands, and there secured by great labor and risk of life and health on the part of the salvors. The court noticed the fact, that, while employed in this service, and in securing and drying the cargo on shore, the growing crops of the salvors suffered from neglect. Stephens *v.* Bales of Cotton, Bee Adm. 170.

1. The Albion, Lush. 282.

2. Bond *v.* Brig Cora, 2 Wash. (U. S.) 80; The Nathaniel Hooper, 3 Sumn. (U. S.) 542; Warder *v.* The La Belle Creole, 1 Pet. Adm. 31. *Compare* The Deveron, 1 W. Rob. 180; The Orbona, 1 Spinks 161.

3. Hayden *v.* The Cochrane, 3 Woods (U. S.) 304.

4. The Augusta, 4 Ir. Jur. N. S. 227.

5. The Eliza, 4 Ir. Jur. N. S. 58.

6. The Thomas Blyth, Lush. 16.

7. The Otto Hermann, 33 L. J. Adm. 189.

8. McGinnis *v.* Steamboat Pontiac, 5 McLean (U. S.) 357; Post *v.* Jones, 19 How. (U. S.) 150; Barrels of Oil, 1 Sprague (U. S.) 91; Stone *v.* The Jewell, 41 Fed. Rep. 103; The Clifton, 3 Hagg. Adm. 117, 120; The Ewell Grove, 3 Hagg. Adm. 221; The Earl Grey, 3 Hagg. Adm. 363; The St. Nicholas, Lush. 29; The Thetis, 3 Hagg. Adm. 14, 62; The Traveller, 3 Hagg. Adm. 370; The Isabella, 3 Hagg. Adm. 427; The Industry, 3 Hagg. Adm. 203; The Salacia, 2 Hagg. Adm. 262; The Hector, 3 Hagg. Adm. 90; The Jane, 2 Hagg. Adm. 338; The London Merchant, 3 Hagg. Adm. 394; The Amerique, L. R., 6 P. C. 468; 31 L. T. 854; The Raikes, 1 Hagg. Adm. 246; The Martin Luther, Swab. 287; The Spirit of the Age, Swab. 286; The Sarah, 1 Rob. 313, n.; The Princess Alice, 3 W. Rob. 138; The William Beckford, 3 Rob. 355; The Kingalock, 1 Spinks 267.

The amount of salvage to be allowed is in the discretion of the court, and it will not be interfered with in the appellate court except in very clear cases of mistake. The Dos Hermanos,

can be made a precedent for deciding another when the only question is the amount of the remuneration.[1] But the discretion should be guided by these general rules as far as practicable, and when the circumstances show a similarity of reasoning and common point of agreement as to amount, the court should consider the precedents of adjudicated cases.[2]

Services attended with little danger or expense and of short duration, are not entitled to be placed in the highest order of salvage.[3] And in order to protect the owners from unfair and unnecessary payments, the peculiar circumstances of each particular case will be carefully inquired into,[4] and the amount of the remuneration will be fixed with reference to such circumstances,[5] and will not at the present day, be assessed on any supposed principle of specific proportion based on the value of the property saved.[6]

The amount of salvage to be allowed in derelict cases is governed by the same principles as other salvage cases and rests in the discretion of the court, according to the circumstances of each case viz., the danger to property, value, risk of life, skill, labor, and the duration of the services.[7] The early cases recognize the practice of allowing for salvage of property found absolutely derelict at sea one-half, and in no case less than one-third of the value of the property saved.[8] This rule is so flexible, and has been so often departed from that it can scarcely be said

10 Wheat. (U. S.) 306; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; Tyson *v.* Prior, 1 Gall. (U. S.) 133; The Delaware, 6 Blatchf. (U. S.) 527.

1. The Connemara, 108 U. S. 352; The Genessee, 7 N. of Cas. Supp. 15, cited; 12 Jur. 401; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

2. The Neto, 15 Fed. Rep. 819.

3. Coffin *v.* The John Shaw, 1 Cliff. (U. S.) 230; The John Gilpin, Olc. Adm. 88; The Clifton, 3 Hagg. Adm. 117; The Westminster, 1 W. Rob. 229; The Connemara, 108, U. S. 352.

4. The Sphynk, 4 Ir. Jur. N. S. 230; The Oscar, 2 Hagg. Adm. 260.

5. The Salacia, 2 Hagg. Adm. 262.

6. The James Dixon, 2 L. T. N. S. 696; The Thetis, 3 Hagg. Adm. 14; The Rendsburg, 6 Rob. 153.

7. Post *v.* Jones, 19 How. (U. S.) 150; The Albion, 3 Hagg. Adm. 255; The Aquila, 1 Rob. 37; The Minerva, 1 Spinks 274; The Sarah Bell, 4 N. of Cas. 144; The Magdalen, 5 L. T. N. S. 807; The Florence, 16 Jur. 572; The Jane, 5 Ir. Jur. 31; The Scindia, L. R., 1 P. C. 241; 4 Moore P. C. N. S. 84; The Inca, 12 Moore P. C. 189; The Kileena, 6 P. D. 193; The Cleopatra, 3 P. D. 145; The Andrina, L. R., 3 A. & E. 286; The True Blue, L. R., 1 P. C. 250.

8. Schooner Boston, 1 Sumn. (U. S.) 328; Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Hindry *v.* The Priscilla, Bee Adm. 1; Rowe *v.* The Brig ——, 1 Mason (U. S.) 372; Morehouse *v.* The Jefferson & Cargo, 1 Pet. Adm. 46; Bell *v.* The Ann., 2 Pet. Adm. 278; The John Wurts, Olc. Adm. 462; Sprague *v.* Maria, 6 Law Rep. 14; Evans *v.* Ship Charles, Newb. 329; Taylor *v.* Ship Cato, 1 Pet. Adm. 48; Warder *v.* The La Belle Creole, 1 Pet. Adm. 31; Sprague *v.* 140 Barrels of Flour, 2 Story (U. S.) 195; The Elizabeth & Jane, 1 Ware (U. S.) 35. See The L'Esperance, 1 Dods. 47; The Blendenhall, 1 Dods. 414; The Ewell Grove, 3 Hagg. Adm. 221; The Elliotta, 2 Dods. 75; The King *v.* Property Derelict, 1 Hagg. Adm. 383; The Charlotta, 2 Hagg. Adm. 361; The Effort, 3 Hagg. Adm. 165; The Britannia, 3 Hagg. Adm. 153; The Frances Mary, 2 Hagg. Adm. 89; The Reliance, 2 Hagg. Adm. 90, n.; The Watt, 2 W. Rob. 70; The Flower City, 16 Fed. Rep. 866. Two reasons are recognized for allowing a liberal reward in cases of derelict property: 1. That the prop-

that there is now any fixed rule as to compensation in salvage cases.[1] It is now the practice to allow a fair compensation for the actual services,[2] and one-half will be given only where both considerable energy and great exertion have been displayed,[3] or a considerable danger incurred by the salvors.[4] If the service rendered to derelicts be of extraordinary merit, even as much as two-thirds of their value may be awarded to the salvors,[5] but it is with great reluctance that more than a moiety is rewarded.[6]

erty having been abandoned as lost, it is not for its owner to complain of the reward paid to strangers who restore it; 2. The protection of the public against danger from the derelict vessel. The Anna, 6 Ben (U. S.) 166.

1. Barrels of Oil, 1 Sprague (U. S.) 91; The Ida Howard, 1 Low. (U. S.) 3. Lord Stowell in The Aquila, 1 Rob. 37 declared the rule which gives to the salvors one-half of the property saved when that property was absolutely derelict or abandoned to be "obsolete."

The principle sought to be enforced is to make a fair division of the salved property between its owners and the salvors. The John Wurts, Olc. Adm. 462.

2. Bark Lovetand, 5 Fed. Rep. 105; Cargo *v.* Bark Edwards, 12 Fed. Rep. 508; Post *v.* Jones, 19 How. (U. S.) 150; The Ida L. Howard, 1 Low. (U. S.) 2; The Georgiana, 1 Low. (U. S.) 91; Fisher Sybil, 5 Hughes (U. S.) 61; The B. C. Terry, 9 Fed. Rep. 920; The Annie Henderson, 15 Fed. Rep. 550.

It is the prevailing disposition of admiralty courts to allow to the owners of the saving vessel one-third of the amount of salvage. Montgomery *v.* The T. B. Leathers, Newb. Adm. 421; The Charles, 1 Newb. Adm. 329; The Delphos, 1 Newb. Adm. 412; Bond *v.* Brig Cora, 2 Wash. (U. S.) 80; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Small *v.* Goods Saved from the Messenger, 2 Pet. Adm. 284; The Alamo, 28 Fed. Rep. 312; Island City, 1 Black (U. S.) 121; The Carl Schurz, 2 Flip. (U. S.) 330; Post *v.* Jones, 19 How. (U. S.) 150.

One-half of the value of the property saved was awarded in the following cases: The Andrew Adams, 36 Fed. Rep. 205; The Saragossa, 1 Ben. (U. S.) 557; Coast Wrecking Co. *v.* Phenix Ins. Co., 20 Blatchf. (U. S.) 557; Taylor *v.* Ship Cato, 1 Pet. Adm. 48; The Ida L. Howard, 1 Low. (U. S.) 3; Peisch *v.* Ware, 4 Cranch (U. S.) 347; The Cayenne, 2 Abb. (U. S.) 42; Montgomery *v.* The T. P. Leathers, Newb. Adm. 421; The John Wurts, Olc. Adm. 462; Bas *v.* Tingey, 4 Dall. (U. S.) 37; The Maria Bishop, Blatchf. Prize Cas. 552; The Geo. W. Wright, 8 Ben. (U. S.) 219.

One-fourth in The Sandringhan, 5 Hughes (U. S.) 316; The Sybil, 5 Hughes (U. S.) 61.

One-fifth in the Joseph C. Griggs, 1 Ben. (U. S.) 81; The Kimberley, 40 Fed. Rep. 289; Eads *v.* Steamboat H. D. Bacon, 1 Newb. Adm. 274.

One-sixth in Williams *v.* Barge Jenny Lind, 1 Newb. Adm. 143; Schooner Adeline, 9 Cranch (U. S.) 244.

One-tenth in Bass *v.* Five Negroes, etc., Bee Adm. 201; The Queen of the Pacific, 25 Fed. Rep. 610; Stone *v.* The Jewell, 41 Fed. Rep. 103.

3. The Sansone, 3 Ir. Jur. 258.

4. The Fortuna, 4 Rob. 194.

5. The Jonge Bastiaan, 5 Rob. 322; The Jubilee, 3 Hagg. Adm. 43, n. See Bearse *v.* 340 Pegs of Copper, 1 Story (U. S.) 314; British Consul *v.* Smith, Bee Adm. 178; Cross *v.* Ship Bellona, Bee Adm. 193; Sprague *v.* 140 Barrels of Flour, 2 Story (U. S.) 195; Lewis *v.* The Elizabeth & Jane, 1 Ware (U. S.) 35; The John E. Clayton, 4 Blatchf. (U. S.) 372.

The whole net proceeds may be awarded as salvage, under special circumstances; as, where the amount is small, and the owner of the property saved refuses to appear. The Zealand, 1 Low. (U. S.) 1.

6. Rowe *v.* The Brig——, 1 Mason (U. S.) 372; Sprague *v.* 140 Barrels of Flour, 2 Story (U. S.) 198; The Britannia, 3 Hagg. Adm. 153; The Effort, 3 Hagg. Adm. 165; The Frances Mary, 2 Hagg. Adm. 89; The Ewell Grove, 3 Hagg. Adm. 209; The Queen Mabb, 3 Hagg. Adm. 242.

Amounts Allowed in Particular Cases. —In the following cases the foregoing rules were applied in determining the amount of salvage to be awarded under particular circumstances: The Zealand, 1 Low. (U. S.) 1; The Ida L. Howard, 1 Low. (U. S.) 3; The Albion Lincoln, 1 Low. (U. S.) 71; The Deer, 1 Low. (U. S.) 95; The W. F. Garrison, 1 Low. (U. S.) 139; The Lovett Peacock, 1 Low. (U. S.) 143; Bowley *v.* Goddard, 1 Low. (U. S.) 154; The Geo. Gilchrist, 1 Low. (U. S.) 235; The Annie Leland, 1 Low. (U. S.) 310; The L. T. Knights, 1 Low. (U. S.) 396; Spencer *v.* The Charles Avery, 1 Bond (U. S.) 117; The M. B. Stetson, 1 Bond (U. S.) 119; Blagg *v.* The Bicknell, 1 Bond (U. S.) 270; The Saxon, 4 Ben. (U. S.) 18; Robinson *v.* The Huntress, 5 Pa. L. J. Rep. 82; The Anna, 10 Blatchf. (U. S.) 456; Harley *v.* Four Hundred and Sixty-seven Bars of Railroad Iron, 1 Sawy. (U. S.) 1; The John Perkins, 3 Ware (U. S.) 87; The Speedwell, 3 Ware (U. S.) 96; The Acorn, 3 Ware (U. S.) 98; The Attacapas, 3 Ware (U. S.) 65; The Rebecca Clyde, 5 Ben. (U. S.) 98; The J. L. Bowen, 5 Ben. (U. S.) 296; The Minnie Miller, 6 Ben. (U. S.) 117; The Wexford, 6 Ben. (U. S.) 117; The Anna, 6 Ben. (U. S.) 166; The Bolivar *v.* The Chalmette, 1 Woods (U. S.) 397; The Senator, 1 Brown Adm. 372; The Michael Groh, 1 Brown Adm. 419; Baker *v.* Hemenway, 2 Low. (U. S.) 501; The C. W. Ring, 2 Hugh. (U. S.) 99; Barden *v.* The William Penn, 2 Hugh. (U. S.) 144; Bean *v.* The Grace Brown, 2 Hugh. (U. S.) 112; Pacific Mail Steamship Co. *v.* Ten Bales of Gunny Bags, 3 Sawy. (U. S.) 187.

A steamship worth $230,000 was towed 700 miles by another steamship worth $100,000, entailing a delay of 36 hours. An award of $10,000 was held proper. The Colon, 18 Blatchf. (U. S.) 277.

A ship worth $47,000 was towed into a safe anchorage by a tug, and $5,000 was held proper compensation. The Allegiance, 6 Sawy. (U. S.) 68.

A city ice-boat worth $245,000 rescued a vessel worth $28,000 from the ice off the Delaware Capes, and $2,500 was held a proper award. The Arendal, 14 Fed. Rep. 580.

But for the salvors, a steamboat laden with cotton ashore on a reef would have been a total loss. An award of $9,625 was made. The Neto, 15 Fed. Rep. 819.

A schooner with her cargo worth $10,000 got aground and was pulled off by a tug. It was held that $500 should be awarded. The Sophia Hanson, 16 Fed. Rep. 144.

A steamship worth with her cargo $205,000 got aground and was assisted by wrecking schooners. It was held that $9,575 afforded a proper compensation. The Dolcoath, 16 Fed. Rep. 265.

A valuable steamship with a rich cargo was rescued from imminent peril of total loss. The skill was extraordinary and the time consumed considerable. One-fifth of the value of the ship and cargo and the salvor's expenses were allowed as salvage compensation. The Egypt, 17 Fed. Rep. 359.

A schooner worth with her cargo $2,500 sprang aleak and was towed into port by a tug. It was held that $250 was a proper award. The C. & C. Brooks, 17 Fed. Rep. 548.

A steamship worth with cargo and freight $264,000 lost the use of her steam power, and drifted for seven days. She was towed into port by a vessel worth $90,000. It was held that $5,500 afforded a fair compensation. The Leipsic, 20 Blatchf. (U. S.) 288.

A vessel went ashore on Long Island and was so badly damaged that she could not be saved. Her cargo was saved by an organized wrecking company. Fifty per cent. of the value of the cargo was allowed for salvage. Coast Wrecking Co. *v.* Phœnix Ins. Co., 20 Blatchf. (U. S.) 557.

A vessel worth with cargo $100,000 was towed into port and one-quarter the value was allowed as salvage. The Sybil, 5 Hughes (U. S.) 61.

A steamer worth $135,000 ran aground and was rescued by two steam tugs. The service took only three hours. An award of $2,500 was made. The Swiftsure, 5 Hughes (U. S.) 228.

A steamer worth with cargo and freight $200,000 stranded on Cape Henry and was abandoned. But for a week of hard labor by an organized force of wreckers she would have been a total loss. One-quarter of the value was deemed a fair compensation. The Sandringham, 5 Hughes (U. S.) 316.

A steamer worth $180,000 ran aground, and was got off in less than a day by a professional wrecker, who was held properly compensated by

$700. The Excelsior, 5 Hughes (U. S.) 416.

A small steamer worth $2,400 became water-logged in a narrow ship channel and was left by her crew without a light. It was held that one-quarter of her value afforded a proper compensation for the service of towing her out. The Carrie, 5 Hughes (U. S.) 445.

A steamer worth $150,000 picked up a brigantine worth $7,700 and towed her into port. The service was compensated by an award of $3,750. The Marie Anne, 5 Hughes (U. S.) 462.

A steamship worth with her cargo $100,000 ran aground and was pulled off in three days by two tugs and a schooner. An adequate compensation was deemed to be $4,200. The Hesper, 18 Fed. Rep. 696.

A schooner worth $4,000 stranded and was towed off in three-quarters of an hour. It was held that $200 was a sufficient award. The Maggie Ellen, 19 Fed. Rep. 221.

A steamer worth with her cargo $160,000 sustained serious damage and would have been lost but for a salvage service lasting forty-eight hours. It was held that $6,000 should be awarded. The Excelsior, 19 Fed. Rep. 436.

A steamship worth with cargo and freight $252,000 lost her propeller and could make no headway under sail. Another steamer worth with cargo and freight $780,000 towed her into port, and $25,000 was deemed a proper award. The Daniel Steinman, 19 Fed. Rep. 918.

A steamer worth with cargo and freight $345,000 ran aground and was towed off by three tugs without much danger or labor. It was held that $8,000 afforded a proper compensation. The Guadalupe, 20 Fed. Rep. 443.

A steamer worth $100,000 broke her steam-pipe and drifted helplessly. She was towed into port in two hours by another steamer worth $75,000. An award of $1,000 was made. The Rosedale, 20 Fed. Rep. 447.

A steamboat worth $35,000 broke from her moorings and drifted down the stream. She was towed into a place of safety by two tugs, which were held properly compensated by $300. The Henry Frank, 4 Woods (U. S.) 127.

A schooner worth with her cargo $17,500 was run into and temporarily abandoned. Pending the abandonment she was towed into a place of safety. Ten per cent. was awarded. The Hyderabad, 11 Biss. (U. S.) 112.

A steamship worth with her cargo $1,000,000 broke her rudder six hundred miles from port and was towed in by another vessel worth $325,000. An award of two and a half per cent. was made. The Alaska, 23 Fed. Rep. 597.

In one case where property worth $647,000 was saved without much labor or risk to the salvors an allowance of ten per cent. was held proper. The Queen of the Pacific, 25 Fed. Rep. 610.

In the case of a schooner worth with her cargo $11,000 found in great distress and towed into port by a fishing schooner, which took three days for the purpose, an allowance of one-third was held proper. The Maggie Willett, 27 Fed. Rep. 519.

In the case of services rendered in getting off a reef, a vessel worth with her cargo $500,000, $18,000 was allowed, the service involving no especial risk. The Alamo, 28 Fed. Rep. 312.

A scow laden with cotton and worth with the cotton $32,000 was towed into the river. It was held that an award of $350 was sufficient. The S. B. Baker, 23 Blatchf. (U. S.) 389.

A steamer worth with her cargo $160,000 became disabled in bad weather fifteen miles below Sandy Hook and was towed into New York City. It was held that an award of $4,000 was proper. The Swiftsure, 29 Fed. Rep. 462.

A schooner worth with her cargo $18,000 became disabled and was taken in tow. An award was made of $1,500. The Fanny Brown, 30 Fed. Rep. 215.

A steamship worth with her cargo $475,000 lost her rudder and drifted for two days. She was then taken up by a steamer worth with her cargo $440,000. An allowance of $25,000 was made in addition to the actual expense incurred. The Gallego, 30 Fed. Rep. 271.

A bark worth with her cargo $200,000 ran upon a shoal and was got off by two tugs. An award of $3,500 was made to one of the tugs. The Cassandra Adams, 30 Fed. Rep. 379.

A tug worth $5,000 became disabled forty miles outside of New York and was taken in by another tug. An award of $1,250 was made. The Mary N. Hogan, 30 Fed. Rep. 391.

A derelict schooner laden with rice was brought into port. The rice was sold for $2,000 and $500 was allowed

as salvage. The Fairfield, 30 Fed. Rep. 700.

A steamship worth with her cargo and freight $500,000, lost her rudder and was brought into New York harbor from a point just outside by another steamer worth $450,000. An allowance of $4,000 was made. The Wisconsin, 30 Fed. Rep. 879.

A steamer ran ashore and sank. She was got off by a wrecking company, and three and a half per cent. of her value, $160,000, was allowed. The Excelsior, 123 U. S. 40.

Where a wrecking company agreed to save a wrecked schooner laden with railroad iron for fifty per cent., this was held a reasonable salvage allowance. The R. V. Bibber, 33 Fed. Rep. 55.

A cotton-laden ship went ashore on the Florida coast. The vessel was lost, but the cotton was mostly saved. Allowances from twenty-five to fifty per cent. were made. The Slobodna, 35 Fed. Rep. 537.

Where a steamship worth with her cargo $26,000 lost her motive power fifty miles north of the island of Cuba and was towed 240 miles by a steamer worth $50,000, the service involving a day's delay, an allowance of $4,000 was made. The Erin, 36 Fed. Rep. 712.

A steamship worth with her cargo nearly $500,000 stranded on the Atlantic coast and was rescued by nine vessels at considerable risk. One-fifth of the value was allowed in addition to the actual outlay. The Kimberley, 40 Fed. Rep. 289.

A towboat with five coal barges in tow drifted down the stream. An award of $250 was made for her rescue, she being of the value of $12,000. The Resolute, 38 Fed. Rep. 923.

A schooner worth with her cargo $16,000 was got off a bar, and $1,000 was allowed. The Nellie Floyd, 39 Fed. Rep. 221.

A steamship which had suffered by a collision was brought in at considerable risk to the steamship rendering the service. The cargo saved was worth $150,000 and the vessel $40,000. An award of $7,500 was made. The Benison, 36 Fed. Rep. 793.

A vessel worth with her cargo $14,000 was towed 240 miles by a steamship worth $225,000. An allowance of $2,000 was made. The Pomona, 37 Fed. Rep. 444.

In the case of a steamship worth with her cargo $300,000 taken into port after the loss of a rudder by tugs worth $50,000, an allowance of $1,800 was made to be apportioned between the tugs. The Cachemire, 38 Fed. Rep. 518.

A tug rescued a stranded ferryboat from a position of some danger. The service was slight and the labor inconsiderable. An allowance of $600 was made. The James Rumsey, 40 Fed. Rep. 909.

A disabled steamship was towed 750 miles into port by another steamship. An award of $25,000 was made. The Italia, 42 Fed. Rep. 416.

For a slight service rendered to a vessel worth $1,700, 10 per cent. was allowed. The Jewel, 41 Fed. Rep. 103.

A schooner worth with her cargo $20,000 went ashore and was got off by two tugs which were allowed $300 each. The Eleanor, 42 Fed. Rep. 543.

A coal barge worth with her cargo $20,000 was found in distress and taken in tow by a steamship with a valuable cargo. The service entailed a delay of 11 hours, and the towing was attended with considerable difficulty. The amount awarded was $4,000. The Albany, 42 Fed. Rep. 654.

A tug and her tow worth $30,000 were rescued from a condition of considerable peril, and $3,500 was allowed. The M. Vandercook, 45 Fed. Rep. 262.

A steamship worth with cargo and freight $375,000 broke her shaft 900 miles east of Halifax, and was towed for three days by a vessel worth $200,000 under circumstances of considerable danger. The award was $8,500. The Veendam, 46 Fed. Rep. 489.

A raft of timber worth $2,200 drifted away and was rescued by a tug. The allowance was $45. A Raft of Piles, 42 Fed. Rep. 917.

A bark worth with her cargo $20,000 was somewhat disabled and was towed into port in nine hours. The award was $400. The Jarlen, 43 Fed. Rep. 176.

A scow worth $4,000 was rescued by tugs and $600 was allowed. Scow, No. 19, 46 Fed. Rep. 406.

A steamship worth with her cargo $90,000 became disabled and was towed into port in fifty hours at a loss of twenty-four hours' time by a steamship worth with her cargo $630,000. The amount allowed was $8,000. The Tancarville, 45 Fed. Rep. 903.

A steamship worth $235,000 ran aground in a position of considerable danger. The award was $31,000. The City of Worcester, 45 Fed. Rep. 119.

A tug rescued scows worth $20,000 from a position of great peril, and $5,000 was allowed. Scows 19, 16 & 24, 45 Fed. Rep. 901.

A steamer worth $150,000 was pulled off a bar by a wrecking schooner and tug. The service involved no danger. The allowance made was $700. The Excelsior, 48 Fed. Rep. 749.

A brig worth with her cargo $8,000 was found in a helpless position by a large steamer with a valuable cargo and was towed into port. The service involved a delay of three days. The allowance made was $2,750 in addition to the expense incurred by the deviation. The Marie Anne, 48 Fed. Rep. 742.

A ship and cargo worth $107,000 broke her anchor and stranded. She was got off by a tug in a short time, and $2,000 was allowed. The G. W. Jones, 48 Fed. Rep. 925.

A steamship worth with her cargo $185,000 became disabled as to her machinery fifteen miles east of Sandy Hook and was towed into port. $1,000 was allowed. The Schiedam, 48 Fed. Rep. 923.

A schooner went aground in a quicksand and was pulled off by steam tugs at considerable risk. The cargo saved was worth $7,000 and the vessel $5,000. The allowance made was $5,000. The Agnes I. Grace, 49 Fed. Rep. 662.

A number of scows worth $30,000 got adrift and were brought in by a tug. The amount allowed was $750. Five Mud Scows, 50 Fed. Rep. 237.

In the case of scows blown out to sea outside Sandy Hook brought in by a tug, one-third of $26,000, their value was allowed. Scows 3 & 16, 50 Fed. Rep. 570.

A steamship worth with her cargo $900,000 went ashore and was got off by an organized wrecking force. The allowance made was $40,000. The Venezuela, 50 Fed. Rep. 607.

A steamship worth with her cargo $205,000 went ashore on the Florida coast and was got off by an organized wrecking force. It was held that 25 per cent. afforded a proper compensation. The Tregorno, 50 Fed. Rep. 946.

In a similar case a similar conclusion was reached. The Eldorado, 50 Fed. Rep. 951.

A steamship worth with her cargo $410,000 lost her rudder plates and drifted at a point about thirty miles from the mouth of the Columbia river. The steamer effecting the rescue was allowed $20,000. The Charles Wetmore, 51 Fed. Rep. 449.

Amounts Allowed Where the Danger Was from Fire.—Two grain elevators, worth $12,000 each, were towed into the stream to save them from taking fire. The tug which towed them was held entitled to $500. The Rialto, 15 Fed. Rep. 124. At the same time a steamship worth with her cargo $378,000 was towed into the stream, and $500 was held proper compensation. The Rialto, 15 Fed. Rep. 124.

A bark laden with naphtha took fire at the dock and was towed by two tugs at some risk. It was held that 15 per cent. of the value of the bark and 25 per cent. of the value of the naphtha should be awarded as salvage compensation. The Cyclone, 16 Fed. Rep. 486.

A steamer took fire at a levee and was towed out. An award of $750 was made. 357 Bales of Cotton, 2 Flip. (U. S.) 288.

A ship and cargo worth $236,000 were rescued from imminent danger of total loss by fire. Eight per cent. was deemed a proper award. The Connemara, 108 U. S. 352.

A steamer worth with cargo and freight $315,000 caught fire and was partially flooded by a wrecking tug with a steam pump. An allowance of $3,500 was made. The Rio Grande, 22 Fed. Rep. 914.

A steamer was towed from a burning pier by two tugs which were allowed $1,100. The Indiana, 22 Fed. Rep. 925.

A vessel worth with her cargo $40,000 caught fire. The fire was put out but only after the value of the property was reduced to $5,500. It was held that $2,100 afforded proper compensation. The Perseverance, 27 Fed. Rep. 478.

Certain lighters laden with naphtha and worth with their loads $4,500 were towed from the neighborhood of a fire. A compensation of $200 was deemed sufficient. The Oregon, 27 Fed. Rep. 871.

Where an oil-laden schooner was towed into the stream from a fire $200 was allowed. Wilson *v.* Winchester, 30 Fed. Rep. 204.

In the case of a cotton-laden vessel towed out from a fire, sunk, and the fire extinguished, $500 was allowed, the value of the vessel and cargo in their damaged condition being $72,000. The Alice M. Minot, 30 Fed. Rep. 212.

A steamship worth with her cargo $275,000 was found to be on fire im-

mediately after leaving port. A tug which assisted her with a fire-pump was allowed $650. The Cherokee, 31 Fed. Rep. 167.

Where one tug extinguished a fire on another tug an allowance of $300 was made. The James A. Garfield, 31 Fed. Rep. 175.

Where a tug towed a lighter from a fire $140 was allowed. The Rose, 31 Fed. Rep. 176.

Where a tug pulled a lighter away from a burning steamer $500 was allowed. The Straits of Gibraltar, 32 Fed. Rep. 297.

A steamer towed from a fire into the stream was required to pay $2,000. The Louisiana, 34 Fed. Rep. 663.

Where several tugs towed a burning steamship from a pier, and the steamship was so badly burned as not to be worth repairing, but still was worth $25,000, an allowance of $8,350 was made to the tugs to be apportioned among them. The Lone Star, 34 Fed. Rep. 807; 35 Fed. Rep. 793.

Where a steamer worth with her cargo $430,000 was towed from a New York pier by two tugs on the breaking out of a fire, each tug was awarded $2,000. The New York, 34 Fed. Rep. 922.

In another case a tug towed a schooner from a fire and $25 was allowed, the service being quickly rendered. The Bessie Whiting, 35 Fed. Rep. 79.

In the case of a vessel worth after a fire $15,000, the cargo being worth $55,000, an allowance of $1,500 was made to the tug rendering the service in question. The Brussels, 38 Fed. Rep. 524.

Where a steamer was towed from a fire with little trouble and risk, an allowance of $50 was made. The Carondelet, 36 Fed. Rep. 714.

In another case a service was rendered to a burning ship for $40,000, and $500 was allowed. The Banloo, 39 Fed. Rep. 570.

In another case where the vessel and her cargo were worth $70,000, and the service rendered was greater, $5,000 was allowed. The Avoca, 39 Fed. Rep. 567.

In another case, where an oil steamer lying at an oil dock caught fire, and a bark and a barge, the latter laden with petroleum, were in imminent danger and were towed into the stream, the bark and the barge with their cargoes being worth about $17,000, the service being slight, $350 was allowed. The Marie, 39 Fed. Rep. 501.

In another case an allowance of $400 was made. The Alice Clark, 39 Fed. Rep. 621.

In still another case the allowance was $4,500. The Labrador, 39 Fed. Rep. 503. Again, $4,500 was allowed. The Old Kensington, 39 Fed. Rep. 496.

In another case the value of the property saved was $100,000. An allowance of $14,500 was made. The Kenilworth, 41 Fed. Rep. 523.

Where a steamship worth with her cargo $600,000 was towed from a fire, $4,500 was allowed to the tugs rendering the service, which lasted two hours and involved little peril. The Holland, 44 Fed. Rep. 362.

A steamer rendered five hours' service to a barge worth $4,000 and saved her from loss by fire. The award was $1,000. The Isaac May, 46 Fed. Rep. 79.

In the case of service rendered by a fireman to a ship which came into port with her cargo of cotton on fire, the allowance was $12,000, the value of ship and cargo being $300,000, and the service occupied five days. The European, 44 Fed. Rep. 484.

In the case of a vessel and cargo worth $81,000 rescued from fire, an allowance of $20,000 was made. The Bay of Naples, 44 Fed. Rep. 90; but on appeal this amount was declared to be excessive and was reduced to $12,000. The Bay of Naples, 48 Fed. Rep. 737.

In another case a steamer worth over $100,000 being towed from a fire to a place of safety, an allowance of $2,500 was made. The Kaaterskill, 45 Fed. Rep. 701.

A number of tugs extinguished a fire on a petroleum-laden ship, but for the assistance, ship and cargo, which were worth $22,000, would have been destroyed. The award was $4,000. The Lydia, 49 Fed. Rep. 666.

In another case the danger from fire not being very great and the service not very considerable, $200 was allowed to two tugs. The John Swan, 50 Fed. Rep. 447.

In another case where a fire broke out in a lighter lying at a New York slip and two tugs pumped water on the flames with the assistance of the harbor fire-boat, and the value of the property saved was $17,000, and the tugs were worth about $27,000, $275 was allowed to the tugs. The Dispatch, 50 Fed. Rep. 611.

VII. APPORTIONMENT OF SALVAGE.—The admiralty court has power to apportion the amount of salvage among the various claimants.[1] No precise rules regulate the exercise of this power. The court is guided mainly by the character of the risk run by the ship-owners, by the nature of the respective services rendered by the master, officers, and crew of the salving vessel.[2] The master of the salving ship, upon whom rests the whole responsibility of employing the ship in the services, generally receives a larger proportion of the salvage than any of the crew.[3] All the members of the crew of the salving vessel who are willing to do what they can are entitled to share in the salvage compensation.[4] Where the property has been saved by more than one set of salvors, the principle is that all who were engaged are entitled to share in the reward in proportion to the services rendered.[5] But the court in apportioning the amount awarded will give a larger share to those persons who actually incurred the difficulty and danger of the salvage enterprise.[6]

1. See The Farnley Hall, 46 L. T. N. S. 216; The Kenmure Castle, 7 P. D. 47; 30 W. R. 708; The Golondrina, L. R., 1 Adm. 334; The Princess Helena, Lush. 190; The Skibladner, 3 P. D. 24; 38 L. T. 150; The Castlewood, 42 L. T. 702; The Wigtonshire, 36 L. J. Adm. 11.

2. Newson on Salv., p. 91.

In Barden *v.* The William Penn, 2 Hughes (U. S.) 144, the distribution of salvage among officers and crew of the vessel was apportioned according to their responsibilities, respectively, in their different stations.

Where seamen, owing to the loss of freight, have a salvage claim, the amount of wages which they were receiving is an equitable criterion to determine the amount of compensation to be awarded. Cartwell *v.* Ship John Taylor & Tackle, 1 Newb. Adm. 341.

3. The Pomona, 37 Fed. Rep. 815; The Martin Luther, Swab. 287. See The Enchantress, Lush. 93; The Earl Grey, 3 Hagg. Adm. 363.

4. Studley *v.* Baker, 2 Low. (U. S.) 205.

Where the owners of a salving vessel sue for salvage without naming the crew, the proper practice is for the court to determine the amount which should be awarded as the entire compensation, and to apportion it between the vessel, master, and crew, and to direct that the sum apportioned to the crew be paid into the registry and await their application for it. Steamer Leipsic, 5 Fed. Rep. 108.

The fact that a vessel is engaged in wrecking, does not raise the presumption that the wages of the crew are not in lieu of any share in the salvage. The Cetewayo, 9 Fed. Rep. 717; The Tornado, Cohen's Adm. L. 108.

Owner and master of a salving vessel, acting for all interested, submitted a claim to compensation for salvage services to arbitration; but the arbitrator decided that the services were only towage, and awarded a sum on that ground. *Held*, that as between libelants and the crew it might be divided as salvage; libelants could not claim to retain it as towage. McConnochin *v.* Kerr, 15 Fed. Rep. 545; 15 Fed. Rep. 360; *reversing* 9 Fed. Rep. 50.

Passengers who are bold to undertake a salvage service and active to assist in performing it, are entitled to an increased share of the proceeds on that account. But passengers who refuse to assist when solicited are not entitled to share in the reward. The Charles Henry, 1 Ben. (U. S.) 8.

Apprentices.—Where apprentices are salvors, their masters are not entitled to their share of the salvage, but it shall be paid to the apprentices themselves. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

5. Norris *v.* The Island City, 1 Cliff. (U. S.) 219; *affirmed*, 1 Black (U. S.) 121; The Ottawa, 1 Low. (U. S.) 274.

6. The Sarah Jane, 2 W. Rob. 111; The Jane, 2 Hagg. Adm. 343.

One of numerous salvors who suffers a special loss through a hazard to

The ordinary rule of distribution is to allow to the owner of the salving vessel one-third of the total sum allowed, and to distribute two-thirds among her officers and crew in proportion to their wages.[1] But in cases of extraordinary merit or extraordinary peril to the ship, he may found a claim to a higher salvage.[2] It is better for all parties that the apportionment of salvage among the salvors should be made by the court rather than by the parties themselves. If the owners and the officers and crew of the salving vessel make an agreement between themselves as to the distribution of salvage, it should be made with the fullest explanation of all the facts or it will be set aside.[3]

which all are exposed may be compensated for this special loss, as for personal injuries in falling down an open hatch while carrying the hose on board the vessel. The Cyclone, 16 Fed. Rep. 486.

Where a canal-boat in being towed across the upper bay of New York, in a heavy sea, broke adrift, and was rescued by a tug in sight of the towing boat, held, that a fireman who jumped upon the canal-boat to make a line fast, should receive a share equal to that of the master of the tug. The Ontario, 8 Ben. (U. S.) 500.

Where the masters of two boats agreed to go to the assistance of a ship that was grounded, for the purpose of getting her off, and to share the profits of the expedition equally between them, but before they reached her discovered that she was afloat, and one of them turned back and the other, pursuing her course, accidentally discovered passengers belonging to the distressed vessel, and afforded them relief, held, that the adventure terminated when the first boat turned back; and that her demand for the division of salvage in this case should be rejected. Marcy *v.* Chambers, 15 La. Ann. 77.

1. Sewall *v.* Nine Bales of Cotton, 5 Phila. (Pa.) 508; The Henry Ewbank, 1 Sumn. (U. S.) 400.

2. Ship Henry Ewbank, 1 Sumn. (U. S.) 400.

The fact that the salvor's vessel deviates from her course to render the service, is an important element in the apportionment between vessel and crew. If the service is not highly meritorious, two-thirds to the vessel and one-third to the crew is a fair apportionment. Markham *v.* Simpson, 22 Fed. Rep. 743.

Where a rescue is made by a steamship, and there is no danger or risk or extra trouble to the crew, and $2,000 are awarded as salvage, including the charge for a tug, the owners should be awarded four-fifths of that sum. And the master, having undertaken the service on his own responsibility, and having been commended for it, is entitled to $200. The balance should be divided among the other officers and employés—the steamship having no passengers—in proportion to their wages. The Pomona, 37 Fed. Rep. 815.

In the fifth circuit the rule for the apportionment of salvage is to give one-half to the salving vessel and the other half to her officers and crew in proportion to their rates of wages, allowing to the vessel any extra expense incident to the salvage services over and above her ordinary outlays. Sonderburg *v.* Ocean Tow-Boat Co., 3 Woods (U. S.) 146.

Three-fourths were allowed in Warder *v.* The La Belle Creole, 1 Pet. Adm. 31. Two-thirds in The Waterloo, B. & H. Adm. 114; The Scindia, L. R., 1 P. C. 241. Four-fifths in The Pomona, 37 Fed. Rep. 815.

In distributing the salvage money in a case where the salving vessel was exposed to no extraordinary risk or unnecessary deviation from her voyage, and where the salvage amounted to less than $2,000, one-fourth was awarded to the owners of the salving vessel, and the remaining three-fourths were divided among her master and crew, the master receiving four shares, the mate two shares, and seven seamen, including the cook, one share each. The Galaxy, B. & H. Adm. 270.

3. Markham *v.* Simpson, 22 Fed. Rep. 743. In Sonderburg *v.* Ocean Tow-Boat Co., 3 Woods (U. S.) 149, the court by Bradley, J., said: "As a general thing it is much better for all

A person dissatisfied with the tender of apportionment may, however, seek the assistance of the court within a reasonable time after the salvage has been decreed, and when the applicant is in a humble class of life, the question of time is one that the court will be indisposed to have pressed against him.[1] Whether a salvage claim will be held stale in admiralty, does not depend so much upon lapse of time as upon change of circumstances affecting the rights and conditions of parties.[2]

VIII. LIEN FOR SALVAGE.—A salvage service carries with it a maritime lien on the property saved[3] which may be enforced by

parties that the apportionment of salvage money should be made by the court than by the parties themselves. There is such a strong temptation for the owners of the salving vessels to speculate upon the improvidence of the men (who are always easily satisfied with a handful of ready cash), and to work upon their fears of losing their situations, that they will be exposed to the suspicion of doing these things even when they have intended to act with perfect fairness. The men are placed at a disadvantage anyhow. If they are firm in standing up to their rights (supposing they fully understand them), they are naturally looked upon by their employers as animated by a spirit of opposition and pertinacity, and the result often is that they are unjustly discharged. But it oftener happens that they do not understand their rights, and that they are easily persuaded to accept a less proportion than they are justly entitled to.

For these reasons owners should be very cautious about making such settlements with their men. It should never be done except with the fullest explanation of all the facts, so that everything may be transacted understandingly and above board. If done otherwise the court should not hesitate to set the arrangement aside. This is the general course pursued in all cases of attempted settlements with seamen. They are regarded as incompetent to take care of their own interests, and they are therefore looked upon as wards of the court."

1. The Spirit of the Age, Swab. 286; The Union Express, 1 Brown Adm. 516.

2. Sonderburg *v.* Ocean Tow-Boat Co., 3 Woods (U. S.) 146.

The libelant sued for his share of salvage money that had been received by respondents more than nine years previously, during which time libelant had made no claim, nor pretended any, and in the meantime the rights and position of the respondents had materially changed, and they had been condemned to pay and had paid to others more than the salvage money that they had received. *Held*, that the claim of the libelant was stale, and could not, therefore, be enforced in admiralty. Coburn *v.* Factors', etc., Ins. Co., 20 Fed. Rep. 644.

3. James on Salv., p. 99; Newson on Salv., p. 79; Desty on Ship. 327; Chapman *v.* The Engines of The Greenpoint, 38 Fed. Rep. 671; The Missouri's Cargo, 1 Sprague (U. S.) 260; The John Perkins, 3 Ware (U. S.) 87; The Amethyst, 2 Ware (U. S.) 20; The Bee, 1 Ware (U. S.) 332; The Emblem, 2 Ware (U. S.) 61; Eads *v.* Steamboat H. D. Bacon, Newb. Adm. 274; The John Gilpin, Olc. Adm. 77; A Box of Bullion, 1 Sprague (U. S.) 57; The Maria, Edw. Adm. 175. See Brevoor *v.* The Fair American, 1 Pet. Adm. 87; Packard *v.* Sloop Louisa, 2 Woodb. & M. (U. S.) 48; Hartfort *v.* Jones, 1 Ld. Raym. 395; Osborn *v.* Rogers, 1 Saund. 264; Seeman *v.* Erie R. Co., 2 Ben. (U. S.) 132; The Maria, Edw. Adm. 175; The Queen Mab, 3 Hagg. Adm. 242; The Effort, 1 Hagg. Adm. 165; The Eugene, 3 Hagg. Adm. 156; The Charlotte, 2 Hagg. Adm. 361; The Blendenhall, 1 Dods. 414; Baring *v.* Day, 8 East 57.

A salvage service carries with it a maritime lien on the things saved, whether the vessel is foreign or domestic. Chapman *v.* The Engines of The Greenpoint, 38 Fed. Rep. 671.

The interest of those who have acquired a claim *in rem* against a vessel for a collision is subject to the right and claim of her subsequent salvors. The remnants of the Jeremiah, 10 Ben. (U. S.) 338.

a suit *in rem* against the ship or cargo or both.[1] The salvors need not remain in the actual possession in order to maintain their rights.[2] The owners, therefore, have no right to remove a ship rescued without the consent of the salvors.[3] Should the owners remove it to another port without obtaining the salvors' consent they will have to reimburse the salvors all expenses incurred in arresting the ship.[4] The amount of the remuneration must be paid or the claim be released by the salvors before the owners will be entitled either to the property or the possession and custody of it.[5] And it requires the most unequivocal acts on their part to show that they intend to abandon their lien, and resort to the owners for payment.[6]

The lien for salvage takes precedence of prior maritime liens,[7] the government's claim for duties,[8] or a lien for general average.[9] It takes precedence of a lien for seaman's wages[10] and of liens of

A lien for salvage does not exist with regard to goods wrecked upon a navigable river, at a great distance from the main sea, although the tide there ebbs and flows. Baker *v.* Hoag, 3 Barb. (N. Y.) 203.

Under the Revised Statutes of *New York*, no one but the sheriff, or one of the coroners or wreckmasters of the county, can hold possession of wrecked property, after the expiration of forty-eight hours, by virtue of any lien for salvage. Baker *v.* Hoag, 3 Barb. (N. Y.) 203.

Clothes of Passengers and Seamen.— There is no lien on the clothes of passengers and seamen, on board the ship rescued. The Rising Sun, 1 Ware (U. S.) 378; Newson on Salvage, p. 79.

1. The Sabine, 101 U. S. 384.

The lien for salvage upon the property saved extends to goods on board a vessel and in charge of a carrier for transportation, notwithstanding such goods are the property of the United States. The Davis, 10 Wall. (U. S.) 15; 6 Blatchf. (U. S.) 138.

2. Desty on Shipp. § 327.

In the case of capture and recapture, the property remains with the recaptors until the salvage is paid. Marshall *v.* Delaware Ins. Co., 2 Wash. (U. S.) 54.

3. The Blendenhall, 1 Dods. 414; The Barney Eaton, 1 Biss. (U. S.) 242.

4. The Nicolai *v.* Heinrich, 17 Jur. 330.

5. The Princess Helena, 30 L. J. Adm. 140.

6. Eads *v.* Steamboat H. D. Bacon, Newb. Adm. 274. *Compare* Long *v.* The Tampico, 16 Fed. Rep. 491.

7. The Barney Eaton, 1 Biss. (U. S.) 242; Emerson *v.* Proceeds of the Pandora, 1 Newb. Adm. 438; Stimson's St. Law, § 4643.

The rights of the owner are not divested by abandonment, but the finder becomes the legal possessor, and acquires a privilege against the property for his salvage, which takes precedence of all other liens. Lewis *v.* The Elizabeth & Jane, 1 Ware (U. S.) 41.

8. Merritt *v.* One Package of Merchandise, 30 Fed. Rep. 195; 32 Fed. Rep. 111. See The Waterloo, B. & H. Adm. 114.

9. The Spaulding, 1 Brown Adm. 310.

Where salvage services are rendered in getting a vessel off a reef, in the distribution of proceeds, they are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of her cargo. And this priority is not ousted by the fact that one of the salvors had the promise of a third party to pay him even if he could not collect from the vessel. The Spaulding, 1 Brown Adm. 310.

10. The Athenian, 2 Flip. (U. S.) 84; The Sydney Cove, 2 Dods. 1; The Medona d'Idra, 1 Dods. 37; The Union, 3 L. T. N. S. 280; The Gustaf, Lush. 506; 31 L. J. Adm. 207; The William F. Safford, Lush. 69; Stimson's St. Law, § 4643.

Where seamen stay by the wreck as long as their personal safety will permit, and assist in saving as much as possible from the wreck, they are en-

masters for wages and disbursements,[1] where the wages are earned and disbursements made previously to the salvage services being rendered. But liens for damages and liens for a master's or seaman's wages and disbursements will be payable in priority to a lien for salvage remuneration in cases where the value of the *res* the subject of the lien is not sufficient to satisfy all the liens.[2] The fact that the salvor held a mortgage upon the vessel not due, the mortgagors being the owners and in possession does not deprive him of his preference.[3]

Nothing short of a distinct agreement to pay the stipulated sum, whether the services be successful or not, will change the character of the salvage service into a mere ordinary contract of employment or deprive it of its maritime lien.[4] It will not be lost, or in any way affected by a temporary leaving.[5] Delivering up a boat to its master after raising it, and allowing it to proceed on its voyage, can have no effect to destroy the lien.[6] Nor is a salvor inferred to have waived or abandoned his lien, from the mere fact that he allows the owner to have possession of the vessel, and does not press him for immediate payment.[7] But the priority of a lien may be lost through laches or want of diligence in enforcing it.[8] Even as against the owners of the *res* the salvors may be held barred by the lapse of time in cases where the salvage services were inconsiderable, and there had been unreasonable delay in enforcing the claim.[9] Where, however, reasonable diligence is used and the proceedings to enforce the lien are taken *bona fide*, the lien will travel with the *res* into whosesoever possession it may pass.[10]

Since the court of admiralty has no jurisdiction to arrest a ship of war belonging to our government or to a foreign neutral power, salvors will not be entitled to enforce a lien in cases where the salvage services have been rendered to such vessels.[11]

titled to wages out of the property saved superior to the claim of salvors; otherwise where they abandon the wreck before salvage service was begun. Schooner Davidson, 9 Biss. (U. S.) 275.

1. The Gustaf, Lush. 506; 31 L. J. Adm. 207; The D. W. Vaughan, 9 Ben. (U. S.) 26.

2. Newson on Salv., p. 81.

3. The Barney Eaton, 1 Biss. (U. S.) 242.

4. Chapman *v.* The Engines of The Greenpoint, 38 Fed. Rep. 671. See The Comache, 8 Wall. (U. S.) 448; Adams *v.* Bark Island City, 1 Cliff. (U. S.) 310.

5. The Elenora Charlotta, 1 Hagg. Adm. 156; The Amethyst, 2 Ware (U. S.) 20.

6. Eads *v.* Steamboat H. D. Bacon, Newb. Adm. 274.

7. The Sterling, 20 Fed. Rep. 751.

8. The Bold Buccleugh, 7 Moore P. C. 267; The Europa, Br. & L. 89; The William F. Safford, Lush. 69; The Saracen, 6 Moore P. C. 56.

9. The Rapid, 3 Hagg. Adm. 419; *compare* The John Brotherick, 8 Jur. 276.

10. The Fairport, 8 P. D. 48.

Lost by Assignment.—An assignment of a claim for salvage divests the lien which originally existed in favor of the salvor. A libel by the assignee claiming such share, will be dismissed for want of jurisdiction. Where the share of the salvor turns out to be greater than the consideration of the assignment, he will be entitled to the surplus. The Geo. Nicholaus, 1 Newb. Adm. 449.

11. The Constitution, 4 P. D. 39; Briggs *v.* Light Boats, 11 Allen (Mass.)

This immunity from arrest will extend to a ship belonging to a foreign sovereign, but engaged in carrying mails, notwithstanding that she also carries merchandise and passengers for hire.[1]

IX. RECAPTURE.—When a vessel is captured by a force hostile to the United States, and is recaptured before being condemned as prize, the court will award salvage. If the captured property belongs to the United States, it will be restored to the United States, and salvage remuneration be paid from the treasury. If it belongs to any person residing within or under the protection of the United States, the court will adjudge the property to be restored to its owners upon payment of the salvage awarded.[2] To warrant the awarding of salvage on recapture, the ship must have been taken from the actual or constructive possession of the enemy;[3] the taking must have been lawful,[4] and there must have been a well founded reason to believe that if the property had not been recaptured, she would have been condemned in the courts of the belligerent.[5]

Salvage will not be allowed for a recapture by a neutral power,[6] or for a recapture of property out of the hands of a bel-

157; The Schooner Exchange *v.* M'Faddon, 7 Cranch (U. S.) 116. See The Prins Frederik, 2 Dods. 451.

Two steam cutters were built at Greenpoint for the Mexican government's use as revenue cutters, and were sent to Brooklyn and put in charge of captains to be taken to Vera Cruz. While at the docks in Brooklyn, a fire broke out, and salvage service was rendered to the cutters. *Held*, that the cutters were subject to a lien for salvage, it not clearly appearing that the property in them had passed to the Mexican government, and further, that if it had passed, the cutters were not at the time in the public service of the government, nor in possession of any officer thereof. Long *v.* The Tampico, 16 Fed. Rep. 491.

1. The Parlement Belge, 5 P. D. 197; 42 L. T. 273.

2. U. S. Rev. Stat. 1878, § 4652. Salvage will be awarded for the recapture of a captured vessel from pirates or the public enemy. Clayton *v.* The Harmony, 1 Pet. Adm. 70; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Bas *v.* Tingey, 4 Dall. (U. S.) 42; Davison *v.* Sealskins, 2 Paine (U. S.) 324; Brevoor *v.* The Fair American, 1 Pet. Adm. 87; The Progress, Edw. Adm. 222.

The law of nations, and the salvage act of the *United States* (March 3, 1800, ch. 14), bar the former owner of all right to property in cases of recapture, where it has been condemned on competent authority. The Star, 3 Wheat. (U. S.) 78; Coulon *v.* The Neptune, 2 Pet. Adm. 356.

3. The Ann Green, 1 Gall. (U. S.) 274; The Franklin, 4 C. Rob. 147; The Edward and Mary, 3 Rob. 305; The Cape Packet, 3 W. Rob. 122.

4. Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Davison *v.* Sealskins, 2 Paine (U. S.) 324.

In Talbot *v.* Seemans, 1 Cranch (U. S.) 1, the court, by Marshall, C. J., said: "The taking must be lawful; for no claim can be maintained in a court of justice found on an act in itself tortious. On a recapture, therefore, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the recaptor are not the same, because no right can accrue from an act in itself unlawful."

5. Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64; Talbot *v.* Ship Amelia, 4 Dall. (U. S.) 34.

6. Talbot *v.* Seeman, 1 Cranch (U.

ligerent,[1] who took possession from a supposed breach of treaty or the law of nations.[2] But salvage will be allowed for the recapture of a neutral armed vessel in possession of the enemy;[3] or the recapture of a ransomed ship.[4]

The United States Revised Statutes require a meet and competent sum to be awarded as salvage in cases of recapture.[5] In *England*, the amount of salvage payable on recapture from an enemy, has been regulated at different periods by various acts of Parliament. The amount has generally been calculated at one-eighth of the value of the property recaptured, if rescued by a vessel of the royal navy, and at one-sixth if rescued by a private ship.[6] This rate of compensation may, however, be increased by the court when special services are rendered.[7]

X. Misconduct or Negligence of Salvors.—A claim for salvage may be diminished or forfeited by the mistakes, negligence, or misconduct of the salvors.[8] Whenever the loss arising from the

S.) 1; Davision *v.* Sealskins, 2 Paine (U. S.) 324.

Salvage is not allowable for the rescue or recapture of neutral property by a neutral from a friendly power. Peck *v.* Randall, 1 Johns. (N. Y.) 165. Nor is salvage allowed in case of recapture of neutral cargo. U. S. *v.* Wilder, 3 Sumn. (U. S.) 308.

A vessel and cargo, belonging to one belligerent, were captured by the other belligerent, and given to a neutral. The neutral took it into port and libeled it in the court of his own country, between which, and the nation to which the vessel originally belonged, war broke out before the final adjudication. *Held*, that this was a case of salvage. The Adventure, 8 Cranch (U. S.) 221.

1. Desty on Shipp., § 316; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; U. S *v.* Wilder, 3 Sumn. (U. S.) 315; The Alexander, 1 Dods. 278; The Eleanora Charlotta, 1 Hagg. Adm. 156; Clayton *v.* The Harmony, 1 Pet. Adm. 78; The War Onsken, 2 Rob. 299.

2. The Waite *v.* The Antelope, Bee Adm. 235; The War Onsken, 2 Rob. 299; The Three Friends, 4 Rob. 268.

3. Desty on Shipp., § 316; Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 121; Talbot *v.* Seeman, 1 Cranch (U. S.) 1.

4. Moodie *v.* Brig Harriet, Bee Adm. 128. See The Henry, Edw. Adm. 192; The Sir Peter, 2 Dods. 73.

5. 2 Parsons on Shipping 317.

6. Newson on Salvage 76.

7. Sir Francis Burton, 2 Hagg. Adm. 156.

8. **Diminution of Award.**—The following acts of misconduct on the part of salvors tend to diminish the amount of award; viz., the salvors damaging the ship or property saved by their want of prudence and skill. The Perla, Swab. 230; The Magdlen 31 L. J. Adm. 22; 5 L. T., N. S., 807; The Houthandel, 1 Spinks 25; The Cape Packet, 3 W. Rob. 122; 6 N. of Cas. 565.

The salvors declining to take on board their ship the master or crew of the ship in distress. The Yan-Yean, 8 P. D. 147; 52 L. J. Adm. 67; 49 L. T. 186.

Salvors putting on shore the master and crew of the ship in distress with a view to increasing the value of their own services. The Magnolia, 2 Ir. Jur. N. S. 235; 29 L. T. 40.

The salvors losing or making way with, but without any felonious intent, clothes belonging to the crew of the derelict. The Louisa, 2 W. Rob. 26; 7 Jur. 182.

The salvors not obeying the master of the ship in distress if he be competent. The Cherokee, 31 Fed. Rep. 167; Evans *v.* Ship Charles, 1 Newb. Adm. 329; The Simpson, 3 Ir. Jur. Adm. 270. Violent or overbearing conduct of the salvors. The Marie, 7 P. D. 203; 47 L. T. 737.

The salvors' ignorance of the locality. The Rosalie, 1 Spinks 188; 18 Jur. 377.

Gross negligence causing delay. The Katie Collins, 21 Fed. Rep. 409.

The deduction of the amount of the award on account of the salvors' misconduct will be measured, not by the amount of damage sustained thereby,

mistake or misconduct of the salvors is probably equal to the loss which would have resulted had there been no salvage serv-

but in proportion to the *quantum* of negligence or ignorance displayed by the salvors. Newson on Salvage, p. 14, *citing* The Cape Packet, 3 W. Rob. 122; The Perla, 2 Swa. 230; The Magdlen, 31 L. J. Adm. 22.

The court, in awarding the salvage, may take into consideration the unworthy conduct of the captain of the tug, who apparently sought to profit by the freight of the crew of the vessel, and reduce the amount from the exorbitant claim. The Young America, 20 Fed. Rep. 926.

Acts Causing Total Forfeiture.—A claim for salvage may be forfeited if it be shown that the salvor has embezzled or concealed from the owner any part of the property saved. Island City, 1 Black (U. S.) 121; The Bello Corrunes, 6 Wheat. (U. S.) 152; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; The John Perkins, 3 Ware (U. S.) 89; 9 L. R. N. S. 490; Flinn *v.* Leander, Bee Adm. 260; The L. T. Knights, 1 Low. (U. S.) 396; The Galaxy, 1 B. & H. Adm. 270; The Rising Sun. 1 Ware (U. S.) 378; Schooner Boston, 1 Sumn. (U. S.) 328; McGregor *v.* Ball, 4 La. Ann. 289.

Embezzlement which is secret and purely the act of an individual will not prejudice co-salvors who are innocent and ignorant of it. The Missouri's Cargo, 1 Sprague (U. S.) 270; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Schooner Boston, 1 Sumn. (U. S.) 326; The Rising Sun, 1 Ware (U. S.) 378; The Florence, 20 Eng. L. & Eq. 607; The Barefoot, 1 Eng. L. & Eq. 661. But all are affected who consent to connive at or conceal it, who encourage it or fail to prevent it when they can. The Missouri, 1 Sprague (U. S.) 260.

Salvors must take reasonable care to prevent plunder by others. Slight neglect in this particular will be considered in the award, and gross neglect will work absolute forfeiture. Cromwell *v.* Island City, 1 Cliff. (U. S.) 221; The John Perkins, 3 Ware (U. S.) 89; The Bello Corrunes, 6 Wheat. (U. S.) 152. They are required to exercise the same degree of diligence in keeping the property placed in their custody as a prudent man ordinarily exercises in keeping his own. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; The Bello Corrunes, 6 Wheat. (U. S.) 152.

The rule, that if salvors are guilty of embezzlement their claim for salvage is forfeited, does not depend on the amount or value of the property embezzled; the law visits any embezzlement, though small, with an entire forfeiture of all salvage. Island City, 1 Black (U. S.) 121; Lewis *v.* Elizabeth & Jane, 1 Ware (U. S.) 43; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; The Rising Sun, 1 Ware (U. S.) 381; Schooner Boston, 1 Sumn. (U. S.) 528; The Missouri's Cargo, 1 Sprague (U. S.) 270; The Bello Corrunes, 5 Wheat. (U. S.) 152; Brevoor *v.* The Fair American, 1 Pet. Adm. 99; Flinn *v.* Leander, Bee Adm. 262; The L. T. Knights, 1 Low. (U. S.) 397; Harley *v.* Gawley, 1 Sawy. (U. S.) 11; The John Perkins, 1 Am. Law Rep. 87; The Duke of Manchester, 2 W. Rob. 470.

Wholesome rules of the admiralty, which deny to salvors, no matter how meritorious, all compensation when guilty of misconduct or bad faith, apply not only when an embezzlement has occurred, but any misconduct, such as false representations made for the purpose of exaggerating the danger or hardship of the service and to enchance the reward. Spoliation, smuggling, and obtrusion of unnecessary services, and a refusal to accept necessary or needful assistance will be punished by a total or partial forfeiture of compensation. Harley *v.* Gawley, 2 Sawy. (U. S.) 11; Schooner Boston, 1 Sumn. (U. S.) 341; The Bello Corrunes, 6 Wheat. (U. S.) 162; The Cherokee, 31 Fed. Rep. 167; A Quantity of Iron, 2 Sprague (U. S.) 51.

A salvor forfeits all claims to salvage by neglecting to inform the salved vessel beforehand of an imminent and secret danger known to him, and against which he is able to warn him; but he may be entitled to a compensation for services performed, although his conduct has been such as to forfeit a salvage remuneration. American Ins. Co. *v.* Johnson, B. & H. Adm. 10.

Willful omission by a salvor to comply with a State law regulating the custody and care of wrecked property is such misconduct as to forfeit salvage which might otherwise be recoverable

ices,[1] or if the ship or property through the negligence or want of skill of the salvors is carried into as great a peril as that from which she was rescued, all claim to salvage will be forfeited.[2] No salvage will be awarded in cases where the salvors refuse further assistance when it is absolutely necessary for the preservation of the ship or goods,[3] or where their services are rendered necessary through their own negligence.[4] An intention on the part of the salvors not to perform the whole service required by the ship in distress, or any intention to protract from improper motives the duration of the service, will entitle a forfeiture to all right to salvage.[5] On the other hand, advice given by salvors according to the best of their judgment and *bona fide* will not be deemed misconduct and forfeit salvage, although it may lead to some accident.[6]

There must be evidence of misconduct on the part of the salvors to induce the court to forfeit or diminish the amount of the salvage remuneration.[7] The burden of establishing this conduct will be on those who impute it.[8]

XI. Proceedings to Recover.—Courts of admiralty in both *England* and this country have jurisdiction to enforce claims for salvage.[9] All suits for salvage may be *in rem* against the prop-

in the United States court. Harley *v.* Gawley, 2 Sawy. (U. S.) 11.

1. Newson on Salvage, p. 14; The Yan-Yean, 8 P. D. 147; 52 L. J. Adm. 67; 49 L. T. 187.

Where the salvor acts under a misapprehension of the abandonment of a government barge, when the goods are not in imminent peril, and nothing is gained by or saved for the government in taking out part of the cargo, such services do not constitute salvage service. Bryan *v.* U. S., 6 Ct. of Cl. 128.

2. The Duke of Manchester, 6 Moore P. C. 90; 10 Jur. 263; The Yan-Yean, 8 P. D. 147.

3. The Maria, Edw. Adm. 175.

4. Newson on Salvage, p. 15. See Beane *v.* The Mayurka, 2 Curt. (U. S.) 72; The Sampson, 4 Blatchf. (U. S.) 28.

A claim of a tug for salvage for towing to a place of safety a steamboat disabled by a collision in New York harbor, caused partly by intervention of other vessels and partly by the tug's not keeping a good lookout,—rejected. The Chas. E. Soper, 19 Fed. Rep. 844.

A vessel, by breach of her contract, with another vessel, having contributed to put the latter vessel in danger and peril, cannot and ought not to be compensated for services, although otherwise salvage services, rendered in aiding to rescue her. The Krona, 28 Fed. Rep. 318.

5. The Magdalen, 31 L. J. Adm. 222.

6. The John Bryant, 5 Ir. Jur. 233.

7. The Cherokee, 31 Fed. Rep. 167; The Charles Adulphe, Swab. 153.

8. The Antles, 15 Moore P. C. 329; Lush. 518; 8 Jur. N. S. 753.

9. Benedict's Adm., § 300 e; Dunlap's Prac. 57; Abbott on Shipping 554; The American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 513; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; The Amethyst, Davies (U. S.) 20; Peisch *v.* Ware, 4 Cranch (U. S.) 347; The Emblem, Davies (U. S.) 61; Post *v.* Jones, 19 How. (U. S.) 150; Houseman *v.* Schooner North Carolina, 15 Pet. (U. S.) 40; 17 & 18 Vict., ch. 140, § 476; 24 Vict., ch. 10, § 9; 25 & 26 Vict., ch. 63, § 59; The Wave, B. & H. Adm. 235; The John Gilpin, Olc. Adm. 77; U. S. *v.* Coombs, 12 Pet. (U. S.) 72; Williams *v.* The Jenny Lind, Newb. Adm. 443; The Two Friends, 1 Rob. 271. See The Rosalie, 1 Spinks 188; The Lancaster, 9 P. D. 14; The Killeena, 6 P. D. 193; The Craigs, 5 P. D. 186.

The admiralty jurisdiction in cases of salvage is not confined to American property nor to cases occurring in

American waters. The Sailor's Bride, 1 Brown Adm. 68. Nor claims arising between citizens of the United States. Salvage may be decreed by the courts of the United States as between aliens where the jurisdiction is not objected to. Mason *v.* Ship Blaireau, 1 Cranch (U. S.) 240.

A district court of the United States has jurisdiction on a libel for salvage of a vessel captured by a French squadron abandoned by the captors, taken possession of as a derelict and brought within United States. McDonough *v.* Dannery, 3 Dall. (U. S.) 188.

In awarding salvage upon a foreign vessel, courts in this country will regard the rate of allowance in the courts of the owner's country. The Waterloo, B. & H. Adm. 114.

If the facts in a controversy between aliens are of a nature to be more properly inquired into by a foreign court, the courts of the United States will not exercise jurisdiction. One Hundred and Ninety-four Shawls, Abb. Adm. 317.

Extent of Admiralty Jurisdiction.—In U. S. *v.* Coombs, 12 Pet. (U. S.) 72, the court by Story, J., said: "In regard to the first clause, the question which arises is, what is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide-waters, as far as the tide flows, and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court, and we see no reason to depart from it. Mixed cases may arise, and indeed often do arise, where the acts and services done are of a mixed nature; as where salvage services are performed partly on tide waters, and partly on the shore, for the preservation of the property saved; in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage. That this, a rightful exercise of jurisdiction by our courts of admiralty, was assumed as the basis of much of the reasoning of this court, in the case of The American Insurance Company *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511. It has also been asserted and enforced by Lord Stowell, on various occasions, and especially in the case The Agusta, 1 Hagg. Adm. 16; The Jonge Nicholas, 1 Hagg. Adm. 201; The Ranger, 2 Hagg. Adm. 42, and The Happy Return, 2 Hagg. Adm. 198. See also The Henry of Philadelphia, 1 Hagg. Adm. 264; The Vesta, 2 Hagg. Adm. 189; The Salacia, 2 Hagg. Adm. 262. And this has been done not only in conformity to the doctrines of the maritime law, but also to what has been held in the courts of common law. For it has been laid down that if the libel is founded upon one single continued act, which was principally upon the sea, though a part was upon land; as, if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig. Adm. F. S.; 1 Rolle Adm. 533, C. 13; Com. Dig. Adm., E. 12."

If the goods of the description of flotsam, jetsam, and ligan are taken up at sea and brought on shore, the court of admiralty has jurisdiction; otherwise if they are cast on the land by the sea. Lacaze *v.* Pennsylvania, Add. (Pa.) 59.

Residue of Property.—If the court of admiralty has jurisdiction over the property, for the purpose of decreeing salvage, it has the power to determine to whom the residue of the property shall be delivered. M'Donough *v.* Dannery, 3 Dall. (U. S.) 188.

Restitution upon payment of salvage will be adjudged in all cases if the original owners can be found. British Consul *v.* Smith, Bee Adm. 178; Wilkie *v.* 205 Boxes of Sugar, Bee Adm. 82.

Common Law Jurisdiction.—It has been held that no action will lie at common law, unless the salvor can prove a contract with the owner of the property saved, or with an agent. Lipson *v.* Harrison, 24 Eng. L. & Eq. 208.

State Courts.—In *New York* it is held that the jurisdiction of the United States courts in admiralty over questions of salvage is concurrent and not exclusive. And a State court of equity jurisdiction may entertain a bill to redeem property though under a claim of salvage where no suit for salvage is pending in admiralty, and may restrain the removal of the property by injunction, appoint receivers, and ascertain salvage liens and decree payment. Cashmere *v.* De Wolfe, 2 Sandf. (N. Y.) 379. *Compare* Frith *v.* Crowell, 5 Barb. (N. Y.) 209.

erty saved, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.[1] On an action *in rem* being instituted, the ship or goods salved will be arrested and detained *pendente lite*, unless bail be given.[2] The salvors will further be entitled to have an appraisement of the ship or goods, but will be liable for damages for detaining the ship or goods an unreasonable time after becoming aware that the value put upon it is substantially correct.[3]

1. **Parties.**—All the parties entitled to participate in a salvage reward should be inserted in the bill and brought into court.[4] If

The superior courts of *Florida* have, under the act of Congress of March 3, 1823, the exclusive jurisdiction of salvage and admiralty causes. American Ins. Co. *v.* Fisk, 1 Paige (N. Y.) 90.

1. Baxter *v.* Heilner, 38 Fed. Rep. 668; Schooner Boston, 1 Sumn. (U. S.) 329; Bondies *v.* Sherwood, 22 How. (U. S.) 214; Brevoor *v.* The Fair American, 1 Pet. Adm. 87; The Centurian, Ware (U. S.) 477; The Trelawney, 3 Rob. 216; The Hope, 3 Rob. 215; Harley *v.* Gawley, 2 Sawy. (U. S.) 11; The Louisa Jane, 2 Low. (U. S.) 295.

If the property is delivered by the salvors to the owners before a compensation for saving it is made, salvors may maintain a libel *in personam* for the salvage. But if they choose to abandon the goods, they will have no claim *in personam* against the owners. The Emblem, Dav. 61; Seeman *v.* Erie R. Co., 2 Ben. (U. S.) 132.

So an action for compensation for salvage services rendered to a vessel, cannot be maintained *in personam* against the master, unless it was performed for his benefit. Miller *v.* Kelly, 1 Abb. Adm. 564.

Actions In Rem and In Personam Cannot be Joined.—The two modes of proceeding cannot be joined in the same libel. Salvors cannot in the same libel proceed *in rem* against a vessel and *in personam* against the consignees of her cargo. The Sabine, 101 U. S. 384.

2. Newson on Salvage, p. 86.

The amount of bail depends upon the value of the property not to the extent of the claim. And however large the amount claimed may be, the defendant is entitled to the release of his vessel on giving bail to the value. The plaintiff should see that bail is taken to the proper amount, as, after the release of the vessel, his only remedy is on the bail bond and his lien on the property is gone. The Kalamazoo, 15 Jur. 885. See also Nostra Senora del Carmine, 1 Spinks 303; The Volant, 1 W. Rob. 383; The Temiscouata, 2 Spinks 208; The Hero, 13 W. R. 927; The Flora, L. R., 1 Adm. 45; The Helene, 35 L. J. Adm. 1.

Where proceedings *in rem* are had in the admiralty for salvage, neither party is bound to obtain a delivery of the ship and cargo on bail, and it is no matter of default, on either side, to wait for the regular termination of the salvage proceedings. Ship Nathaniel Hooper, 3 Sumn. (U. S.) 543.

Motion to Reduce Bail.—If a vessel and cargo are attached upon the allowance of a libel for salvage wherein no amount is named, and if a release of the property attached is subsequently effected out of court, and by agreement of the parties a motion to reduce the amount of the stipulation given in advance of a hearing of the cause upon its merits, made after the vessel and cargo are no longer within the jurisdiction, will be denied; but, if a stipulation be executed under an order of court, or under U. S. Rev. St., § 941, the rule is otherwise. The Monarch, 30 Fed. Rep. 283.

3. The Margaret Jane, L. R., 2 A. & E. 345; 20 L. T. N. S. 1017; The Paul, L. R., 1 A. & E. 57; 14 L. T. 192; The Magdalen, 5 L. T. N. S. 807.

4. Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Schooner Boston, 1 Sumn. (U. S.) 328; The Edward Howard, Newb. Adm. 522; Stratton *v.* Jarvis, 8 Pet. (U. S.) 4. *Compare* The Camanche, 8 Wall. (U. S.) 448.

Although all the suitors for salvage ought to join in the suit against the property saved, yet the non-joinder of the crew of the salvor vessel, in a suit by the master and owner, is no objection to the maintenance of the suit, in a case where the crew were exposed to

the names of some are designedly concealed, the bill will be dismissed.[1] Any co-salvors who may have been omitted need not file a new libel where the property has been already taken possession of and is in the custody of the court under process, but they may bring forward their claims by a suitable allegation, and thus make themselves parties without a formality of process and notice to the other parties. Where different libels are filed by the co-salvors unnecessarily, it is at the peril of paying the costs.[2]

Mortgagees of a ship,[3] assignees of a bankrupt owner,[4] underwriters who accept the abandonment of the insured property,[5] seamen whose wages might be affected by the proceedings, or any person having an interest in the property proceeded against, may appear and defend.[6] Persons whose interest is merely collateral, however, and have no interest in the subject-matter of the proceedings, are not allowed to intervene.[7]

2. Evidence.—In salvage actions the burden of proof is on the plaintiff, and if the service is not clearly established, no award will be made.[8] The proof of any allegation of misconduct on the part of the salvors will fall on the defendants who must establish it conclusively in order to defeat the salvor's claim.[9] So, if the defendants allege that the salvors took the vessel to an improper place, they must establish it. There is an exception to the rule as to the incompetency of witnesses on account of interest in cases of salvage. The salvors are from necessity witnesses as to facts occurring at the time of the salvage service, but only as to such facts. They are not competent witnesses as to facts occurring in port after the property is brought in.[10] So the examination of the crew of a salved vessel taken by a receiver of wreck, will not be admissible in a salvage action to prove the facts stated in the examination.[11] If the evidence shows that certain parties not before the court were actually salvors and entitled to compensation as such, it is the duty of the

no extraordinary hardships or personal danger. The A. D. Patchin, 1 Blatchf. (U. S.) 414.

Ship-owner.—The owner of a vessel which is employed in a salvage service may recover compensation for such employment out of the salved property, either as a co-salvor, by uniting with the officers and crew of the salving vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join. Waterbury *v.* Myrick, B. & H. Adm. 34.

Mortgagor.—A mortgagor before condition broken can bring a libel for salvage, he being in the use, possession, and control of the salving vessel. The Cherokee, 30 Fed. Rep. 703.

1. The Edward Howard, Newb. Adm. 522.

2. Ship Henry Ewbank, 1 Sumn. (U. S.) 400.

3. The Julindur, 1 Spinks 71.

4. Dowthorpe, 2 W. Rob. 73. See The St. Catharine, 3 Hagg. Adm. 251.

5. The Regina del Mare, Br. & L. 315; The Cargo ex Galan, B. & L. 167.

6. The Union, Lush. 128.

7. Jones on Salv. 164; The Killarney, Lush. 427.

8. The Princess Alice, 6 N. of Cas. 584; 3 W. Rob. 138.

9. The Charles Adolphe, Swab. 153; Newson on Salvage, pp. 91, 95.

10. Schooner Boston, 1 Sumn. (U.S.) 328; Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Lewis *v.* The Elizabeth & Jane, 1 Ware (U. S.) 35.

11. The Little Lizzie, L. R., 3 A. & E. 56; 23 L. T. 84.

court to retain their proportionment in the registry subject to their order. In no event can such amount inure to the benefit of the claimants of the vessel.[1]

3. Appeal.—Courts of admiralty do not encourage appeals in salvage on slight or frivolous grounds, or, indeed, in any cases, except upon some plain, clear, and determined mistake of law or fact in the court below which is manifestly not justified by the circumstances, and the *onus probandi* of such mistake is upon the appellant.[2] Where an appeal is taken from a decree awarding libelants salvage, it vacates altogether the decree of the district court, and the case is tried *de novo* in the circuit court.[3] But a decree of salvage by the circuit court is not, under the act of Congress of February 16, 1875, ch. 77, to be altered by the supreme court for excess in the amount awarded, unless the excess is so great that upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.[4]

4. Costs.—The general rule in salvage cases is to decree all the costs and charges in the case to be borne and paid by the property saved and apportioned among the claimants according to their respective interests.[5] If the claim for salvage fails, the plaintiffs may be and on many occasions have been ordered to pay them,[6] and the more especially if the case set up by the salvors turns out to be a false or fraudulent one.[7] Salvors who have been guilty of misconduct may not only forfeit their claims for salvage but be also condemned to pay the costs to the defendants.[8] Where a vessel is attached for salvage before demand and under circumstances which put the claimants to unnecessary expense, no costs should be allowed to the libelants.[9] So if the

1. Montgomery *v.* The T. P. Leathers, Newb. Adm. 421.

2. Bearse *v.* Three Hundred and Forty Pigs of Copper, 1 Story (U. S.) 314.

3. The Hesper, 18 Fed. Rep. 696; 122 U. S. 256. See Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Yeaton *v.* U. S., 5 Cranch (U. S.) 281; The Roarer, 1 Blatchf. (U. S.) 1; The Saratoga *v.* The Four Hundred Thirty-eight Bales of Cotton, 1 Woods (U. S.) 75; The Lucille, 19 Wall. (U. S.) 73; The Charles Morgan, 115 U. S. 69.

4. The Connemara & Joseph Cooper, 108 U. S. 352; Potomac Steamboat Co. *v.* Baker Salvage Co., 123 U. S. 40.

The Supreme Court of the United States has not appellate jurisdiction where the goods of several owners are saved from one vessel, though the salvage money, in the aggregate, amounts to more than $2,000. Stratton *v.* Jarvis, 8 Pet. (U. S.) 4.

5. Ship Nathaniel Hooper, 3 Sumn. (U. S.) 543.

6. The Duke of Manchester, 10 Jur. 863; The Edward Hawkins, Lush. 515; The Lady Egidia, Lush. 513; The London, Br. & L. 82; The Nymphe, 5 L. T. N. S. 365,

Where claims for special damage incurred in rendering a salvage service are not advanced until the trial, even though full opportunity is thereafter given contestants to meet such claims, costs will not be allowed to libelants. The Benison, 36 Fed. Rep. 793.

7. The Susannah, 3 Hagg. Adm. 345, n.; The Giacomo, 3 Hagg. Adm. 344.

8. The Lady Catharine Braham, 5 L. T. N. S. 693. See The Joseph Harvey, 1 Rob. 306; Ship Nathaniel Hooper, 3 Sumn. (U. S.) 543.

9. The Rosedale, 20 Fed. Rep. 447. See The Alaska, 23 Fed. Rep. 597.

Fire broke out on a wooden ship, which had previously carried petro-

libelants make a demand which is exorbitant, the costs will be denied in consequence of the extravagance of the claim presented.[1] If the defendants tender to the salvors and pay into court a sum subsequently held to be sufficient and the salvors, notwithstanding, proceed with their suit, they will be condemned in costs.[2] Although respondent in a cause for salvage makes a tender which is adjudged sufficient, yet if it is not so liberal but that the salvors might reasonably prosecute the suit in expectation of obtaining a larger reward, the court has power, in the exercise of a sound discretion, to allow him costs of proceedings for the tender.[3] In a case of unnecessary assistance, the court will, in considering the question of costs, have a due regard for the intent and hope of the libelant, and, if it appears that the efforts of the libelant were made with the intent and hope of rendering assistance, the costs will be divided.[4]

SAME—(See also SAID).—"The same" generally refers to the next preceding antecedent,[5] but the word may grammatically refer to more than one antecedent.[6] The "same" does not always mean identical, not different or other; it frequently means of the kind or species, though not the specific thing. It is often used as a substitute for that which has been used before, and is employed in the sense of a pronoun. In this sense it is very frequently employed in legal documents and pleadings.[7]

leum, and which was lying in a crowded dock. A water boat near by came up, on a call for assistance, and poured water into the ship for some twenty minutes, when the city fire department appeared and extinguished the fire. The ship was valued at $40,000. *Held*, that $500 should be awarded as salvage, but without costs, as no proper effort was made by the salvors to make known the amount demanded before suit, and the ship was seized without notice of intention to proceed against her. The Vanloo, 39 Fed. Rep. 570.

1. The O. M. Hitchcock, 25 Fed. Rep. 777.

In a suit for salvage, the district court awarded a sum much less than libelant asked, but denied costs because the amount asked was exorbitant. The circuit court on approving the decree refused the libelant costs of appeal. The Colon, 18 Blatchf. (U. S.) 277. See The Colon, 10 Ben. (U. S.) 60.

Although a vessel has been arrested for an exorbitant claim for salvage, costs may be allowed libelants where the respondent has made no offer of compensation whatever for the services rendered. The Indiana, 22 Fed. Rep. 925; The Straits of Gibraltar, 32 Fed. Rep. 297.

2. The New Orleans, 23 Fed. Rep. 909; Steamer Leipsic, 5 Fed. Rep. 108; The Maggie Ellen, 19 Fed. Rep. 221; The Rialto, 15 Fed. Rep. 124; The Paris, 1 Spinks 289; The Cargo ex Honor, L. R., 1 A. & E. 87; The Black Boy, 3 Hagg. 386, n.; The Batavier, 1 Spinks 174.

3. Lubker *v.* The M. H. Quimby, 8 Rep. 806.

4. The Brandow, 29 Fed. Rep. 878.

5. Co. Litt. 20 b, 385 b; 2 Kent. Com. 255; Hancock *v.* Hancock, 14 Pick. (Mass.) 75. See also SAID; Huskinson *v.* Lefevre, 26 Beav. 160.

6. Court *v.* Buckland, L. R., 1 Ch. Div. 605.

7. Thus, "to deliver policies and receive premiums upon the 'same' is equivalent to deliver policies and receive premiums upon 'them;' or, substituting the noun for its representative pronoun, to deliver policies and receive premiums upon 'policies.'" Crapo *v.* Brown, 40 Iowa 493. And see Brockway *v.* Rowley, 66 Ill. 99.

As ordinarily understood the word "same" when used in comparison means, "of like kind, species, sort, dimensions, or the like; not differing

SAME OFFENSE.—See JEOPARDY, vol. 11, p. 934.

SAMPLE.—The word sample, both in its legal and popular acceptation, means that which is taken out of a large quantity as a fair representation of the whole—a part shown as a specimen.[1]

SANCTION.—In the original sense of the word a sanction is a penalty or punishment provided as a means of enforcing obedience to a law.[2] In jurisprudence a law is said to have a sanction when there is a state which will intervene if it is disobeyed or disregarded.[3] Hence the controversy as to whether international law has a sanction.

SANE (see also INSANITY, vol. 11, p. 105) means whole, sound, in a healthful state, and is applicable equally to the mind and to the body.[4]

SAPONIFICATION.—See MEDICAL JURISPRUDENCE, vol. 15, p. 260.

SATISFACTION.—1. At law, or as the question arises out of contract, see ACCORD AND SATISFACTION, vol. 1, p. 94; COMPOSITION WITH CREDITORS, vol. 3, p. 385; DEBTOR AND CREDITOR, vol. 5, p. 179; JUDGMENTS, vol. 12, p. 149*y*; MORTGAGES, vol. 15, p. 725; PAYMENT, vol. 18, p. 148; RELEASE, vol. 20, p. 774. *Compare* SETTLEMENT, and references there given.

2. In equity, see DEBTOR AND CREDITOR, vol. 5, p. 202; ELECTION, vol. 6, p. 251; LEGACIES AND DEVISES, vol. 13, pp. 70, 104.

SATISFACTION PIECE.—In practice. A memorandum in writing, entitled in a cause, stating that satisfaction is acknowledged between the parties, plaintiff and defendant. Upon this being duly acknowledged and filed in the office where the record of the judgment is, the judgment becomes satisfied, and the defendant discharged from it.[5]

in character, or in quality or qualities compared, corresponding; not discordant; similar; like." Webst. Dict. *followed* in Cobb *v.* Lincoln, 15 Neb. 88.

In a Devise.—A devise of "my estate called L" to A for life "and after his decease I give the same" unto B, without words of limitation, was held to give B only a life interest. Doe *v.* Lean, 1 Q. B. 229. But this case was on a will made previously to 1 V., ch. 26, and seems to have turned on the word "estate" as implying merely local situation, and not describing the interest of the testatrix in the land, rather than as laying down that because A was to have a life estate, therefore B was to have "the same." See further 2 Jarm. on Wills 282.

Same Cause—Same Cause of Action.—See CAUSE, vol. 3, p. 46, n; RES JUDICATA, *Position and Relation of Issues.*

1. Webber *v.* Com., 33 Gratt. (Va.) 904.

For Sale by Sample.—See IMPLIED WARRANTY, vol. 10, p. 165.

2. Just. Inst. 2, 1, 10.

3. Holland's Jur. 60.

Sanction of an oath is a belief that the Supreme Being will punish falsehood, and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood. Blocker *v.* Burness, 2 Ala. 355. See generally OATH, vol. 16, p. 1017.

4. Den *v.* Vancleve, 5 N. J. L. 661.

5. Burril's L. Dict.

SATISFY, SATISFACTORY, ETC.—The courts have had frequent occasion to interpret contracts for the rendition of services, the manufacture of articles, etc., in which it is agreed that the services shall be "satisfactory" to the employer, or that the article shall "satisfy" the purchaser, etc. The effect of such contracts has been already treated under appropriate titles in this work,[1] and several additional cases will be found in the notes.[2]

1. See CONTRACTS, vol. 3, p. 845, n.; CONDITIONAL SALES, vol. 3, p. 433; MASTER AND SERVANT, vol. 14, p. 777.

2. **General Doctrine.**—In Gray *v.* Alabama Nat. Bank, 10 N. Y. Supp. 5, upon the construction of a contract to make steel plate bank-drafts, "a satisfactory design" to be furnished the purchaser, it was held that the purchaser might reject the work, without assigning any reason for his dissatisfaction. The court by McAdam, C. J., said: "There is no doubt of the general proposition that where one party agrees to do a thing to the satisfaction of another, and the excellence of the work is a matter of taste, such, for instance, as a portrait, bust, suit of clothes, dramatic play, or a particular piece of furniture, the employer may reject it without assigning any reason for his dissatisfaction. In such a case the law cannot relieve against the folly of the employé, by inquiring whether the dissatisfaction of the employer was based upon reasonable grounds or not. It is even doubtful whether it can inquire into the good faith of the employer's decision. Glenney *v.* Lacy, 1 N. Y. Supp. 513; Campbell Printing-Press Co. *v.* Thorp, 36 Fed. Rep. 414; Seeley *v.* Welles, 120 Pa. St. 75." (But see Hartford Mfg. Co. *v.* Brush, 43 Vt. 528; Daggett *v.* Johnson, 49 Vt. 345; McClure *v.* Briggs, 58 Vt. 82; 56 Am. Rep. 557; Singerly *v.* Thayer, 108 Pa. St. 291, where it is said that the decision of the person to be "satisfied" must be made in good faith.) "Parties must stand to their contract as they make it; and, if one party agrees to furnish an article that is satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction. If, however, the task to be performed does not involve matter of taste, fancy, or judgment, but of common experience, such as an ordinary job of mechanical work, or the quality of material, a different rule applies, and in such cases the law will say that what in reason ought to satisfy a contracting party does satisfy him. Duplex, etc., Boiler Co. *v.* Garden, 101 N. Y. 387; 54 Am. Rep. 709." And see Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475; Miesell *v.* Globe Mut. L. Ins. Co., 76 N. Y. 117.

This distinction between articles involving taste, fancy, etc., and those of mechanical utility, it is apprehended, is put too strongly. It is true that most of those cases in which the courts have held that where the promisee is to be "satisfied," he is the sole judge of his own satisfaction, are cases involving fancy, taste, etc. But it would seem that there is no reason why he should not in any case, if he so chooses, make such a contract. As was said by Graves, C. J., in Walter A. Wood Reaping, etc., Co. *v.* Smith, 50 Mich. 570: "Cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action. Such is his will. He will not enter into any bargain except upon condition of reserving the power to do what others might regard as unreasonable."

Where the subscription to the capital stock of a railroad company is upon condition that the road "be located through the town of B satisfactory to the selectmen of said town," it is not sufficient for the company to show "that the road was located wisely, prudently, and judiciously for the interest of the said corporation and said town," without showing that it was

SATISFACTORY EVIDENCE—(See also REASONABLE DOUBT). —By satisfactory evidence which is sometimes called sufficient evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt.[1]

SATISFIED—(See generally PAYMENT, vol. 18, p. 148).—The term satisfied, in legal understanding, when applied to a note or bond, is, that it is paid.[2]

SAVED.—See note 3.

SAVING CLAUSE.—See CLAUSE, vol. 3, p. 279; STATUTES.

also satisfactory to the selectmen. Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295.

In Seeley *v.* Welles, 120 Pa. St. 75, action was brought for the purchase money of a reaping machine, and defendant contended that the purchase was upon condition that the machine should "satisfy" him. The court by Clark, J., said: "If the defendant's theory of the case on the facts is accepted, it is plain that although the reaper may have worked well, in the opinion of those who saw it, yet, if it did not work to the satisfaction of the defendant, he was not obliged to take it. . . His objections to the reaper may have been ill founded; indeed, they may have been in some sense unreasonable, in the opinion of others, yet if they were made in good faith, he had the right if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved? What the learned court said to the jury on this point was equivalent to saying that although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought he ought to have been satisfied, he was bound to take it; whereas, if the defendant's testimony is true, he was to judge of the merits of the machine himself, not the bystanders nor the jury; and if he exercised his own judgment in good faith in the refusal to accept it, he was certainly not bound for the price. The case is ruled by Singerly *v.* Thayer, 108 Pa. St. 291, where the authorities are collected."

Cases Holding a Reasonable Compliance Sufficient. — Though the rule is settled, as stated above, there are cases seemingly exceptional in which it is held that the party "is satisfied" when he "ought to be satisfied," and that he is not allowed to make an unreasonable or capricious decision.

Thus, in Braunstein *v.* Accidental Ins. Co., 1 B. & S. 782; 101 E. C. L. 784, it is said that where one party has to perform a contractual obligation to the "satisfaction" of the other—*e. g.*, furnish "proof satisfactory" of death or accident—this does not give that other the power to act capriciously—he can only ask for a reasonable fulfillment of the obligation. And so it has been held that condition to furnish a title "satisfactory" to the purchaser, only entitles him to make the usual objections. Lord *v.* Stevens, 1 Y. & C. 222.

"The words 'satisfactory indorser' have a recognized commercial signification. It must be an indorsement satisfactory to the payee, and not to the maker. The payee cannot capriciously reject such indorser, but must show good and satisfactory reasons for such rejection. In other words, he must accept an indorser whom he ought to accept." Cutter *v.* Cutter, 48 N. Y. Super. Ct. 475; *aff'd* 98 N. Y. 628.

But it would seem that in these cases the subject-matter or context of the contract controlled the word "satisfactory," and that therefore they are not truly exceptions to the rule, although from the language of the decisions it might at first appear that they were.

1. Thayer *v.* Boyle, 30 Me. 481, *quoting* 1 Greenl. Ev., § 2.

2. Reynolds *v.* Thomas, 1 Root (Conn.) 306.

3. **In the law of salvage** the word "saved" is used in the sense of "salved," *i. e.*, "saved by salvors." Cargo *v.* Schiller, 2 Prob. Div. 150; 21 Moak's Rep. 571. See generally SALVAGE.

SAVINGS BANKS.—(See also BANKS AND BANKING, vol. 2, p. 89; CORPORATIONS, vol. 4, p. 184; NATIONAL BANKS, vol. 16, p. 143.)

I. Definition, 716.
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VIII. Insolvency, 740.

I. DEFINITION.—A savings bank is an institution for the reception of small sums of money, to be invested for the benefit of the depositors.[1] Whether a bank is a savings bank depends not upon its designation, but upon its organization, powers and mode of doing business, as provided in the act of incorporation.[2]

1. "A savings bank is defined to be any institution in the nature of a bank formed for the purpose of receiving deposits of money for the benefit of the persons depositing; to accumulate the produce of so much thereof as shall not be required by the depositors, their executors and administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof, to the depositors, their executors or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no profit whatsoever from any such deposit or the produce thereof." Grant on Banking 614. See also Johnson *v.* Ward, 2 Ill. App. 261.

In Huntington *v.* National Sav. Bank, 96 U. S. 388, the court by Strong, J., defined a savings bank as follows: "It is not a commercial partnership, nor is it an artificial being, the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to intrust their property to its keeping."

In Com. *v.* Reading Sav. Bank, 133 Mass. 16; 43 Am. Rep. 495, the court, by Devens, J., said: "A savings bank in this commonwealth is an institution formed for the purpose of receiving deposits of money for the benefit of the depositors investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and further, of returning the deposit itself."

In Tappan *v.* Warren Sav. Bank, 127 Mass. 109, the court said: "The chief business of a saving bank is to receive deposits, invest them in certain classes of securities, specified in the statutes of the commonwealth, and to pay to depositors the amount due them, either in whole or in part, as they from time to time demand. It has no authority to do a general banking business, not even to engage in the business of discounting bank paper. It is no part of the business for which it is established, to give a market value to, or obtain a market for, the negotiable paper of persons or other corporations, by guaranteeing or indorsing it. Its duty is to keep safely invested the moneys deposited with it, not to hazard those moneys by assuming responsibility for the performance of the contracts of others."

2. State *v.* Lincoln Sav. Bank, 14 Lea (Tenn.) 42; State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111. Thus where the style of the bank was "Odd Fellows' Savings and Commercial Bank," but the articles of incorporation stated, "Said corporation is organized for the following named purposes: to

II. NATURE AND POWERS.—In the essential features of their organization, savings banks are, like other corporations, creations of the law for the more convenient transaction of business to be done by them. They are capable of corporate action, and, like other corporations, are liable for such action. Toward the public, and toward individuals, their obligations are similar to those of corporations generally.[1] Savings banks are not formed, primarily, for the advantage and profit of the stockholders or corporators, but for the benefit of the depositors; and herein they differ radically from ordinary banks,[2] yet, strictly speaking, they cannot be called charitable institutions.[3] They are not banks of issue and circulation,[4] nor can they do business as banks of discount, unless such power be expressly conferred by statute.[5] But savings

do a general savings and commercial banking business; to buy and sell real and personal property; to discount bills, notes, and other commercial and negotiable paper and instruments; to buy and sell exchange; to receive money on deposit, with or without agreement to pay dividend or interest thereon; to borrow and loan money; to improve and lease real estate, and to do any and all acts incident to or necessary to, the transaction of any and all the matters above stated,"—it was held that the bank, having all the attributes of an ordinary commercial bank, could not be deemed a savings bank. Mitchell *v.* Beckman, 64 Cal. 117.

1. For example, a savings bank may be liable to an action for malicious prosecution. Reed *v.* Home Sav. Bank, 130 Mass. 443; 39 Am. Rep. 468.

2. National Bank *v.* Boston, 125 U. S. 60; Hannon *v.* Williams, 34 N. J. Eq. 255; 38 Am. Rep. 581; Lewis *v.* Lynn Sav. Inst., 148 Mass. 235; People *v.* Ulster Co. Sav. Inst. (N. Y. 1892), 31 N. E. Rep. 738; 1 Alb. L. J. 406; 1 Morawetz on Priv. Corp. (2d ed.), § 390. And the profits after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security. Huntington *v.* National Sav. Bank, 96 U. S. 388.

Joint Stock Corporation Doing Savings Bank Business.—A joint stock corporation organized for the purpose of doing business on account of, and for the benefit of, its shareholders, and where the gains and profits belong to the shareholders, although receiving savings deposits on which it agrees by contract with the depositor to pay a certain rate of interest, is not a savings bank in the true sense of the term. Johnson *v.* Ward, 2 Ill. App. 261.

3. Huntington *v.* National Sav. Bank, 96 U. S. 388; West's Appeal, 64 Pa. St. 186. See also Sheren *v.* Mendenhall, 23 Minn. 92; People *v.* Nelson, 46 N. Y. 477. These cases, however, are not decisive upon this point, because the corporations in suit were incorporated for the purpose of profit by the shareholders, and not for the depositors, except incidentally. See also Boone on Corp., § 229.

4. Savings Bank *v.* Field, 3 Wall. (U. S.) 495; Eaves *v.* People's Sav. Bank, 27 Conn. 229; 71 Am. Dec. 59.

The act incorporating the Louisiana Savings Company was not intended to create a banking institution; it conferred no power to issue notes for circulation, and the laws relative to banking corporations are not applicable to such an institution. State *v.* Louisiana Sav. Co., 12 La. Ann. 568.

5. *In re* Jaycox, 12 Blatchf. (U. S.) 209.

Under the *Kansas* Gen. Stat 225, art. 16, § 127, empowering savings associations to discount negotiable notes, they may purchase such notes. Pope *v.* Capital Bank, 20 Kan. 440; 27 Am. Rep. 183. See Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299; United German Bank *v.* Katz, 57 Md. 128.

A statutory prohibition against discounting by savings banks is not violated when the full face of the note is advanced by the bank and nothing is reserved. Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142.

Though a savings bank has discounted commercial paper without any statutory power to do so, it may recover the money thus loaned—although the se-

banks, incorporated by special charter, have the implied power, inherent in corporations created for business purposes, of borrowing money required in the course of their business, and of making negotiable paper, or a pledge of their securities, as a means of borrowing.[1] The investments which such institutions may make are prescribed by their charters, or by general statute, and must, of course, be made in accordance therewith.[2] There are also stat-

curities are void. Pratt *v.* Short, 79 N. Y. 437; 35 Am. Rep. 531; Rome Sav. Bank *v.* Krug, 102 N. Y. 331; United German Bank *v.* Katz, 57 Md. 128; *contra*, *In re* Jaycox, 12 Blatchf. (U. S.) 209.

The same principle has been held to sustain a mortgage given under the following circumstances: Defendant E executed his bond and mortgage to secure the People's Savings, etc., Institution for indebtedness, "upon or by reason of any promissory note, bill of exchange, overdraft or otherwise." The corporation lent the mortgagor money upon the discount of his notes, which recited that the maker had deposited the bond and mortgage as collateral. It was held that the notes were void, as the corporation had no power to lend money on personal security, nor to discount commercial paper; but being authorized to invest in bonds and mortgages, the loan was valid, and the mortgage enforceable. The court by Andrews, J., said: "The notes were void, but the company, by the express terms of the 11th section of the charter, was authorized to invest its funds in bonds and mortgages, and other securities specified. There was a loan in this case, and this created an indebtedness to the bank, which was within the condition of the mortgage. The words 'or otherwise' in the declaration of trust, are broad enough to cover any debt which the company might hold against the mortgagor. The fact that the loan was made by way of discount of commercial paper, and upon the security of the notes as well as of the mortgage, does not vitiate the valid security. The substance of the transaction in respect to the mortgage was that it was taken to secure the loan and not the notes, which, at most, were mere evidences of the loan." Pratt *v.* Eaton, 79 N. Y. 449; *reversing* 18 Hun (N. Y.) 293.

1. And a purchaser of such paper, before maturity, from a third person, in whose hands it is apparently as business paper, has the right to assume that it was made for a valid purpose. Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. L. 513. In this case, the court by Depue, J., said: "In order to make the business successful, these institutions are required to keep their money invested as closely as may be consistent with the ordinary demands of depositors. But in seasons of financial excitement they may be subjected to extraordinary demands from depositors, to meet which and save the credit of the institutions large sums of money may be required to be raised on sudden and unforeseen contingencies. At such times, the securities such institutions usually hold are likely to be depressed in the market, and unsalable except at ruinous sacrifices. If these institutions should not have the power to borrow money and to make negotiable paper, or make a pledge of securities on which money may be borrowed temporarily, great sacrifices in the sale of the securities in which the trust funds are invested, if not financial ruin, would be the probable result of every unexpected run upon the bank by depositors to withdraw their deposits. It is the existence of conditions and contingencies of this kind likely to arise in the conduct of business that the law recognizes as the ground for raising by implication a power in corporations to borrow money and give negotiable security as a means of borrowing."

2. Rome Sav. Bank *v.* Krug, 102 N. Y. 331; Rome Sav. Bank *v.* Kramer, 32 Hun (N. Y.) 270; Williams *v.* McKay, 46 N. J. Eq. 25. Where the charter of a savings bank provides that "said corporation shall invest no money . . . on bond and mortgage except on real estate worth at least double the amount of the sum invested above all incumbrances," it requires that the landed security shall be worth double the incumbrances upon it and the investment in it combined. Williams *v.* McKay, 46 N. J. Eq. 25. Under its charter power to invest its capital in "bonds, notes . . . and other evidences of debt, and to hold any real

utes in the various States regulating savings banks in regard to the reserve fund, the division of profits, and other like matters.[1]

estate necessary to carry on its business," a savings bank has power to loan money, and to secure the same by a trust deed. Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

Where the charter of a savings institution provides that the funds shall be invested in, or loaned on, *public stocks*, or private *mortgages*, and that when loaned on such stocks or mortgages, a sufficient bond, or other satisfactory personal security, in addition, shall be required of the borrower, the promissory note of the borrower, given to secure a loan, is perfectly lawful, and the fact that it is not accompanied by the public stocks, or mortgage required by statute, but is merely secured by a pledge of bank stock, will not render it invalid. Mott *v.* U. S. Trust Co., 19 Barb. (N. Y.) 568.

But speculative contracts entered into for the sale or purchase of stock, or other property, by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, unless authorized by its charter, are *ultra vires*. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135; 19 Am. St. Rep. 482.

Massachusetts.—Savings banks are authorized to invest in, and loan upon, the stock of safe-deposit and trust companies. Massachusetts Acts, 1890, ch. 168, p. 101.

The Provident Institution for Savings in Boston, although chartered in 1816, is nevertheless subject to the general laws of the commonwealth passed since that time, relating to the investments of deposits by savings banks and institutions for savings. Opinion of the judges, 9 Cush. (Mass.) 604.

New Jersey.—In addition to the requirements of the *New Jersey* Laws (1878), p. 393, for the better security of depositors in the savings banks, there must be, when a bank, a ward of court, invests in mortgages, a certificate of the counsel of the bank that the title is good and the mortgage valid, and also a certificate in writing by a master designated by this court, approving the security as a proper investment of trust money. *In re* Newark Sav. Inst., 32 N. J. Eq. 644.

New York.—By its charter and various acts amendatory of the same, relating to its powers and duties, the plaintiff, a savings bank, was authorized to invest money deposited with it in certain specified securities, including public bonds and stocks and mortgages upon real estate, but not promissory notes. The trustees were also directed to invest in stocks or public securities, or any bonds and mortgages, as provided in this act, all sums received by them beyond an available fund of not exceeding $25,000, or not exceeding one-third of the total amount of deposits, with said institution, at the discretion of said trustees, which they may keep to meet current payments of such corporation, and which may by them be kept on deposit, on interest or otherwise, or in such available form as the trustees may direct. It was held that an available fund exceeding the amount of $25,000 might, in the discretion of the trustees, be held to meet current payments, provided it did not exceed in amount one-third of the total amount of deposits; that under the authority to keep the said available fund on deposit, on interest or otherwise, or in such available form as the trustees may direct, the trustees might make loans therefrom upon personal security—*e. g.*, the promissory note of the borrower. Rome Sav. Bank *v.* Kramer, 32 Hun (N. Y.) 270; *aff'd* in Rome Sav. Bank *v.* Krug, 102 N. Y. 331.

Texas.—A savings bank and trust corporation, organized under the *Texas* statute (1871), is without power to buy and sell cotton for future delivery. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135; 19 Am. St. Rep. 482.

Maine.—A violation by the trustees of a savings bank of the statutory restrictions upon the investment of the funds thereof, is a violation by the corporation, within the *Maine* law of 1877, ch. 218, § 36, providing for a reduction of the deposits, etc. *In re* Newport Sav. Bank, 68 Me. 396.

1. It is provided by the statutes of *New York* that a reserve fund shall be kept by the savings bank, either on hand or on deposit, in any bank or with any trust company, not exceeding ten per cent. of the whole amount of deposits with the savings bank. *New York* Stat. (Birdseye), p. 220. See also Erie Co. Sav. Bank *v.* Coit, 104 N. Y. 532.

Under P. L. *New Jersey*, 1878, a savings bank cannot divide more than five per cent. per annum among its de-

III. Relation to Depositors—1. Generally.—The authorities are not agreed as to the precise legal relation existing between a savings bank and its depositors. By some the relation is held to be that of agent and principal,[1] by others, that of debtor and creditor,[2]

positors until after its surplus exceeds fifteen per cent. of its deposits. *In re* Provident Sav. Inst., 30 N. J. Eq. 5.

A savings bank organized under the *California* act of April 11, 1862, is not authorized to appropriate and pay as a dividend to its stockholders and depositors, on the profits arising from its business, any portion of the interest upon its loans or investments that may have matured or accrued, but which have not been actually collected and received in money, notwithstanding such interest is amply secured, and certain to be eventually paid. People *v.* San Francisco Sav. Union, 72 Cal. 199.

Under the *Massachusetts* Pub. Stats., ch. 116, § 36, a savings bank may receive on deposit funds in trust "for maintaining cemeteries or cemetery lots." Gates *v.* White, 139 Mass. 353.

Report of Condition of Bank—Perjury.—*New York* Laws, 1882, ch. 499, § 270, requires savings banks to make semi-annual reports of their condition to the state banking department; sections 271 and 272 provide that such report shall state the assets and liabilities of the bank, inclusive of the amount due depositors; section 273 declares that "the report shall be verified by the oath of the two principal officers of the institution, and the statement of assets shall be verified by a majority of the trustees who examined the same, pursuant to the requirements of section 279 of this act;" section 279 provides that the trustees of every savings bank shall examine the books, vouchers and assets of the bank, and its affairs generally; and that "the statement or schedule of assets and liabilities reported to" the banking department semi-annually "shall be based upon such examination, and shall be verified by the oath of a majority of the trustees making such examination." It was held that the two principal officers of a bank are required to certify under oath that the report is a correct report of the condition of the bank, based on their own knowledge; and, where the treasurer of a bank knowingly makes a false affidavit that the report correctly states the amount due depositors, it is error to sustain a demurrer to an indictment against him for perjury, on the ground that he was only required to swear that the report was a correct statement of, or correct as based upon, the examination made by the trustees, and that any other oath was extrajudicial, and a charge of perjury could not be predicated upon it. People *v.* Ostrander (Supreme Ct.), 19 N. Y. Supp. 324.

1. Bunnell *v.* Collinsville Sav. Bank, 38 Conn. 203; 9 Am. Rep. 380. In this case a savings bank met with a loss which was by vote of the directors apportioned *pro rata* among the depositors. In an action by a depositor to recover the full amount of his deposit, it was held that the bank was simply the agent of the depositors, and the plaintiff could not recover. Said the court, by Park, J., "The assets of savings banks consist of loans of money made by them for the benefit of their depositors from whom the money was derived. . . . A depositor knows when he puts his money with such an institution that he is placing it at hazard. If the money deposited is lost, the depositor loses it through the instrumentality of his agent, and he has no cause to complain." In Coite *v.* Savings Soc., 32 Conn. 173, savings banks are said to be large incorporated agencies for receiving and loaning money on account of their owners. See also Eaves *v.* People's Sav. Bank, 27 Conn. 229; 71 Am. Dec. 59; Greene *v.* Sprague Mfg. Co., 52 Conn. 330; Mitchell *v.* Beckman, 64 Cal. 117.

2. Knecht *v.* U. S. Sav. Inst., 2 Mo. App. 563. In People *v.* Mechanics, etc., Sav. Inst., 92 N. Y. 7, the court, by Andrews, J., said: "The primary relation of a depositor in a savings bank to the corporation is that of creditor, and not that of a beneficiary of a trust. The deposit when made becomes the property of the corporation. The depositor is a creditor for the amount of the deposit, which the corporation becomes liable to pay, according to the terms of the contract under which it is made. When payment is made the claim of the depositor is extinguished and he has no further claim upon the funds or assets of the bank."

And in Reed *v.* Home Sav. Bank, 130 Mass. 443; 39 Am. Rep. 468, the court, by Gray, C. J., said: "A depositor

but the view supported by the weight of authority is that the bank is a trustee for its depositors.[1]

2. Assets—Rights of Depositors.—The depositors are entitled to share in the profits of the bank, and are liable to bear its losses, *pro rata*.[2] Debts of the bank, contracted in the course of its business, being the expenses of executing the trust, are entitled to preference over the claims of depositors.[3] In the voluntary winding up of a savings bank, under the direction of court, only those who were depositors when the proceedings were instituted, are entitled to share in the surplus.[4] The general depositors

in a savings bank becomes a creditor of that bank as really and as effectually as a depositor in a bank of discount or deposit. There is no relation of trustee and *cestui que trust* between bank and depositor any more than in any other case of debtor and creditor."

In 1 Morawetz on Private Corp. (2d ed.), § 391, it is stated: "The rights of the depositors in a savings bank are of a twofold character. While the corporation is solvent and in operation, the depositors may be regarded solely in the light of creditors of the corporation; they may withdraw their deposits and claim interest, as provided in the charter and by-laws, and may enforce their rights by the usual remedies at law. But the depositors are in reality something different from ordinary creditors. They are in reality joint beneficiaries of the corporate estate, and occupy a position similar to that of the stockholders in an ordinary corporation. The courts will recognize the true position of the depositors, as they do the true position of the shareholders, whenever this becomes necessary for the protection and adjustment of their equitable rights."

1. Berry *v.* Windham, 59 N. H. 288; 47 Am. Rep. 202; Robinson *v.* Dover, 59 N. H. 521; People *v.* Ulster Co. Sav. Inst. (N. Y. 1892), 31 N. E. Rep. 738. In *re* Newport Sav. Bank, 68 Me. 396; Savings Bank *v.* New London, 20 Conn. 111; Stockton *v.* Mechanics, etc., Sav. Bank, 32 N. J. Eq. 163. And as such trustee it is subject to the jurisdiction of equity over trusts. Accordingly, equity will interfere, if there appears to be occasion for so doing, to prevent the unequal distribution of the assets of such an institution—for example, to prohibit the payment of any depositors in full, so long as it is uncertain whether there will be assets enough to pay the others in full also. In *re* Newark Sav. Inst., 28 N. J. Eq. 552. See also Morristown Sav. Inst. *v.* Roberts, 42 N. J. Eq. 496. The managers of a saving bank being trustees for depositors, the statute of limitations does not run against a claim of injury by neglect on their part. Williams *v.* McKay, 40 N. J. Eq. 189; 53 Am. Rep. 775.

In Hun *v.* Cary, 82 N. Y. 65; 37 Am. Rep. 546, it was held that the relation existing between the savings bank and its trustees was that of principal and agent, while the relation between the trustees and the depositors was similar to that of trustee and *cestui que trust*. See also Savings Inst. *v.* Makin, 23 Me. 360.

In Johnson *v.* Ward, 2 Ill. App. 261, it was held that the funds, whether made up of the deposits themselves, or of the interest, gains and accumulations thereof, are trust funds, held for the benefit of the depositors.

In Makin *v.* Savings Inst., 19 Me. 128; 36 Am. Dec. 740, the defendant undertook not only to receive and invest the money of the depositors, but, *at all events*, to pay a stipulated interest, and to repay the principal, at certain times prescribed by itself. It was held that by virtue of this engagement the bank assumed other and greater liabilities than those properly appertaining to an ordinary trustee. A trustee does not assume to bear the risk of losses; this institution did assume such risk. See also Makin *v.* Savings Inst., 23 Me. 350; 41 Am. Dec. 389; Savings Inst. *v.* Makin, 23 Me. 360.

2. Bunnell *v.* Collinsville Sav. Soc., 38 Conn. 203; 9 Am. Rep. 380; Osborn *v.* Byrne, 43 Conn. 156; 21 Am. Rep. 641; Lewis *v.* Lynn Sav. Inst., 148 Mass. 235; 12 Am. St. Rep. 535.

3. Stockton *v.* Mechanics, etc., Sav. Bank, 32 N. J. Eq. 163.

4. Morristown Sav. Inst. *v.* Roberts, 42 N. J. Eq. 496. As those who withdraw their deposits before the institu-

can, ordinarily, after demand, maintain actions at law against the bank for the amounts of their deposits when they are entitled to withdraw them under the regulations of the institution and according to its peculiar constitution.[1]

IV. Officers: Duties, Powers and Liabilities.—The officers intrusted with the management of the affairs of a savings bank are held to the exercise of common care, prudence and judgment.[2]

tion of such proceedings cannot be liable to contribute to any loss to which the remaining depositors might be subjected, so, on the other hand, they are not entitled to participate in the surplus. Morristown Sav. Inst. *v.* Roberts, 42 N. J. Eq. 496.

1. They can maintain such actions because, by the constitution of the bank, they are to receive their money back. An ordinary corporate stockholder cannot maintain an action against his corporation for the amount or value of his stock, because, by the constitution of the agency, he is not to receive his money back. Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43; Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87. See also Makin *v.* Savings Inst., 23 Me. 350; 41 Am. Dec. 389; Lewis *v.* Lynn Sav. Inst., 148 Mass. 235; 12 Am. St. Rep. 525. And in an action against a savings bank, by the assignee of a depositor, to recover the sum deposited, the defendant cannot set up as a defense that the deposit is the proceeds of securities belonging to third parties, which the depositor obtained and fraudulently converted, and that such third parties have notified the defendant of those facts and that they claim the deposit as their property. Lund *v.* Seamen's Sav. Bank, 37 Barb. (N. Y.) 129.

Liens.—The lien given by the general banking act of *Pennsylvania* upon deposits does not apply to savings banks. Merchants' Bank *v.* Shouse, 102 Pa. St. 488.

A savings bank has no lien upon the surplus proceeds of the sale of stock held as collateral for payment of a promissory note, for the general balance due from the maker. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262.

2. Williams *v.* McKay, 40 N. J. Eq. 189; 53 Am. Rep. 775; Williams *v.* McDonald, 42 N. J. Eq. 392; Dodd *v.* Wilkinson, 42 N. J. Eq. 647; Leffman *v.* Flanigan, 5 Phila. (Pa.) 155; Maisch *v.* Seamen's Sav. Fund Soc., 5 Phila. (Pa.) 30. In Marshall *v.* Farmers, etc., Sav. Bank, 85 Va. 676, the president of the bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts and were loaned large sums by the bank with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but ten per cent. on the deposits. It was *held*, that though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors.

In an action against the trustees of a savings bank to recover for their mismanagement, the proof showed that the bank was substantially insolvent, owing its depositors over $70,000; that its assets were entirely insufficient in amount and in an unsatisfactory shape to meet any sudden or unusual call; that in this condition of affairs the trustees authorized the purchase of four lots, at a cost of $74,500, obligating themselves to erect a building on one of the lots to cost $25,000. It was held that this justified a finding by the jury that the trustees failed in that measure of reasonable prudence, care and skill which the law requires, and imposed liability upon them for loss thereby occasioned. Hun *v.* Cary, 82 N. Y. 65; 37 Am. Rep. 546. A savings bank manager is bound to possess ordinary competency, and cannot excuse misconduct by pleading gross ignorance. Williams *v.* McKay, 46 N. J. Eq. 25. By voluntarily taking the position, a trustee undertakes that he does possess and will exercise ordinary

They cannot assume responsibilities, nor enter into contracts or transactions so as to bind the bank, unless such acts are clearly incidental to the duties imposed upon them.[1] Neither the presi-

care and judgment, and it is immaterial that the services are rendered gratuitously. Hun *v.* Cary, 82 N. Y. 65; 37 Am. Rep. 546. Neglect of the president of a savings bank to attend the bank meetings is not neglect or omission of the duties which should have been performed at such meetings, which will render him personally liable for frauds committed upon the bank made possible by reason of such neglect. *In re* Marquis of Bute's Case, 2 Ch. Div. 100.

Degrees of Liability as between the Managers.—In a suit by the receiver of a savings bank against its managers, where a loss is shown to have resulted from dishonesty and disregard of the charter's requirements, or culpable negligence, all the managers who are chargeable with such faults must be held alike responsible, so far as the receiver is concerned, without reference to the degree of their dereliction. But, as between themselves, there may be grades of liability according to the degrees of culpability. Such grades may be as follows: First, those managers who were concerned in and profited by an unlawful, imprudent or negligent transaction that resulted in loss; second, those who, though concerned in such a transaction, did not profit by it; third, those who, though they did not know of the transaction which occasioned the loss, by the negligent and improper discharge of some duty which was especially imposed upon them, made such loss possible; fourth, those who, though they did not know of the transaction which occasioned the loss, negligently omitted to perform a duty specially charged upon them, the proper performance of which would have prevented the loss, and, fifth, those who, though not charged by the by-laws with any special duty, failed to exercise that reasonable circumspection over the affairs of the bank which the law demanded of them. Williams *v.* McKay, 46 N. J. Eq. 25.

It is competent to consider the illegal conduct of managers when present with their associates, in order to determine whether such managers are liable for like illegal acts done by such associates in their absence. Dodd *v.* Wilkinson, 42 N. J. Eq. 647; Wilkinson *v.* Dodd, 42 N. J. Eq. 234.

Misapplication of Funds.—A trustee of a savings bank is liable at common law to the corporation for misapplication of the funds of the bank, and a receiver may enforce such liability. VanDyck *v.* McQuade, 57 How. Pr. (N. Y.) 62.

Loans on Second Mortgage—Prudence.—Loans on second mortgage, although permitted by the charter of a savings bank, must be condemned as imprudent, when the first mortgage is large, and the investor is obliged to be perpetually ready to pay the first encumbrance. Williams *v.* McKay, 46 N. J. Eq. 25.

1. Com. *v.* Reading Sav. Bank, 133 Mass. 16; 43 Am. Rep. 495; Com. *v.* Scituate Sav. Bank, 137 Mass. 301; Riley *v.* Albany Sav. Bank, 36 Hun (N. Y.) 513; Citizens' Sav. Bank *v.* Blakesley, 42 Ohio St. 645; New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335.

An agreement by an officer of a savings bank to give notice to a surety in case of a default on the part of the makers of a note pledged as collateral, does not bind the bank in the absence of some authority conferred upon such officer to make the agreement. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

The plaintiff delivered U. S. bonds to the clerk of the treasurer of the defendant for safe keeping in the bank, and took his receipt therefor. It was no part of the business of the bank to receive valuables or securities for safe keeping; its charter did not authorize it to act as a mere depositary. The evidence showed that the bank never received the bonds or their proceeds. It was held that the contract being *ultra vires* of the defendant, it was not liable for the unauthorized act of its treasurer or of his clerk, never having had the possession of the bonds or their avails. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

A treasurer of a savings bank may direct a suit to be brought on an overdue note; and if, judgment being obtained, and land taken on execution set off to the bank, the attorney of the bank, acting under the direction of the treasurer and of a trustee, to whom such matters have been intrusted, accepts seisin, and brings a writ of entry to recover possession of the land, it is no

dent[1] nor the treasurer[2] has, *virtute officii*, the power to borrow money in behalf of the bank; nor has the treasurer the power to execute a release in the name of the bank;[3] to transfer a promissory note,[4] or to assign a mortgage[5] belonging to the bank. While the publication by the directors that directors and stockholders are personally responsible for the debts of the bank does not constitute a contract with depositors, yet, if intentionally false, it will afford the basis of an action for deceit.[6] The direc-

objection to the proceedings that a previous vote of the trustees authorizing them has not been passed. Bristol Co. Sav. Bank *v.* Keavy, 128 Mass. 298.

A savings bank which had taken certain shares of stock to secure a loan made by it, resolved that it be sold by the president for the best interest of the bank. The president sold a part of the stock and directed a broker to sell the remainder at a price named, which he did, and so advised the president, whereupon the latter informed him that he had himself previously sold the stock. The broker being unable to deliver the stock was compelled to pay the purchaser $4,110. In an action by the broker against the receiver of the bank to recover the amount so paid, it was held that the president was authorized to employ the plaintiff to make such sale and that the bank was liable to him for the damage occasioned by the act of its president, and that the liability of the bank was not affected by the fact that it was forbidden by statute to loan money upon personal security. Sistare *v.* Best, 16 Hun (N. Y.) 611.

1. Fifth Ward Sav. Bank *v.* First Nat. Bank, 47 N. J. L. 357. Whether such officer was held out in this case as being possessed of such a power was left to the jury as a matter of fact.

2. Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. L. 513.

3. Dedham Sav. Inst. *v.* Slack, 6 Cush. (Mass.) 408.

4. Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 107; 34 Am. Rep. 351; Holden *v.* Upton, 134 Mass. 177. See also Com. *v.* Reading Sav. Bank, 133 Mass. 16; 43 Am. Rep. 495. This view, however, need not cast any doubt upon the authority of a treasurer of a savings bank, who usually receives payment of notes due to the corporation, to surrender to the makers of notes, which are paid, such collateral securities as may be held therefor, and to execute such transfers as may be necessary to revest the property in the original owners. Holden *v.* Upton, 134 Mass. 177.

A provision in the by-laws of a savings bank that the treasurer "shall draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding upon the corporation," means his signature to necessary papers, and in discharge of obligations to the corporation, and does not authorize him to bind the corporation by indorsing its name on a promissory note. Bradlee *v.* Warren, Five Cents Sav. Bank, 127 Mass. 107; 34 Am. Rep. 351.

5. Holden *v.* Phelps, 135 Mass. 61; and the fact that he had assigned other mortgages by verbal consent and under the direction of the investment committee of the bank, is not sufficient to give him a general authority to assign mortgages, or to entitle the assignee to infer that he had such authority, even if this fact were known to the assignee. Holden *v.* Phelps, 135 Mass. 61. See also Holden *v.* Hoyt, 134 Mass. 181; Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48; Holden *v.* Whiting, 29 Fed. Rep. 881.

Nature of Office of Treasurer.—The treasurer of a savings bank is an officer of much more limited powers than the cashier of a commercial bank. His duties more nearly resemble those of the paying and receiving tellers of banks. Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. L. 513; Com. *v.* Reading Sav. Bank, 133 Mass. 16; 43 Am. Rep. 495. In Fifth Ward Sav. Bank *v.* First Nat. Bank, 47 N. J. L. 357, the court, by Beasley, C. J., said: "It would be truly disastrous to these valuable institutions, if they cannot appoint a treasurer and deposit in his custody their money and securities without such situation giving rise to an inevitable inference that such official has been clothed with an unlimited capacity to contract loans and sell and pledge such securities."

6. The defendants, directors of the Hackensack Savings Bank, authorized the publication in a newspaper of the following advertisement: "Hackensack

tors and trustees may be held liable for losses incurred through violation of a law or provision of the charter regulating the investment of deposits.[1]

V. Pass Books—1. Nature and Character.—In this connection the term is used to designate a kind of memorandum book which the banks issue to their depositors adapted to be carried back and forth by them, and in which a record of deposits may be made.[2] It is not a negotiable instrument in a commercial sense, nor can it be made such by the agreement of the parties.[3]

Savings Bank. Directors and Stockholders Personally Responsible." This was followed by a list of the names of the directors and officers of the bank. The plaintiff saw this advertisement, and because of it became a depositor in the said bank. On the pass book given him was the following printed statement: "The directors and stockholders are personally responsible for all debts and engagements of the bank." The bank became insolvent and the plaintiff brought suit against the directors for the amount of his deposits. It was *held* that while such publication did not constitute a contract with the depositors, yet if the statement was false it would afford the foundation for an action for deceit. The court, by Van Syckel, J., said: "It is manifest that the essential features of a contract are not present here. The publication was a mere representation that a certain fact existed, which cannot, in legal contemplation, be viewed as an agreement, without utterly disregarding the distinction between an *ex parte* statement and a contract. If the published statement had been that stockholders alone were personally responsible, the idea that thereby a contract arose on the part of the directors that the stockholders were personally liable, would not even have been suggested. The fact that the advertisement included the directors in the asserted liability cannot transform a mere representation into a bargain. The language used contains no undertaking that the directors will pay future depositors. It does not purport to create any liability whatever, or to enter into any engagement, but asserts that a liability already existed. It is not in the form of a present undertaking or agreement to pay. If a contract, it embraces in its terms both directors and stockholders. No authority appears to charge the latter with such an obligation; the language used is inapt and insufficient for that purpose, and could not have been so intended or understood. It is clear that no contract was entered into between these parties and that no recovery can be had on the ground of a contract liability. But the statement that directors and stockholders were responsible for all debts and engagements of the bank was false, to the knowledge of defendants, and therefore fraudulent. It appearing as one of the findings of fact in the case that the plaintiff made his deposits relying upon the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit." Westervelt *v.* Demarest, 46 N. J. L. 37; 50 Am. Rep. 400.

Representation By Director of Solvency of Bank.—Where a depositor in a savings bank sues a director for deceit in representing that the bank was solvent, and that it could not be insolvent without his knowledge, as he was on the finance committee, there can be no recovery unless there was a fraudulent purpose to deceive, and that is a question of fact. Cowley *v.* Smith, 46 N. J. L. 380; 50 Am. Rep. 432.

1. Dodd *v.* Wilkinson, 42 N. J. Eq. 647; Wilkinson *v.* Dodd, 42 N. J. Eq. 234. In Williams *v.* McDonald, 42 N. J. Eq. 392, the defendant, who was a director and member of the finance committee of a savings bank, which afterwards became insolvent and a receiver was appointed, having acted with the president in investing its funds on mortgages on real estate not worth at least double the amount of the sum invested above all encumbrances against the prohibition in its charter (P. L. of 1869, p. 180, § 10) was held chargeable with the loss on the investment.

Indiana. — In *Indiana*, an action against the officers and trustees of savings banks for violation of statutory duties can be maintained only by the auditor of State. Ryan *v.* Ray, 105 Ind. 101.

2. Abb. L. Dict.

3. Witte *v.* Vincenot, 43 Cal. 325; Stewart *v.* State, 42 Tex. 242; Smith *v.*

2. By-Law Requiring Presentation.—A by-law requiring presentation of the pass book, as a condition precedent to the repayment of deposits, is a reasonable one,[1] and when such regulation is printed in the book, it forms part of the contract between the depositor and the bank.[2] If, however, the book is wrongfully withheld by another, or has been lost or destroyed, the depositor is entitled, upon proof of the fact, to receive his money without it.[3]

Brooklyn Sav. Bank, 101 N. Y. 58; 54 Am. Rep. 653; Eaves *v.* Peoples Sav. Bank, 27 Conn. 229; 71 Am. Dec. 59; McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300; Howard *v.* Windham Co. Sav. Bank, 40 Vt. 597. As the character of a security, as being negotiable or otherwise, must appear, not by force of the mere stipulation of the parties that it shall be such, but must be implied by law as the result of the form and effect of the security itself. Witte *v.* Vincenot, 43 Cal. 325.

Certificate of Deposit.—But a certificate of deposit in a savings bank, payable to the depositor, or order, on demand, and on return thereof, is a negotiable instrument, and the bank has a right, when payment is demanded, to insist that the certificate shall be produced and delivered up, as its voucher of payment, and security against any future claim. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320; 81 Am. Dec. 603.

1. Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543; Shoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418; Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255; Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96; Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78; 88 Am. Dec. 194; Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134; 37 Am. Rep. 669.

Enforcement of Rule in Case of Administrators.—It seems that such requirement is to be insisted upon less strictly against an administrator representing the rights of creditors, since, in asserting their rights to the fund, it cannot be supposed that the pass book would be under their control. Wall *v.* Provident Sav. Inst., 6 Allen (Mass.) 320; Palmer *v.* Providence Sav. Inst., 14 R. I. 68; 51 Am. Rep. 341.

2. Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78; 88 Am. Dec. 194; Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96; 6 Allen (Mass.) 320; Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255; Peoples Sav. Bank *v.* Cupps, 91 Pa. St. 315. See also Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543; Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33.

Assent Implied.—Though the by-laws of a savings bank require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent will be implied where a depositor, living at a distance, and receiving a deposit book by mail with the by-laws printed in it, leaves the deposit and keeps the book for several years, without going to the bank and leaving his signature. Gifford *v.* Rutland Sav. Bank, 63 Vt. 108.

3. Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543; Wagner *v.* Howard Sav. Inst., 52 N. J. L. 225.

In Palmer *v.* Providence Sav. Inst., 14 R. I. 68; 51 Am. Rep. 341, both the charter and by-laws contained a provision that "no person shall receive any part of his principal or dividend without producing the original book, that such payments may be entered thereon." The depositor died, and his family refused to give the book to the administrator. It was held that he could recover the deposits without producing the book. Durfee, C. J., in delivering the opinion of the court, said: "The provision in question was evidently designed as a safeguard against the payment of deposits to the wrong persons. It would be impossible for the officers of an institution, like the defendant, having perhaps several thousand depositors, to recognize and identify each depositor when he should apply for payment of his deposit. The possession of the book would afford a strong presumption that the person presenting it was authorized to receive the money. A depositor, therefore, who can produce his book may reasonably be required to do so, as the condition of receiving payment. But we do not think that either the legislature, when they incorporated the provision into the defendant's charter, or its trustees, when they inserted it in the by-laws, contemplated that it should be applied to a depositor unable to produce the book

3. Payment to Party Presenting.—If a savings bank pays money to one presenting a depositor's pass book, and apparently in the lawful possession thereof as owner, the true depositor cannot recover from the bank,[1] unless its officers failed to

in consequence of its loss or destruction, or the wrongful withholding of its possession from him by another. The practical effect of such a construction would be to deprive a depositor, so situated, of his money."

Bond of Indemnity.— In Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78; 88 Am. Dec. 194, the plaintiff's deposit book contained the following: "Depositors are alone responsible for the safe keeping of the book, and the proper withdrawal of their money; no withdrawal will be allowed without the book, and the book is the order for the withdrawal." The book had been lost or stolen, and the bank declined to pay the plaintiff the amount deposited without indemnity—this he refused to give. In an action for the recovery of the deposit, it was held that the bank could not be compelled to pay without indemnity; that under such a contract the bank was as much entitled to the production and offer of the book upon a demand for the deposit, as the maker of a note, payable to bearer, to an offer of the note upon payment, when payment is demanded.

The administrator of one who has deposited money in a savings bank, upon terms and conditions set forth in the by-laws contained in the pass book, one of which provides that "no persons shall receive any part of their principal or interest, without producing the original book," cannot maintain an action against the bank for such deposit without producing the book, or tendering, in lieu thereof, a satisfactory bond of indemnity. Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96. But he may maintain the action if the deposit is needed for the payment of debts, upon tendering a satisfactory bond of indemnity in lieu of the book, if the latter was fraudulently disposed of by the intestate in his lifetime. Wall *v.* Provident Sav. Inst., 6 Allen (Mass.) 320.

In Mitchell *v.* Home Sav. Bank, 38 Hun 255, the by-laws of the bank provided that, in case of loss of a pass book on satisfactory proof and adequate indemnity a duplicate might be issued, and that no person should have the right to demand or receive any sum . . . . without his pass book, to which the plaintiff subscribed. It was held that she could not recover against the bank without producing her original book, or procuring another by tendering indemnity.

An administrator brought suit against a savings bank to recover the deposit of his intestate; he was unable to obtain the pass book from the latter's family. It was held that as no claim had been made to the deposit by any third party, the administrator should not be compelled to give a bond of indemnity to the bank. Palmer *v.* Providence Sav. Inst., 14 R. I. 68; 51 Am. Rep. 341. The case of Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543, has been thought to favor the view that a tender of indemnity is unnecessary, but an examination of the case will show that the question of security was not raised or decided.

If money is deposited in a savings bank by an agent, who signs on the books of the bank the name of the principal only, and receives from the bank and delivers to his principal a deposit bank, in which the principal is credited with the amount, the principal, after demanding payment from the bank and being refused, and giving his own affidavit of his ownership, and of the circumstances attending the deposit, may maintain an action against the bank for the money, without tendering them a bond of indemnity; although it is the custom of the bank to require depositors to sign their names when making their first deposit, and not to receive any deposits by one person for the benefit of another unless so entered in their books. Wallace *v.* Lowell Sav. Inst., 7 Gray (Mass.) 134.

1. Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507; 96 Am. Dec. 500; Hayden *v.* Brooklyn Sav. Bank, 15 Abb. Pr. N. S. (N. Y.) 297; Kelly *v.* Emigrant Industrial Sav. Bank, 2 Daly (N. Y.) 227; Shoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418; Wilcox *v.* Onondaga Co. Sav. Bank, 40 Hun (N. Y.) 297; Levy *v.* Franklin Sav. Bank, 117 Mass. 448; Goldrick *v.* Bristol Co. Sav. Bank, 123 Mass. 320; Donlan *v.* Provident Sav. Inst., 127 Mass. 183; 34 Am. Rep.

exercise reasonable care and diligence in making the payment;[1]

358; Gifford *v.* Rutland Sav. Bank, 63 Vt. 108; Fiore *v.* Ladd (Oregon, 1892), 29 Pac. Rep. 435. *Compare* Eaves *v.* Peoples Sav. Bank, 27 Conn. 229; 71 Am. Dec. 59.

But a by-law of a savings bank to the effect that "all payments made by the bank upon presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney, when accompanied by the pass book," will not authorize or protect the bank in a payment to a stranger the only evidence of whose authority to receive it was the possession of the pass book, as the by-law contemplated but two modes of payment, one to the depositor personally, the other upon his written order, both requiring the presentation of the pass book as the condition thereof. Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58; 54 Am. Rep. 653.

And a savings bank is liable to a depositor for payments out of his deposit made by it to a third person who presents the book, without a written order from the depositor, where the contract of deposit provides that payments shall be made only to the depositor in person, or to his attorney duly constituted by writing, though it also provides, in a subsequent clause, that the bank will not be liable for any fraud committed in producing the bank book, as, if the two provisions are inconsistent the later one must be rejected. Kummel *v.* Germania Sav. Bank, 53 Hun (N. Y.) 632; Clarke *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346.

In Donlan *v.* Provident Sav. Inst., 127 Mass. 183; 34 Am. Rep. 358, the deposit book contained the usual regulation, but the depositor was unable to read, which fact, however, was unknown to the bank. After the death of the depositor, of which the bank had no notice, it paid the money to a person personating the depositor who presented the book. It was *held*, that the executor of the depositor could not maintain an action for the amount so paid. See also Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134; 37 Am. Rep. 669.

A depositor in a savings bank may maintain an action to recover the amount of his deposit, although, upon production of the pass book, the bank has paid the amount due to one who has been appointed as his administrator, under the erroneous belief that he was dead after he had been absent for more than seven years without being heard from. Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87. A contrary rule is laid down in Roderigas *v.* East River Sav. Bank, 63 N. Y. 460; 20 Am. Rep. 555; but this case has been severely criticised. See 15 Am. Law Reg. 212; 10 Am. Law Rev. 787.

1. Appleby *v.* Erie Co. Sav. Bank, 62 N. Y. 12; Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58; 54 Am. Rep. 653; Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83; 38 Am. Rep. 468; Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507; People's Sav. Bank *v.* Cupps, 91 Pa. St. 315.

A savings bank having a by-law that although it "will endeavor to prevent fraud on its depositors, yet the payments to persons producing the pass books issued by the bank shall be valid payments to discharge the bank," is still bound to exercise reasonable care and diligence to protect the depositors from fraud and larceny. Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249; Kimball *v.* Norton, 59 N. H. 1; 47 Am. Rep. 171; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386.

But reasonable care and diligence do not necessarily require the bank to demand strict proof of the identity of the depositor. Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507; 96 Am. Dec. 500; Hayden *v.* Brooklyn Sav. Bank, 15 Abb. Pr. N. S. (N. Y.) 297.

A stipulation between a savings bank and a depositor, that his deposit may be paid to anyone presenting the book, does not relieve the bank from the duty of exercising reasonable care. Kimball *v.* Norton, 59 N. H. 1; 47 Am. Rep. 171.

Question for the Jury.—In replevin against a bank for the pass book evidencing plaintiff's deposits, where one of the regulations contained in such pass book required depositors to give thirty days' notice of the withdrawal of their deposits, it is a question for the jury whether the bank, in the absence of such notice, was guilty of negligence in paying the amount of plantiff's deposit to one who had stolen the pass book and presented it at the bank personating plaintiff and signing his name to the receipt, the bank having received no notice from plaintiff of the theft. Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242. See also Saling *v.* German

and the burden of proof is on the depositor to show negligence.[1]

4. As Evidence.—In an action against a savings bank to recover the amount of a deposit, the pass book is admissible in evidence, at least to show the amount of the plaintiff's money received by the bank, although the book contains printed conditions of deposit and payment.[2]

VI. Gifts of Deposits—1. Inter Vivos—*a.* Delivery of Pass Book.—A delivery of a savings bank deposit book by the depositor to a third person, with intent to make a gift of the deposit, constitutes a valid gift; the principle applicable is that governing equitable assignments.[3] If, however, the book is delivered merely for safe keeping, or for a purpose inconsistent with an intention

Sav. Bank, 15 Daly (N. Y.) 386; Farmer *v.* Manhattan Sav. Inst. (Supreme Ct.), 15 N. Y. Supp. 235.

The by-laws of a defendant savings bank, printed in its customers' deposit books, contained the following: "The bank will use its best efforts to prevent fraud, but all payments made to persons producing the deposit books shall be deemed good and valid payments;" "drafts may be made personally or by order in writing of the depositor if the bank have his signature on the signature book." Plaintiff was a depositor and defendant had his signature in such book; his wife wrongfully obtained possession of his deposit book, which she presented with a forged order for $2,850, and this sum was paid to her. The order and the signature book were produced on the trial. Three of defendant's own officers testified that there was a difference between the signature to the order and that in the signature book. The court left it to the jury to determine whether defendant used its best efforts to prevent fraud. It was held that this was proper, and that a request to charge that if the defendant exercised ordinary care and diligence and paid in good faith, it was excused, was properly refused. Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314.

1. Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507.

2. Brown *v.* Abington Sav. Bank, 119 Mass. 69; Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96. But the entries upon the books of a savings bank, and upon the pass books issued by such bank to a depositor, are not conclusive evidence of the ownership of a deposit in the bank. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374.

3. Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39.

In Hoar *v.* Hoar, 5 Redf. (N. Y.) 637, the testator, in his lifetime, had a deposit in a savings bank, which was claimed, after his death, by his widow, as a gift *inter vivos*, and the only evidence in support of her claim was a declaration by testator to third persons, that he had given her the money in the bank—that he had given her the bank book—that it was hers; the bank book not having been delivered. It was held not to constitute a valid gift, for want of delivery.

But it is held that delivery of the pass book is not necessary when the intended donee is already in possession of it, that in such case the gift, if completed and unambiguous, may be effected by a simple oral declaration. Providence Sav. Inst. *v.* Taft, 14 R.I. 502.

In Penfield *v.* Thayer, 2 E. D. Smith (N. Y.) 305, it was held that a formal delivery of the pass book is not essential if there be any act evincing an intent to deliver. In this case it appeared from the testimony of a single witness that the plaintiff and intestate had boarded in the same house, near the city of New York; that the plaintiff was a woman dependent on his bounty; that he paid her board and manifested a disposition to befriend her; that being about to go to the said city, he remarked to her, "My trunk and what is in it I give to you; there is enough in it to take care of you for life," or "for a spell," adding in the same conversation that he wished a son of the witness to have his tool-chest; that he thereupon went to the city, with no expectation, as appeared from his declarations, of returning, but that after a few days he did return, used

to relinquish the control of the deposit or the depositor's interest in it, there is no gift.[1] The delivery may be to a trustee for the donee instead of to the donee himself.[2]

b. DEPOSIT IN NAME OR TO CREDIT OF ANOTHER. — A mere deposit by one in the name or to the credit of another, without more, is not equivalent to a gift. Deposits are sometimes thus made to evade a by-law of a bank limiting the amount receivable on one account; if such was the depositor's motive, there is no gift.[3] It has been held that a deposit in the name of

his tools, and resumed the occupation of his room, where he soon after died; and the plaintiff then, for the first time, upon consulting her friends, took possession of the trunk, which contained articles of clothing belonging to him, and a savings bank deposit book. It was held that the intestate made to the plaintiff a valid gift *inter vivos* of the deposit book, the same having been in the trunk at the time of the declaration above mentioned; and, further, that from such a state of facts the law implies such delivery by the donor as is requisite to render the mere words of the gift effectual.

1. Curry *v.* Powers, 70 N. Y. 212; 26 Am. Rep. 577. In this case a father deposited money in his own name in several savings banks. He had for some time desired to make a present to his sons, and finally delivered to each a check for $6,000, and a deposit book on the several savings banks where he had money deposited for a larger amount than the several checks. Each of the checks was payable four days after his death, and had a memorandum at the top to the effect that "the pass book must be presented with the check." Upon the delivery of the checks the decedent said he wanted it in this form, as he desired the control of the money during his life, to receive the interest. He observed at the time: "You will want these books to get the money. I don't consider them safe here," and to one of his sons B, said: "You take them and take care of them." And when he signed the checks said: "Boys, this is something which will do you good when I am gone. It will not do you any good while I am here." B took the books and placed them in the custody of one of the savings banks, in an envelope marked "B bank books to have when called for." It was held that the transaction was not a gift, as there was no transfer or relinquishment of control over the fund.

2. Hill *v.* Stevenson, 63 Me. 364; 18 Am. Rep. 231.

In Withers *v.* Weaver, 10 Pa. St. 391, A deposited money in a savings institution and received a certificate therefor, which he assigned, and the money due thereon, to B in trust for his (A's) son; but at the time of the assignment A said it might be that he would need some money and if he did he would call on B for it; he had made arrangements with his son that whatever was advanced him should, at his death, be settled by his son, and the balance paid over to him. The trustee surrendered the old certificate and took out a new one in his name. The assignment was therefore in form complete, but it was held that the donor evidently showed no intention of parting with the ownership and control of the money, and consequently there was not a valid gift.

But in Davis *v.* Ney, 125 Mass. 590; 28 Am. Rep. 272, a depositor in a savings bank delivered her bank book, accompanied by an assignment of her deposit, to B, upon an oral agreement that B should draw for her what money she wanted during her life-time, and pay the balance at her death to her son. This was done. The trust was held to be valid and binding.

3. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374; Davis *v.* Lenawee Co. Sav. Bank, 53 Mich. 163. In Robinson *v.* Ring, 72 Me. 140; 39 Am. Rep. 308, a depositor having placed to his account the maximum sum allowed by the bank on one account, afterwards made another deposit in the name of his brother, and continued to make deposits in that name until the sum amounted to $1300. During all this time he retained the pass-book in his possession, and at his death it was found among his effects. There was no evidence of a delivery of the pass book to his brother, nor any declaration of a trust at the time of the deposit or afterwards,

a third person, so made for the purpose of avoiding a probable attachment, could not be claimed as a gift by such third person, there having been no intent to make a gift.[1]

Where the deposit is made "subject to the order of" or "payable to," the depositor, these expressions are generally held to indicate an intention on the part of the depositor to retain his interest in and control over the fund, and as inconsistent with a complete gift or valid declaration of trust, but this may be overcome by establishing fully and clearly the donative intent.[2] It

nor of a gift, except so far as the form of the deposit may be presumed to mean a gift. It was held that the money still belonged to the depositor, and that no interest, legal or equitable, was transferred to the person in whose name the deposit stood.

Evidence.—When money was deposited in a savings bank, by a husband in the name of his wife, it was held that upon the question of ownership of the deposits, evidence of the following circumstances was admissible: the husband's ability and the wife's inability to earn and accumulate; the depositing and withdrawing of sums in and from the accounts by the husband; the transfer of sums between the accounts in question and other accounts of the husband; that the husband in fact opened the account; that he had prior accounts which had run up to $2000, the legal limit for a single depositor; that after the wife's death the husband continued the account as his own; that no administration was taken out on the wife's estate for four years; that before her death she had given her husband an order for the whole sum; that she had never had any other account; that she had never personally deposited or withdrawn a single sum; that she was unknown to the officers of the bank; that the pass book was usually in the husband's possession, or else in their joint possession. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374.

And a letter written by a savings bank to the depositor concerning the deposits, and her declarations relating to it, are competent evidence upon the intention in making the deposit; and the length of time between the declaration and the deposits affects the weight of such evidence only, and not its competency. Scott *v.* Berkshire Co. Sav. Bank, 140 Mass. 157.

1. Broderick *v.* Waltham Sav. Bank, 109 Mass. 149. In this case the jury found that the money deposited by the plaintiff, and for which he brought suit against the bank, was his own money; that he did not deposit it for the person in whose name it was deposited, or as trustee for that person, or with the intention of making a gift. It appeared further that that person disclaimed any interest in the money and refused to transfer the bank book, because she knew nothing of the deposit and had no interest in the money. The court said that, assuming that the plaintiff's fraudulent purpose to avoid an attachment would have been a bar to an action by the plaintiff to recover the deposit back if he had transferred it and the transfer had been accepted, yet the intent without any transfer would not work a forfeiture of the deposit to the bank; that he had a right to it as against the bank; and that, having presented the bank book to the bank, and there not being and never having been any adverse claimant, he was entitled to recover.

2. A deposited in two savings banks, and the pass books contained this heading, in one: "—— Bank, in account with B, c. b. p. A." In the other: "—— Bank, in account with C, sub. to A." In the first case, the letters "c. b. p." meant "can be paid;" in the second, the abbreviation "sub." meant "subject to." A retained both books. It was held that there was no gift, nor was there a declaration of trust, the phrases used subjecting the money to the control of the depositor, showing that she designed to keep the money as her own. Northrop *v.* Hale, 72 Me. 275.

Where a father deposited money in a savings bank in the names of his children, and retained possession of the pass books, without notice to them of the deposits, and without any declaration of his intention, except that the deposits were made *subject to his order*, it was held that there was neither a gift of the money nor sufficient evidence of an intention to create a trust. Marcy *v.*

Amazeen, 61 N. H. 131; 60 Am. Rep. 320.

Nor, *a fortiori*, does a deposit in the name of the owner of the money, subject to his own order, or the order of B, amount to a trust. Murray *v.* Cannon, 41 Md. 466.

A deposit by A in this form, "A, B, or the survivor of them, subject to the order of either," is not equivalent to a declaration of trust. Taylor *v.* Henry, 48 Md. 550; 30 Am. Rep. 486.

J made a deposit in a savings bank of moneys belonging to him, in the name of his son A, who was seventeen years old and resided with his father. In compliance with the rule of the bank, J at the date of the deposit signed with his own name a request to the bank to receive the deposit, a declaration of assent to the by-laws, and a promise to abide by them, running in the name of A. At the same time the bank credited A with the deposit and issued and delivered to J a pass book with a similar entry. In both the account and pass book were originally written the words "payable to" J, but these were erased before the pass book was delivered, how or why did not appear. A subsequent deposit was also made and credited on the pass book. J drew a sum from the account and signed a receipt therefor in the pass book in his own name. From time to time J presented the pass book to have the interest credited, and the bank officers had no dealings with any other person in respect to the account. There was no evidence that A ever had the pass book in his possession or knew of the deposits; he died in 1886. J retained possession of the pass book at all times until his death. He had eight or nine pass books in the bank representing deposits made in the names of other persons. The rules of the bank, which were printed upon its pass books, provided that drafts may be made personally or by the order in writing of the depositor if the bank have his signature, "but no person shall have the right to demand any part of his principal or interest without producing the original book that such payment may be entered thereon;" also, that all payments to persons presenting the pass books shall be valid. In an action brought by the executor of A to recover said deposits, it was held that they belonged to the estate of J; that no trust or gift was established in favor of A. Beaver *v.* Beaver, 117 N. Y. 421; *reversing* 53 Hun (N. Y.) 258.

B, the plaintiff's executor, deposited $800 in the defendant savings bank in the name of C but payable to himself. He took a deposit book, which he kept and controlled. He withdrew a little more than half of it, and in a few months directed the treasurer of the bank to add to the first entry, "Payable to S. Barlow," so as to make it read, "Payable to S. Barlow, during his life, and after his death to Marion Cushing." B made his will before the deposit in which was this provision, "I hereby confirm all gifts I have made or shall make to any of my children." C was a grandchild. It did not appear that B did or said anything else in relation to the deposit, or that indicated an intention to hold the pass book in trust for C. A by-law printed in the pass book provided that no deposit could be withdrawn without the production of the book. The bank had no communication with C, and understood that B was the depositor, and so treated him. C had no knowledge of the transaction. It was held that there was neither a gift nor a trust. Pope *v.* Burlington Sav. Bank, 56 Vt. 284; 48 Am. Rep. 781.

Two savings bank deposit books were left by A B at his death in 1879, one of which stood in his own name, and the other in the name of "J B order of A B." J B was the son of A B. On the last page of the book was this order: "May 12, 1878. Treas. of B Sav. Bank:—Pay J B what may be due on my deposit book No. —. A B." On the last page of the other was the following: "August 12, 1871. Treas. of B Sav. Bank:—At my decease pay J B what may be due on my deposit book No. —. "A B." Further deposits were made and money drawn out on both books after the dates of the orders, the books being kept by the treasurer of the bank, and A B having access to them whenever he pleased, as long as he lived. J B never had possession of the books, nor any knowledge of them during the life of his father. It was held not a valid gift. Burton *v.* Bridgeport Sav. Bank, 52 Conn. 398; 52 Am. Rep. 602.

A decision opposite to Northrop *v.* Hale, 72 Me. 275, was arrived at in Gardner *v.* Merritt, 32 Md. 78; 3 Am. Rep. 115, on about the same state of facts, *except* that in the latter the donative disposition clearly appeared, where-

requires even stronger evidence to make out a case of gift or trust when the deposit is in the names of the owner and another jointly.[1] But when the donative disposition of the depositor is fully and

as in the former it was not established. The facts in Gardner *v.* Merritt, 32 Md. 78; 3 Am. Rep. 115, were as follows: A grandmother, from time to time, during a period of five years, deposited various sums of money in a savings bank to the credit of five grandchildren, the accounts in the bank being in the name of each, as a minor, and the deposits made subject to the order of herself, or that of her daughter. She also kept an account in the bank in her own name, the deposits being subject to a like order. About the time the grandmother began to make these deposits to the credit of her grandchildren she declared that "she was going to put the money in bank for the children." Under the by-laws of the bank guardians could deposit for the benefit of their wards, and parents for their children; and if desired at the time of the deposit, subject the same to the control of such guardian or parent. The grandmother died, and shortly thereafter, the daughter, who was the executrix of her mother, obtained from the bank all the money that had been deposited to the credit of the grandchildren, and administered it as part of the estate of her mother. Upon a bill filed in the name of the grandchildren against the daughter, to obtain an account of the moneys so withdrawn by her, it was held that the moneys deposited by the grandmother were perfected gifts which she had no design to countermand, and the donees were entitled to the several amounts which stood to their credit in the bank when withdrawn by the defendant, with interest thereon from the date of the withdrawal. And in Eastman *v.* Woronoco Sav. Bank, 136 Mass. 208, H deposited a sum of money in a savings bank in the name of E, "subject to the order of H." A few days afterwards H asked E to come to his house, showed him the deposit book, said he was going to give it to him, and delivered it temporarily into his possession. H then said he would keep the book for E as he had a safe, and took it and put it into the safe. On the same day, by E's request, H signed and delivered to E a paper certifying that the money was for him. H never drew the interest upon the deposit, but allowed it to accumulate during his life, doing nothing to assert a personal ownership. E gave seasonable notice to the bank that he should claim the money, but the bank paid the same to H's administrator. It was held in an action by E against the bank, after the death of H, that the jury were authorized to find a completed gift of the money by H to E.

In Detroit Sav. Bank *v.* Burrows, 34 Mich. 153, money was deposited by the husband to the credit of his wife, and at the time he delivered to the bank a paper on which his wife's name was twice written by her, and informed the receiving teller that all checks against the deposit were to be drawn to his order. The teller thereupon wrote on the paper on which were the wife's signatures the following words: "All checks will be drawn to order of Charles Burrows." The paper was then pasted in the depositor's signature book, where it afterwards remained. It was held to be a question of fact, under all the circumstances, whether the money was understood to be deposited for her use, or for that of her husband, or for the joint use of the two, who were to act in drawing it out. It *seems*, had the understanding been that the husband himself should draw for the money, he must have been considered the creditor.

1. Where a deposit was made by intestate, in the name of himself and wife, thus, "Richard or Kate Ward," she never having had possession of the pass book during his life, it was held that the deposit was presumptively his property exclusively. The fact that it was deposited in this manner was held by the court as the highest evidence that he did not intend to part with his control over it, and the most that could be said in respect to the deposit being to the credit or order of his wife also, was that it would enable her, under the rules of the bank, to draw the money in case of his inability for any reason to do so, and that in doing this she would act as his agent. *In re* Ward, 2 Redf. (N. Y.) 251.

In Marshal *v.* Crutwell, L. R., 20 Eq. 328, the husband of the plaintiff, being in feeble health, transferred his bank account from his own name into the joint names of himself and wife, and directed the bank to honor checks

clearly established, the court will generally give effect to the deposit in the name of the donee in one way or another; either as a valid transfer of the legal and equitable interest in the money to the donee,[1] or as a transfer which constitutes the bank a trustee for him,[2] or a valid declaration of trust on the part of the depos-

drawn either by himself or his wife. He afterwards paid in large sums to this account. All checks were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but it was stated by the bank manager that he remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and wife. After the death of the husband (a few months after the transfer) the plaintiff claimed to be entitled to the balance. It was held that the transfer was intended merely for the convenience of the husband in the management of his affairs, and that the wife was not entitled.

In Mulcahey *v.* Emigrant Industrial Sav. Bank, 62 How. Pr. (N. Y.) 463, a savings bank account was opened "with John O'Keefe or Ellen Mulcahey, creditor." Both parties were present at the bank at the time of the deposit. It was held that this latter circumstance, coupled with the form of the deposit, was, in the absence of proof to the contrary, sufficient evidence that the money was the joint property of the depositors, and that the deposit was a joint one.

1. Where a mother made deposits in a savings bank in the name of her son, who was thriftless, and subsequently drew out the fund and deposited it in her own name, and afterwards gave it to a friend (who had been a friend to the son), and asked her to be a mother to him, and finally made the friend her executrix; it was held that although the son had been wholly ignorant of the transaction, the original deposit created an irrevocable gift which he could enforce against the executrix. *In re* George, 23 Abb. N. Cas. (N. Y.) 43.

In Kerrigan *v.* Rautigan, 43 Conn. 17, a woman deposited money in a savings bank for E K, her niece, the deposit being placed to the credit, on the books of the bank, of "E K ——— M K *guardian;*" she at the time informing M K, the guardian, that she had put the money in the bank for E K. The bank delivered to her a pass book with the deposits so entered therein. She retained the book in her possession, and afterwards had the money transferred back to her by the guardian. The deposit was held to constitute a complete gift and beyond her power of revocation.

And in Howard *v.* Windham Co. Sav. Bank, 40 Vt. 597, A deposited $220 in a savings bank in the name of B, and took a deposit book in which was the following entry by the treasurer of the bank: "1864, No. 530, B deposited $220." The treasurer also entered in the books of the bank that B deposited $220. A retained the deposit book until her death, and it was found among her effects. It did not appear that B knew of the gift during her life, she having died previously to A's decease. The deposit was held to be a perfect gift.

S deposited money in a savings bank in the name of his daughter, intending it as a present gift to her, subject to the right in himself and wife to take the income during their lives. The daughter was informed of the arrangement and assented thereto—the pass book was never delivered to her. It was held to be a valid gift of the deposit, subject to the life interest specified. Smith *v.* Ossipee Valley Ten Cents Sav. Bank, 64 N. H. 228; 10 Am. St. Rep. 400.

In Orr *v.* McGregor, 43 Hun (N. Y.) 528, it was held that while the deposit of one's money in a savings bank to the credit of another, without any qualification expressed at the time, is of itself *prima facie* evidence of a gift to the latter of the fund deposited, yet an intent to the contrary may be shown.

2. A deposited a sum of money in a savings bank in the name of B, who was her niece, intending that it should be a gift to B, but retained the deposit book in her possession until her death. A by-law of the bank provided that deposits should only be withdrawn by the depositors or persons authorized by them. During her last sickness, A, for the first time, informed B of the gift. On a bill in chancery, brought by A against B and the bank to recover the deposit, it was held that the deposit

itor;[1] and the retention of the pass book by the depositor generally makes no difference in the result.

c. DEPOSIT IN NAME OF DEPOSITOR AS "TRUSTEE."—A deposit in one's own name as "trustee" or "in trust" for another is not conclusive evidence of the creation or existence of a trust; it may be shown that the intention was otherwise.[2] But if, in the circumstances and upon the evidence, the intention to create a trust is shown, it is not essential that the beneficiary should have notice thereof, nor that the pass book should have been delivered to him, as its retention may be deemed in the capacity of trustee; and such a trust when once created is, like other trusts, irrevocable, unless the power of revocation is reserved or the consent of the beneficiary obtained.[3] If it appears that the intention was

created a trust in the bank in favor of B, and that, upon information of what had been done being conveyed by A to B, and acceptance by B, her title to the money became absolute, although there was no delivery of the pass book. Blasdel *v.* Locke, 52 N. H. 238.

1. Barker *v.* Frye, 75 Me. 29.

A, about three years before his death, deposited sums of money in a savings bank to the credit of each of four of his children, making an entry on the signature book of the bank in each case as follows: "B (child's name), A, trustee." The account was opened on the bank's books, and on a pass book given to A, in the same form. He drew no part of the principal or interest of three of said sums, but retained the books until his death; telling each of the four children that the deposits were made for them, and that at his death the money would be theirs. He never delivered the pass books to them, nor did he make any entry or charge other than above stated. He made no deposits nor any gifts of consequence to his other children. It was held that the deposits were trust funds held by the depositor as trustee. Petition of Atkinson, 16 R. I. 413.

2. Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228; 6 Am. Rep. 222; Powers *v.* Provident Sav. Inst., 124 Mass. 377; Sherman *v.* New Bedford Five Cents Sav. Bank, 138 Mass. 581; Scott *v.* Berkshire Co. Sav. Bank, 140 Mass. 165; Parkman *v.* Suffolk Sav. Bank, 151 Mass. 218; Weber *v.* Weber, 9 Daly (N. Y.) 211; Walker *v.* Welsh (Mass. 1887), 11 N. E. Rep. 727. In Martin *v.* Frank, 75 N. Y. 134; 31 Am. Rep. 446, this was left an open question.

3. Wheatley *v.* Purr, 1 Keen 551; Alger *v.* North End Sav. Bank, 146 Mass. 418; 4 Am. St. Rep. 331; Boone *v.* Citizens' Sav. Bank, 21 Hun (N. Y.) 235; 38 Am. Rep. 498; 84 N. Y. 83; Anderson *v.* Thomson, 38 Hun (N. Y.) 394; Scott *v.* Harbeck, 49 Hun (N. Y.) 292; Terry *v.* Bale, 1 Dem. (N. Y.) 452; *In re* Collyer, 4 Dem. (N. Y.) 24; Mabie *v.* Bailey, 95 N. Y. 206; Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450; 10 Am. St. Rep. 479; Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125; 15 Am. St. Rep. 494; Weaver *v.* Emigrant Industrial Sav. Bank, 17 Abb. N. Cas. (N. Y.) 82.

A deposit was made in a savings bank, the depositor receiving therefor a pass book containing an account opened with him as trustee with one H. After receiving the pass book he left it with the mother of H for some considerable time, but subsequently obtained the book and drew the money out of the bank and then died. It was held that his executrix was chargeable to the beneficiary of the trust with the amount of the money so drawn by the testator. Macy *v.* Williams, 55 Hun (N. Y.) 489. The evidence in this case developed a much stronger case in favor of a trust than in the case of Martin *v.* Funk, 75 N. Y. 134; 31 Am. Rep. 446, where S deposited in a savings bank moneys belonging to her in trust for M and K, who were her distant relatives, and the pass books were retained by her until her death and one year's interest drawn, and M and K were ignorant of the deposit; and it was held that the transaction constituted a trust. In this case the retention of the pass book by the depositor was considered a circumstance upon the question of intent, but not a decisive one.

In Minor *v.* Rogers, 40 Conn. 512; 16 Am. Rep. 69, a similar deposit was upheld as a declaration of trust. And in regard to the retention of the pass book by the depositor, Park J., said: "She retained possession thereof because the deposit was made in her name as trustee, and not because she had not given the beneficial interest of the deposit to the plaintiff." The only circumstance that distinguishes Ray *v.* Simmons, 11 R. I. 266; 23 Am. Rep. 447, from Martin *v.* Funk, 75 N. Y. 134; 31 Am. Rep. 446, is that in the former the intended beneficiary was informed of the deposit—and the court held the trust effectual.

In Witzel *v.* Chapin, 3 Bradf. (N. Y.) 386, and Millspaugh *v.* Putnam, 16 Abb. Pr. (N. Y.) 380, the deposits were in the same form as in Martin *v.* Funk, 75 N. Y. 134; 31 Am. Rep. 446; and in the former of the two cases the beneficiary had no notice of the deposit, and in both cases the gifts were upheld.

In Willis *v.* Smyth, 91 N. Y. 297, U, plaintiff's intestate, deposited a sum of money in a savings bank in her name *in trust* for her daughter. The bank issued a pass book in which the account was entered as with her in trust for her said daughter. This deposit was drawn out by U. But afterwards having sold a house and lot she deposited two thousand dollars to the credit of the said account, which was entered in said pass book; she also, at the same time, made a deposit to the credit of an account with her in trust for a granddaughter, receiving another pass book therefor. On the same day she deposited the balance of the purchase money received to her own credit in another savings bank. U retained the pass book until her death. In an action to determine the title to the deposit, it was held that the transaction disclosed an intention to create a trust for the benefit of her daughter, and that the latter was entitled to the fund. The court considered the fact that prior to the second deposit the daughter was married and so bore a different name at that time, and that the name was not changed in the account, as not affecting the question, as the deposit was clearly made for her benefit; and also the fact that U drew the interest on her deposit did not change or affect the character she had given to it as a trust fund; nor did the fact that she had offered to loan the money after the deposit was made; nor that she, in the first place, proposed to deposit the whole purchase money in the bank where the balance was deposited.

In Sayre *v.* Weil (Ala. 1892), 10 So. Rep. 546, the defendant deposited money in a bank to the credit of himself as trustee for G's children. He testified that he had deposited the money from time to time, for the last ten or fifteen years, as a gift to those children. It was held that the trust was irrevocable, nothing remaining in the defendant but the naked legal title.

In the case of Gaffney's Estate, 146 Pa. St. 49, G deposited a sum of money in bank in his name in trust for M, as shown by the deposit book and books of the bank. The deposit book was in the possession of M at G's death. It was held that, in the absence of rebutting evidence, there was sufficient evidence to create a trust in favor of M.

But where the defendant, the plaintiff's father, deposited in a savings bank a sum of money in his name in trust for plaintiff, and it appeared that he adopted this form for the purpose of obtaining the highest rate of interest which the bank allowed, and not intending to part with the ownership or right of receiving back the money from the bank, nor to make a gift or transfer of it or any part of it to plaintiff, and upon an agreement with the bank that the money, or any part of it, should not be withdrawn from the bank without the production of the deposit book, which he retained in his own possession, and he afterwards withdrew a part of the sum deposited; it was held that there was no intent on the part of the defendant to create a trust for the plaintiff and that none was created. Weber *v.* Weber, 9 Daly (N. Y.) 211; Weber *v.* Weber, 58 How. Pr. (N. Y.) 255.

And where the facts were as follows: A husband deposited money in a bank in his own name, in trust for his wife, but the deposit book was never delivered to her, and upon his death the special administrator took possession of it; the testimony of the wife, and her son by a former marriage, was conflicting as to the statements of the husband making a gift of the money to his wife, and they were not corroborated in any substantial way; it was held that the evidence failed to show that a completed gift was intended and made. Walker *v.* Welsh (Mass. 1887), 11 N. E. Rep. 727.

In Stone *v.* Bishop, 4 Cliff. (U. S.) 593, A deposited in his own name as

not to create a present trust, but to make a testamentary disposition of the deposit, reserving the legal title and control and benefit, a trust will not be enforced, but the case is within the statute of wills.[1]

much as the rules of the bank allowed, and then opened an account in his name in trust for B. A never notified B of the deposit, nor did he give him the pass book; and these facts were held to negative the supposition of the creation of a trust. In accordance with this decision is that of Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228; 6 Am. Rep. 222. An attentive consideration of the cases cited above will disclose that, by the current of authority, these circumstances alone are not entitled to such weight; though the fact that there was a by-law of the bank, and a statute of the State, limiting the amount that the bank might receive on one account, and that such limit had been reached by the depositor in each case before opening the account in trust, is of importance on the question of intention.

In Jewett *v.* Shattuck, 124 Mass. 590, the decision of the court was adverse to the trust on the strength of the facts that the depositor from time to time withdrew portions of the deposit, and that the person named in the bank book as *cestui que trust* had no knowledge of the deposit.

In Clark *v.* Clark, 108 Mass. 522, the deposit was entered " in trust for" B. B offered to prove that the deposit was intended as a benefit to her, but the evidence was excluded. On exception the ruling was upheld. The court expressed the opinion that the trust was not complete, but without giving any reason for that opinion, and considered itself bound by the decision in Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228; 6 Am. Rep. 222. This case may be considered as in effect overruled by the later case of Gerrish *v.* New Bedford Sav. Inst., 128 Mass. 159; 35 Am. Rep. 365, the facts of which were as follows: A, after depositing the maximum amount allowed by the bank, placed other sums in the name of himself as trustee for his son and his granddaughters. He retained the pass books and during his life collected the interest. The son and granddaughters offered to prove that A had said to them at various times "that he had put this money in the bank for them, but he wanted to draw the interest during his lifetime, and after he was gone they were to have the money."

It was held that the evidence was admissible, and that upon all the evidence a jury would be justified in finding that A had fully constituted himself a trustee for the claimants.

Parol Evidence.—A fund being deposited in a savings bank in the name of M. A. R., the depositor, "in trust for Sarah," the beneficiary called "Sarah" may be identified by parol evidence. Bartlett *v.* Remington, 59 N. H. 364.

1. In Bartlett *v.* Remington, 59 N. H. 364, it was held that a fund deposited in a savings bank in the name of the depositor, in trust for one who was neither party nor privy to the transaction, the depositor retaining the title and control of the fund, was held by the depositor upon an executory trust, and that such trust being without consideration was not enforceable;—that it was a testamentary disposition of property not made according to the statute of wills, and that the fund remained a part of the estate of the depositor after his death.

In Sherman *v.* New Bedford Five Cents Sav. Bank, 138 Mass. 581, it appeared that A deposited money in a savings bank in the name of B, in whose name the pass book, which A kept in his possession, was issued. The following condition was annexed: "Interest to be paid on order of A. Principal to be drawn by B after decease of A." A never had any communication with B in regard to the matter and B did not know of the deposit until after A's death. It was held that the executor of A's will could reclaim the deposit from the bank as against B, no perfected gift appearing, and the tendency of the facts being to show that A's intention was that the gift should not take effect until after his death, and that it was intended to be in the nature of a testamentary disposition.

In Nutt *v.* Morse, 142 Mass. 1, it appeared that A deposited sums of money in a savings bank " in trust " for certain relatives, and that he told each relative that he had done this, saying that he (A) could control the money while he lived, but that it was to belong to the relatives after his death. A drew the

2. Mortis Causa.—A savings bank deposit may be the subject of a valid gift *mortis causa*. Such a gift may be made by the delivery of the pass book to the donee, or to a third person for him, accompanied by an assignment of the fund, the necessary intent existing.[1] But whether there must be an assignment of the fund in addition to the delivery of the book, is a question on which authorities have differed. According to the weight of authority, however, delivery alone, the necessary intent existing, may suffice.[2] If the book is not in the possession of the donor, nor so situated

interest during his lifetime. Before his death he said that he should not make a will and that he had provided for these relatives by depositing money in the savings bank. Just before he died he said to the relatives, "When I am gone you take these books and transfer the money to your own names and say nothing to anybody about it." It was held that there was not a perfected gift, that the transaction was intended to be in the nature of a testamentary disposition, and was an attempted evasion of the statute of wills.

In Smith *v.* Speer, 34 N. J. Eq. 336, A made a deposit in her savings bank account and caused to be entered in the pass book that the account was in trust for B, signing the entry. A kept the pass book and drew the dividends and part of the deposit until she became insane. It was held that B had no claim to be protected during his lifetime against her or her guardian drawing the funds, and that it was clear that she had never parted with the legal title or the complete and absolute control, or the right of use and disposition, and that her design in making the entry evidently was to make a disposition of a merely testamentary character.

An agreement of two savings bank depositors, that the survivor shall have the other's deposit, each retaining the absolute title and control of his deposit during life, is a testamentary disposition of property not made according to the statute of wills, and is invalid. Towle *v.* Wood, 60 N. H. 434; 49 Am. Rep. 326.

1. Sheedy *v.* Roach, 124 Mass. 472; 26 Am. Rep. 680; Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425; 37 Am. Rep. 371.

2. Tillinghast *v.* Wheaton, 8 R. I. 536; Vandermark *v.* Vandermark, 55 How. Pr. (N. Y.) 408. See Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39, an analogous case of gift *inter vivos*. Where A, in contemplation of death, delivered to B a sealed package, informing him that it contained money and savings bank books, with directions as to what should be done with the property; and on A's death, B opened the package and found therein a sum of money and certain savings bank books, with a writing, signed by A, stating where he wished to be buried, and that whatever was left, after paying all bills and expenses, was to be divided among certain persons named; it was held to be a valid gift *mortis causa* to B in trust. Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425; 37 Am. Rep. 371.

And in Curtis *v.* Portland Sav. Bank, 77 Me. 151; 52 Am. Rep. 750, the plaintiff, by direction of her aunt four days before her death, took a key from her bureau, unlocked her trunk and took therefrom her savings bank book, and thereupon the aunt said to her: "Now keep this and if anything happens to me bury me decently, and put a headstone over me, and anything that is left is yours." This was held to constitute a *donatio mortis causa*, coupled with the trust indicated.

In Ashbrook *v.* Ryan, 2 Bush (Ky.) 228; 92 Am. Dec. 481, it was held that delivery of the pass book, unaccompanied by an assignment, was inadequate.

Also in Walsh's Appeal, 122 Pa. St. 177; 9 Am. St. Rep. 83. But it is worthy of note that in this case there was a by-law of the bank requiring a transfer on its books in order to vest the title in the donee. It would seem, however, that such a by-law was intended for the protection of the bank merely, and non-compliance therewith ought not to affect the transaction as between the alleged donor and donee. But see McGonnell *v.* Murray, 3 Irish Eq. R. 460, containing a review of the English authorities.

In the following cases the question of assignment was not involved; the

as to be actually delivered before his death, a mere attempt to make a gift by word of mouth will not constitute a valid gift *mortis causa*.[1]

VII. TAXATION.[2]—When money is deposited in a savings bank the legal title thereto becomes vested in the bank as trustee for the depositor who is the beneficial owner; but this division of title into legal and equitable ownership does not increase the

alleged gifts were not sustained in the first and second cases because the deceased did not surrender the dominion and control of the fund before his death; in the third, because the intention to make the gift was not shown, nor was a delivery established. Taylor *v.* Henry, 38 Md. 550; 30 Am. Rep. 486; Daniel *v.* Smith, 75 Cal. 548; Fiero *v.* Fiero, 5 Thomp. & C. (N. Y.) 151. In this case the facts were as follows: A woman, who had money on deposit in a savings bank, during her last sickness told a girl who lived with her, and had the custody of her deposit book, to get the book, which being done, she said: "Take that and keep it and lock it up." The girl retained the book.

The court distinguished the case from Champney *v.* Blanchard, 39 N. Y. 111, where the deceased had certain moneys which were in the possession of the alleged donee as a deposit, and for which the latter had given a receipt. This receipt the deceased gave to the alleged donee, accompanied by expressions of an intent to make a gift of the money represented by it, and the gift was held valid.

In Conser *v.* Snowden, 54 Md. 175, there was no delivery; besides there was a serious failure of proof as to the disease of which the alleged donor died, and it was essential, to make the attempted gift an effective gift *mortis causa*, that the donor should die of the very disorder with which she was suffering when the gift was made, and that there should be no intervening recovery.

Action in Name of Administrator.—A donee *mortis causa* of a savings bank deposit book may maintain an action in the name of the administrator of the estate of the donor, and without his consent, against a bank, to recover the deposit. Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425; 37 Am. Rep. 371.

1. In Case *v.* Denniston, 9 R. I. 88, a gift *mortis causa* was claimed of a sum of money deposited in a savings bank in Providence. The deposit book was not in the possession of the donor, a married woman, but was in the possession of another person in Providence. The donor aforesaid died at Mystic, Connecticut. Shortly before her death she told her son that she had not long to live, spoke of the bank book being in the possession of her son-in-law, and that she wanted him (her son) to get it, settle the bills, and if anything was left to divide it among her three children. After her death her son (one of the defendants) obtained possession of the book, but the bank refused to pay the money deposited without a bond. It was held not a valid gift *mortis causa*. The following observation by Durkee, J., in delivering the opinion of the court in this case, shows how strict is the requirement of delivery to constitute a gift *mortis causa*. "We think the defendant is not entitled to either the bank book or the money which it represents as a gift *mortis causa*. There was no delivery. It is urged that a book was in the possession of Mrs. Lawton, who, it is claimed, was a donee, and that it was not where the intestate could get it to deliver, and that upon these grounds the gift should be sustained. But we think a delivery should not be dispensed with on such grounds."

In French *v.* Raymond, 39 Vt. 623; 11 Am. Rep. 222, S had sent money at different times to the amount of $100 to her uncle, the defendant, to put into the savings bank for her, which he had done and had always kept the bank book in his possession. She came to his house, was taken sick and died. Before her death, but after she had despaired of recovery, she said she gave her money to her uncle, wanted him to have it, etc. It did not appear that she delivered the bank book or anything else to him. It was held that this did not constitute a valid gift *mortis causa*.

On the subject of gifts *mortis causa* generally, see GIFTS, vol. 8, p. 1308.

2. See generally, TAXATION.

amount of taxable property, nor does it subject the property to the liability to be twice taxed.[1] Thus, a tax of all the deposits in a savings bank to the bank, and a tax to the several depositors of their deposits therein, is double taxation and contrary to the fundamental principal of taxation.[2]

VIII. INSOLVENCY.—Upon the insolvency of a savings bank, the assets become a trust fund to be managed for the benefit of the creditors.[3] A general depositor cannot set off his deposit against a debt due from him to the bank;[4] all that he is entitled to is his

1. Berry *v.* Windham, 59 N. H. 288; 47 Am. Rep. 202. When the money is deposited the legal title held by the trustee, and the equitable title held by the depositor, are no more than they were before when he held them both undivided. The title to the money is divided, not multiplied, by depositing it in a savings bank. Robinson *v.* Dover, 59 N. H. 521.

2. Berry *v.* Windham, 59 N. H. 288; 47 Am. Rep. 202. And a tax upon the deposits and on the stocks and personal property in which such deposits are invested is double taxation. Nashua Sav. Bank *v.* Nashua, 46 N. H. 389.

Under the *New Hampshire* Statute of 1869, ch. 4, all the deposits and accumulations in the several savings banks in that State, however such deposits and accumulations may be invested, are to be taxed to the banks; and such taxes are to be paid to the State in the first instance. And such deposits are not liable to any other tax. Under this statute, real estate purchased with the deposits and accumulations of the bank, is not subject to taxation as real estate in the place where the same is located. Rockingham Ten Cents Sav. Bank *v.* Portsmouth, 52 N. H. 17.

In Massachusetts, it was held in Worcester County Sav. Inst. *v.* Worcester, 10 Cush. (Mass.) 128, that savings banks were not taxable for bank stock in which they had invested money received on deposit. And it was similarly held in *Rhode Island* under the Tax Act of January 1855. Providence Sav. Inst. *v.* Gardiner, 4 R. I. 484.

The reserved profits of a saving bank whose charter empowers the directors by majority vote to "divide the whole property among the depositors in proportion to their respective interests therein," belong to the depositors, and cannot be taxed as the property of the bank. Mechanics' Sav. Bank *v.* Granger (R. I. 1890), 20 Atl. Rep. 202.

The concluding clause of U. S. Rev. Sts., § 3408, exempting from taxation deposits of money in savings banks, exempts from tax all deposits to the extent to which they are invested in U. S. securities, and also to the extent of $2.000. German Sav. Bank *v.* Archbold, 104 U. S. 708.

3. Roan *v.* Winn, 93 Mo. 503; 19 Am. & Eng. Corp. Cas. 102; People *v.* Ulster Co. Sav. Inst. (N. Y. 1892), 31 N. E. Rep. 738.

The *Pennsylvania* act of April 16, 1850, and the other statutes regulating the distribution of the assets of insolvent banks and establishing an order of preference to creditors, do not embrace savings institutions or banks, so called, which are prohibited from exercising banking privileges. Fox's Appeal, 93 Pa. St. 406.

Indiana.—*Indiana* Rev. St., § 2757, provides a complete scheme for winding up the affairs of savings banks, and makes the state auditor the only person entitled to institute proceedings. All whose rights are involved must assert them in those proceedings. They cannot maintain an independent action. Ryan *v.* Ray, 105 Ind. 101.

Creditor's Bill.—After the appointment of an assignee of an insolvent savings bank, the depositors cannot maintain a creditor's bill against those indebted to the bank. Brown *v.* Folsom, 62 N. H. 527.

A stockholder and director of a savings bank which had become in fact insolvent, with the knowledge of which insolvency he was legally chargeable, although its stock was selling at par, purchased from the bank certain real estate, paying therefor in stock of the bank. Two years subsequently the bank made an assignment for the benefit of its creditors. The same was set aside by a creditor, who became such fifteen months after the sale. Roan *v.* Winn, 93 Mo. 503; 19 Am. & Eng. Corp. Cas. 102.

4. Osborn *v.* Byrne, 43 Conn. 155; 21

just proportion of what remains at the final winding up of the institution.[1] Sometimes the courts will scale down the deposits, and authorize an insolvent savings bank to continue its business on a solvent basis.[2]

Am. Rep. 641; Hall *v.* Paris, 59 N. H. 71; Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43. In an action by a savings bank against two persons upon a joint and several promissory note, the defendants cannot set off, either under the Gen. Sts., ch. 130, § 8, or the statute of 1878, ch. 261, the amounts severally due them from the bank. Barnstable Sav. Bank *v.* Snow, 128 Mass. 512. *Compare* New Amsterdam Sav. Bank *v.* Tartter, 4 Abb. N. Cas. (N. Y.) 215.

And where a savings bank made a loan to a depositor, it was held that the placing of the amount to the credit of the depositor on the books of the bank, the same being entered in her pass book and remaining subject to her check for a long time before the bank closed its doors, was an actual payment of the money to her; and that she was not entitled to a deduction from her indebtedness of so much of the borrowed money as remained on deposit when the bank suspended payment. Hannon *v.* Williams, 34 N. J. Eq. 255; 38 Am. Rep. 581.

But where a person indebted to a savings bank as a borrower deposited an amount less than the debt, intending to use the money, so deposited, for a payment upon the debt, and this was known to the officers of the bank, it was held that the amount deposited could be set off against the debt. Osborn *v.* Byrne, 43 Conn. 155; 21 Am. Rep. 641. Likewise a *special* deposit, made to be withdrawn upon call, may be set off against the depositor's debt to the bank. Hall *v.* Paris, 59 N. H. 71.

1. Osborn *v.* Byrne, 43 Conn. 155; 21 Am. Rep. 641; People *v.* Ulster Co. Sav. Inst. (N. Y. 1892), 31 N. E. Rep. 738.

But under *New Hampshire* Gen. Laws, ch. 170, making the depositors of an insolvent savings bank, when their deposits are scaled, the equitable owners in common of the property of the bank, a depositor's withdrawal of the reduced amount is not a gift of his share of the property remaining over the scaled amount to the other depositors. *In re* Francestown Sav. Bank, 63 N. H. 138.

"**Special Deposits.**"—A savings bank received deposits under two different regulations, one of which provided for receiving deposits which should participate in the profits of the investments, which deposits were to be payable only on thirty days' notice to the institution, unless notice should be waived; and the other provided for the receipt of deposits which should not participate in the profits, but should be payable on demand. These latter were called "special deposits," and though kept in separate books, the funds of both kinds of deposits were indistinguishably intermingled. In insolvent proceedings, it was held that the so called "special deposits" were equally trust money with those held for investment, and the fact of non-participation in the profits made no difference—and the so-called "special" depositors were not entitled to priority in payment over the other class of depositors. But had the agreement been that the "special deposits" should be returned in the same coin or bills received—had they been deposits for safe keeping, the owners would not have parted with their property in them, and the bank would only have acquired a qualified property as bailee in them. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163. See also Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 627.

2. In *re* Newark Sav. Inst., 28 N. J. Eq. 552. See also Bunnell *v.* Collinsville Sav. Bank, 38 Conn. 203; 9 Am. Rep. 380. And under N. Y. Laws 1882, ch. 409, § 278 (2 Rev. St., 8th ed., p. 1573), declaring that when suit is brought against a savings institution, alleging its insolvency and demanding its dissolution, the court may grant such relief and render such judgment as the interests of the parties seem to require, the court may scale down deposits and authorize the resumption of business, where the effect of this will be to allow the institution to continue on a solvent basis. People *v.* Ulster Co. Sav. Inst. (N. Y. 1892), 31 N. E. Rep. 738.

Forfeiture of Charter.—In State *v.* Louisiana Sav. Co., 12 La. Ann. 568, it was held that a mere temporary suspension of payment by a savings bank should not be deemed an absolute cause

SAY.—See note 1.

SCAFFOLD.—See ERECT, vol. 6, p. 808.

SCALING LAWS.—A term used to signify statutes establishing a process of adjusting the difference in value between depreciated paper money and specie. Such statutes were rendered necessary by the great depreciation of the paper money immediately following the establishment of American independence; and still more recently to scale those debts which were made payable in Confederate money. These statutes, of course, are obsolete at the present day.[2]

SCANDAL AND IMPERTINENCE (IN EQUITY AND CODE PLEADING).

I. Definition, 742. II. Striking from the Record, 745. III. Costs, 746.

I. DEFINITION.—Scandal consists in the allegation of anything which is unbecoming the dignity of court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous.[3] Nothing, however,

of forfeiture of the corporate charter, though it might be otherwise if the suspension was fraudulent.

1. **Say About, Say From.**—"Say about," "say from" are words frequently used in contracts of sale to indicate an uncertain quantity, as, for example, a contract to sell all the spars manufactured by A, "say about 600." They have been held, ordinarily, to emphatically mark the vendor's purpose to guard himself against being supposed to have made any absolute promise as to quantity. See SALES. But in a charter party, a contract to deliver "a full and complete cargo . . . say about" a specified quantity, the words "say about" have been held to have a different meaning from what they would bear in an ordinary contract, and not to be mere words of expectation, but words of limitation and therefore of contract. Morris *v.* Levison, L. R., 1 C. P. D. 155. *Compare* ABOUT, vol. 1, p. 32; MORE OR LESS, vol. 15, p. 717.

2. See Burrill's Law Dict., title *Scale.*

3. 1 Daniel's Ch. Pr. (5th ed.) 347.

Facts not material to the issue are impertinent and, if reproachful, are scandalous. Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Goodrich *v.* Parker, 1 Minn. 195.

Scandalous matter is that which contains charges of a criminal nature prejudicial to the character and reputation of a party, or of a third person. *Ex parte* Simpson, 15 Ves. 476.

In Miller *v.* Buchanan (N. Y. 1880), 5 Fed. Rep. 366, the following language contained in the answer of the defendant was excepted to on the ground of impertinence: "Further answering, these defendants admit, on information and belief, that a decree was rendered in the suit of the above-named complaints against S. J. Foree *et al.*, at the date as alleged in the said bill; but these defendants, on like information and belief, denied that said decree was rendered after full consideration, but, on the contrary, aver, on such information and belief, that the said decree was made, and the said finding had, without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein; the court, as these defendants are advised and believe, without taking time to consider, deciding the said cause and granting the said decree, even before counsel had completed the argument and presentation of the same." It was held that such language was neither impertinent nor scandalous, as the allegation contained no imputation upon the court.

which is material to the matter in dispute—*i. e.*, relevant to the issue between the parties, pertinent, is technically scandalous.[1]

In Smith *v.* Reynolds, Moseley 69, the plaintiff filed his bill to be relieved against a stale bond, and mentioned the fact of a subsequent bond which he had somehow lost and by reason of which he was obliged to sue the defendant in chancery and had recovered. The defendant in his answer said that he did not believe that the plaintiff had lost the bond last mentioned, but believed that he had fraudulently concealed or destroyed it; and the chancellor held that the defendant had denied what was not material and what the plaintiff did not require him to answer; and that he had gone out of the way purely to reflect on the plaintiff.

"It has been decided that, under a general charge of immorality, evidence of particular instances of misconduct may be introduced. Where, therefore, such evidence can be made use of under the general charge, the specific instances should not, if it can be avoided, be introduced into the bill; thus, it is improper, in a suit which is founded upon the want of chastity in a particular individual, as in cases of bills to set aside securities given *turpi consideratione*, to charge particular instances of levity which might affect the character of strangers, and to fill the record with private scandal; because evidence of those particular instances may be given under the general charge." 1 Dan. Ch. Pl. & Pr. (5th ed.) 349, *citing* Whaley *v.* Norton, 1 Vern. 483; Clarke *v.* Periam, 2 Atk. 337.

And see Carpenter *v.* West, 5 How. Pr. (N. Y.) 53; Christie *v.* Christie, L. R., 8 Ch. 499, for instances of matter held scandalous.

1. 1 Daniel's Ch. Pr. (5th ed.) 347; 4 Minor's Inst. (2d ed.) 1179; Story's Eq. Pl., § 270; Fenhoulet *v.* Passavant, 2 Ves. 24; Lord St. John *v.* Lady St. John, 11 Ves. 526; Reeves *v.* Baker, 13 Beav. 436; *Ex parte* Simpson, 15 Ves. 476; Fisher *v.* Ownes, 8 Ch. Div. 645; Desplaces *v.* Goris, 1 Edw. Ch. (N. Y.) 350; Wilkinson *v.* Dodd, 42 N. J. Eq. 234.

"For a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond, given before marriage, to draw in a poor woman to marry; or where a man falsely represents himself to have a great estate, when in fact he is a bankrupt; or where one man is personated for another; or in the case of a common cheat, gamester, or sharper about the town; in these, and many other instances, the allegations may appear to be very scandalous, and not fit to remain on the records of the court; and yet, perhaps, without having an answer to them, the party may lose his right; the court, therefore, always judges whether, though matter be *prima facie* scandalous, it is or is not of absolute necessity to state it; and if it materially tends to the point in question (Everett *v.* Prythergch, 12 Sim. 367; B. *v.* W., 31 Beav. 342; S. C. nom.; A. *v.* B., 8 Jur. N. S. 1141; Edmunds *v.* Lord Brougham, 12 Jur. N. S. 156, V. C. S.), and is become a necessary part of the cause, and material to the defense of either party, the court never looks upon this to be scandalous." 1 Dan. Ch. Pr. (5th ed.), § 348.

In a bill by a *cestui que trust* to remove the trustee, it is not scandalous nor impertinent to charge a trustee with corrupt or improper motives in execution of the trust, or to allege any other misconduct. Earl of Portsmouth *v.* Fellows, 5 Mad. 450.

And an executor who is called to account is not subject to an exception for scandal and impertinence for saying in his answer that some of the property is withheld from him by a forged deed possessed by the complainant, for his silence might prejudice him hereafter. Fairbanks *v.* Fairbanks, 2 Edw. Ch. (N. Y.) 209.

"But in an English case brought by a clergyman, where the defendant included in a schedule of accounts a charge for money paid by him for an order of filiation of a bastard made upon the plaintiff, the court held the item, although relevant, a proper subject of exception, because the mode of bringing it forward was intended to drive the plaintiff out of his parish. (Attorney Gen'l *v.* Hewit, in Chanc. July 1801, *cited* in Cooper's Eq. Pl. 319; Story's Eq. Pl., § 862.) It may be doubted whether so much respect for the cloth would be shown by an American court." Foster's Fed. Pr., § 147.

The Degree of Relevancy is of no account in determining the question; if the matter is at all pertinent it is not scandalous. Cooper's Eq. Pl. 19; *Ex*

All matters not material to the suit, or which, if material, are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity, constitute impertinence.[1]

As appears from these definitions, there is an intimate relation between scandal and impertinence—nothing being scandalous un-

parte Simpson, 15 Ves. 477; Fenhoulet *v.* Passavant, 2 Ves. 24.

1. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343.

Impertinence is the introduction of any matter in a bill, answer, or other proceedings in a suit which is not properly before the court for decision at any particular stage of the suit. Story Eq. Pl., §§ 266, 270; Wood *v.* Mann, 1 Sumn. (U. S.) 588.

Impertinence consists in setting forth what is not necessary to be set forth, as where the pleadings are stuffed with long recitals or long digressions of matters of fact which are totally immaterial. Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 438.

Impertinences are described by Lord Chief Baron Gilbert to be "where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a deed is unnecessarily set forth *in haec verba*." 2 Gilb. For. Rom. 209; Norway *v.* Rowe, 1 Meriv. 347; Lowe *v.* Williams, 2 S. & S. 574; Bally *v.* Williams, 1 M'L. & Y. 334; Attorney Gen'l *v.* Richards, 6 Beav. 444; Alfrey *v.* Alfrey, 14 Beav. 235. "A prolix setting forth of pertinent matter is itself impertinent." Per. Lord Eldon, in Slack *v.* Evans, 7 Price 278 n. See also Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 346.

To ascertain whether an allegation or statement in a bill is pertinent as a matter of pleading, it is proper to see if an issue can be framed out of it which will be material if proved or admitted, to aid in obtaining the relief to which the complainant would be entitled by the bill. Goodrich *v.* Parker, 2 Minn. 195.

In Spaulding *v.* Farwell, 62 Me. 319, the bill sought to obtain an account and settlement of the earnings of a vessel. Two of the respondents in their answer admitted the allegations of the bill, but pleaded the Statute of Limitations as a defense thereto. And, further, by way of moral justification for setting up such a plea, declared that the plaintiffs were indebted to them upon certain other accounts.

This was held impertinence. The court by Peters, J., said: "Two of the respondents, in their answers, virtually admit the principal facts alleged in the bill, but set up the Statute of Limitations as a defense thereto. This, of course, is proper enough. But they then go further, and, by way of excuse or justification for setting up such a plea, assert that the complainant is indebted to them, respectively, in certain other accounts, which have no connection whatever with the transactions set forth in the bill. This was unnecessary and improper. It introduces matters which cannot be put in issue, and about which evidence cannot be received. It would only excite prejudice or feeling, and tend to unnecessary discussion and delay. The rule which disallows impertinent allegations is a sound and just one, and, whenever required, should be enforced."

A copy attached to the bill, and referred to as part of it, of an instrument already sufficiently pleaded, is impertinent. Goodrich *v.* Parker, 1 Minn. 195.

Matters which are material to the party's case are not necessarily impertinent because they are such as the court may take judicial notice of. Wells *v.* Oregon, etc., R. Co., 15 Fed. Rep. 561.

A few unnecessary words will not make a pleading impertinent. Carpenter *v.* West, 5 How. Pr. (N. Y.) 56; Del Pont *v.* De Tastet, T. & R. 486; Desplaces *v.* Goris, 1 Edw. Ch. (N. Y.) 350.

Test of Impertinence.—The best test is to try whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties. Wilkinson *v.* Dodd, 42 N. J. Eq. 243; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103. See also Goodrich *v.* Parker, 1 Minn. 195; Mezena *v.* Brucker, 3 Tenn. Ch. 161.

Matter upon which no issue could be framed, or which could not be given in evidence, is impertinent. Littlejohn *v.*

less it is also impertinent. But a pleading may be impertinent, although it contains no scandal.[1]

II. **STRIKING FROM THE RECORD.**—Courts of equity have always exercised the power of expunging from the record upon the motion or exception of the opposite party, all scandalous or impertinent matter.[2] It has even been held that a person not a party to the suit may, by leave of court, file exceptions to a pleading for scandalous matter reflecting upon himself,[3] and that the court may, of its own motion, expunge scandalous matter at any time.[4]

Greeley, 22 How. Pr. (N. Y.) 347; Carpenter *v.* West, 5 How. Pr. (N. Y.) 53.

1. 4 Min. Inst. (2d ed.) 1179, *et seq.*; 1 Dan. Ch. Pr. (5th ed.) 349; Fenhoulet *v.* Passavant, 2 Ves. 24; Clay *v.* Williams, 2 Munf. (Va.) 105; 5 Am. Dec. 453; Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 660.

A bill may contain matter which is impertinent without the matter being scandalous; but if, in a technical sense, it is scandalous, it must be impertinent. McIntyre *v.* Union College, 6 Paige (N. Y.) 239. See also Goodrich *v.* Parker, 1 Minn. 195.

2. Erskine *v.* Garthshore, 18 Ves. 114; *Ex parte* Le Heup, 18 Ves. 221; Christie *v.* Christie, L. R., 8 Ch. 499; Johnson *v.* Tucker, 2 Tenn. Ch. 244; Mason *v.* Mason, 4 Hen. & M. (Va.) 414; Goodrich *v.* Parker, 1 Minn. 195; Wood *v.* Mann, 1 Sumn. (U. S.) 588; Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; *affirmed* in 21 N. J. Eq. 484; Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437; Sommers *v.* Torrey, 5 Paige (N. Y.) 54; 28 Am. Dec. 411; Powell *v.* Kane, 5 Paige (N. Y.) 265; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103.

Any Party to a cause may file exceptions for scandal. Coffin *v.* Cooper, 6 Ves. 514. Thus, a defendant not served with a bill may appear *gratis* and except for scandal. Fell *v.* Christ's College, 2 Bro. C. C. 279. And so one defendant may file exceptions for scandal in a co-defendant's answer. Coffin *v.* Cooper, 6 Ves. 515.

When Objections Must be Made.—Objections to a bill for impertinence must be made before answer. Anonymous, 2 Ves. 631; Ferrar *v.* Ferrar, Dick. 173; Anonymous, 5 Ves. 656; Jones *v.* Spencer, 2 Tenn. Ch. 776; Story Eq. Pl., § 270.

But exceptions for scandal may be taken at any stage of the suit. Ellison *v.* Burgess, 2 P. Wms. 312 n.; Anonymous, 5 Ves. 656; Fenhoulet *v.* Passavant, 2 Ves. 24; Anonymous, 2 Ves. 631; Barnes *v.* Saxby, 3 Swanst. 232 n.; Everett *v.* Prythergch, 12 Sim. 363; Booth *v.* Smith, 5 Sim. 639; Anonymous, 5 Ves. 656.

New York Code.—*New York* Code of Civil Procedure 545, provides that "irrelevant, redundant, or scandalous matter contained in a pleading, may be stricken out upon the motion of a person aggrieved thereby."

In Carpenter *v.* West, 5 How. Pr. (N. Y.) 53, it was said that as to scandalous, impertinent, irrelevant, and redundant matter, the Code has not in any respect changed the former practice in equity cases. See Shaw *v.* Jayne, 4 How. Pr. (N. Y.) 119; Knowles *v.* Gee, 4 How. Pr. (N. Y.) 317.

Injunction.—Where the bill contains scandalous matter, an injunction will not be granted until it is expunged. Davenport *v.* Davenport, 6 Madd. 251; Kerr on Inj. 625; see also Coyle *v.* Alleyne, 14 Beav. 171.

3. Story Eq. Pl. 266, 862; Williams *v.* Douglas, 5 Beav. 82. Prior to that case, there had been some doubt upon the question whether a person not being a party to the cause was entitled to file exceptions for scandal because the pleading in the suit contained matter scandalous as against him, and impertinent as between the parties. Langdon, M. R., said: "There is but little authority on the subject, but from the terms in which Lord Bacon's order is expressed, from the *dicta* of Lord Eldon, expressed in a manner to show that he had considered the subject, and from the apparent necessity of the case, there being, as I can see, no other way of doing effectual justice to an injured party, it would seem that the court must have jurisdiction and authority to expunge the scandal from the record at the instance of a person who may not be a party to the cause." It was held, however, that a person not a party to the record could not adopt this proceeding without special leave.

4. *Ex parte* Simpson, 15 Ves. 476;

But an allegation will not be expunged from a pleading as impertinent or scandalous unless the impertinence clearly appears, for if it is erroneously stricken out, the error is irremediable.[1]

If the complainant calls for an answer to impertinent matter, he must take the answer, though it be impertinent.[2]

III. Costs.—A party aggrieved by scandal or impertinence in the pleadings is entitled to the costs of the proceedings to have it expunged from the record.[3] And it has been held frequently

Christie *v.* Christie, L. R., 8 Ch. 499; Campbell *v.* Taul, 3 Yerg. (Tenn.) 548. See also Langdon *v.* Goddard, 3 Story (U. S.) 13; Wood *v.* Mann, 1 Sumn. (U. S.) 588.

1. Story's Eq. Pl. 267; Wells *v.* Oregon, etc., R. Co., 15 Fed. Rep. 561; Johnson *v.* Tucker, 2 Tenn. ch. 244. See also Littlejohn *v.* Greeley, 22 How. Pr. (N. Y.) 345.

In Davis *v.* Cripps, 2 Y. & C. 443, the court said: "The court in cases of impertinence ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for this reason, that the error on the one side is irremediable, on the other not. If the court strikes it out of the record, it is gone; and the party may have no opportunity of placing it there again. Whereas, if it is left on the record, and is prolix or oppressive, the court, at the hearing of the cause, has power to set the matter right in point of costs."

And this passage is quoted approvingly in Camden, etc., R. Co. *v.* Stewart, 21 N. J. Eq. 491, and Wilkinson *v.* Dodd, 42 N. J. Eq. 243.

"Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it may be material, the exception will not be allowed, as that would leave the defendant without remedy, but the allegations excepted to will be allowed to remain in the answer, and the effect thereof, if found to be true, determined on the final hearing." Chapman *v.* School Dist. No. 1, Deady (U. S.) 110.

No Part of Allegations Excepted to Must Be Relevant.—An exception for impertinence must be supported *in toto*, and if it includes any passage which is not impertinent, the exception must fail. Van Rensselaer *v.* Brice, 4 Paige (N. Y.) 174; Goodrich *v.* Parker, 1 Minn. 195; Desplaces *v.* Goris, 1 Edw. Ch. (N. Y.) 353; Tench *v.* Cheese, 1 Beav. 571; Wagstaff *v.* Bryan, 1 R. & M. 30; Chapman *v.* School Dist. No. 1, Deady (U. S.) 108.

Mr. Daniel says: "In the case of exceptions for impertinence an exception cannot be partially allowed; and, therefore, if part of an exception be good and the rest bad the whole exception must be overruled. It has not, it is believed, ever been so held as to exceptions for scandal; and if the question should arise, it is conceived that the practice with reference to exceptions for impertinence would not be followed." 1 Daniel's Ch. Pr. 352.

An exception for impertinence will be overruled if the expunging of the matter excepted to will leave the residue of the clause, which is not covered by the exception, either false or wholly unintelligible. McIntyre *v.* Union College, 6 Paige (N. Y.) 240.

2. McGuckin *v.* Kline, 31 N. J. Eq. 457; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; McIntyre *v.* Union College, 6 Paige (N. Y.) 239; McIntyre *v.* Ogden, 17 Hun (N. Y.) 604. But see Langdon *v.* Pickering, 19 Me. 214, where it was held that the introduction of scandalous and impertinent matter in a bill, does not authorize or justify similar matter in an answer to meet such improper allegation in the bill.

3. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; Erskine *v.* Garthshore, 18 Ves. 114; *Ex parte* Le Heup, 18 Ves. 221; Sommers *v.* Torrey, 5 Paige (N. Y.) 54; 28 Am. Dec. 411; Powell *v.* Kane, 5 Paige (N. Y.) 265; 1 Daniel's Ch. Pr. (5th ed.) 347.

United States Equity Rule XXVI.—If a bill contains scandal or impertinence, "it may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the

that the solicitor and counsel of the opposite party are personally liable for such costs.[1]

SCENERY.—See note 2.

SCHEDULE—(See also INVENTORY, vol. 11, p. 812).—A schedule is a piece of paper or parchment annexed to a statute, deed, constitution, or other document, exhibiting in detail matters mentioned generally in the principal paper. The word is also used as an equivalent to "inventory."

In practice, when an indictment is returned from an inferior court in obedience to a writ of *certiorari*, the statement of the previous proceedings sent with it is termed the "schedule."[3]

SCHISM.—See RELIGIOUS SOCIETIES, vol. 20, p. 773.

SCHOOLMASTER.—See ASSAULT, vol. 1, p. 794; SCHOOLS.

court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent the plaintiff shall be entitled to all costs occasioned by the reference."

Upon Appeal.—"The existence of a rule that in a case of this sort costs are to be given as between solicitor and client, goes far to show that costs of the appeal ought to be given also. I think the reason is this: First of all, that the plaintiff is responsible for the introduction of matter foreign to the suit, and which is of such a nature that it ought to be expunged at once; in which case it would not be right that the costs should be left to be dealt with along with the other costs. Secondly, the court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter. The principle appears to be that the offending party must pay to the other parties the whole expense to which they have been put by his introduction of libelous matter. I think, therefore, that we ought to give the appellants their costs of the appeal." Christie *v.* Christie, L. R., 8 Ch. 499.

1. Sommers *v.* Torrey, 5 Paige (N. Y.) 54; 28 Am. Dec. 411; Cushman *v.* Brown, 6 Paige (N. Y.) 539; McVey *v.* Cantrell, 8 Hun (N. Y.) 522.

"It is a settled law that the solicitor who draws a scandalous or impertinent pleading or proceeding, and the counsel who sanctions it with his name, are both personally liable to the adverse party for the costs of expunging the scandalous and impertinent matter, and as a general rule also, these costs should be charged upon them instead of their client in the first instance, although the client is also liable therefor." Powell *v.* Kane, 5 Paige (N. Y.) 265.

In Mason *v.* Mason, 4 Hen. & M. (Va.) 414, scandalous matter was expunged from an answer at the cost of the defendant, he having written it himself, and put it into the cause without his counsel's knowledge.

Examiner.—"It was the practice to except to pleadings, interrogatories, depositions, affidavits, and schedules, and to strike out the unnecessary and irrelevant matter, at the cost of the party in fault, or in some cases at the cost of the offending solicitor, and the courts have intimated that an examiner might be made to pay the costs occasioned by taking down the impertinent answers of a witness to interrogatories put by the examiner. 1 Dan. Ch. Pr. 356, 360; Gresley's Eq. Ev. 214, 229, 230; Gompertz *v.* Best, 1 Y. & C. 117; Gude *v.* Mumford, 2 Y. & C. 445; Story's Eq. Pl, §§ 48 & 881a; 1 Barb. Ch. Pr. 41 & 602; Powell *v.* Kane, 5 Paige (N. Y.) 265." Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343.

New York Code of Civil Procedure, § 545, provides that where scandalous matter is stricken out "the attorney whose name is subscribed to the pleading may be directed to pay the costs of the motion, and his failure to pay them may be punished as contempt of court."

2. A contract provided for the furnishing "of scenery and fixtures for the theater." It was held that painting the walls of a theater did not fall within the denomination either of "scenery" or "fixtures." Forbes *v.* Howard, 4 R. I. 364.

3. Saund. 309a, note 2.

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I. **DEFINITIONS.**—A school is an institution of learning of a grade below that of a college or university. It is a place of primary instruction. As used in the American reports the term generally refers to the common or public schools existing under the laws of each State and maintained at the expense of the public.[1]

1. Bouv. L. Dict.

In the constitution of *California* the term "schools" refers to the common or public schools, such as are organized for the sole purpose of disseminating knowledge and imparting scholastic instruction. Boy's, etc., Aid. Soc. *v.* Reis, 71 Cal. 631.

Under an act making it a criminal offense wilfully to interrupt or disturb any public, private or select school while the same is in session, it is essential to a school, within the intent of the statute, that there should be a teacher and pupils. A meeting of persons assembled for the purpose of singing together, for their common improvement in the art of singing, but without a teacher, is therefore not a school within the statute. State *v.* Gager, 28 Conn. 232.

But a "singing school" with a teacher and pupils is embraced within the statute. State *v.* Gager, 26 Conn. 697.

So, also, a school for instruction in the art of writing is a school within the meaning of a similar statute. State *v.* Leighton, 35 Me. 195.

"School" is a very general term for almost any kind of institution for instruction in art, science, literature, etc. It is very commonly employed, how-

Common or public schools are schools supported by general taxation, open to all of suitable age and attainments, free of expense, and under the control of agents appointed by the voters.[1]

ever, as meaning, particularly, institutions of a subordinate or ordinary character—those which teach elementary learning to young people, in distinction from places for more advanced instruction, which take distinctive names, such as academy, college, high school, seminary and university. Of schools in this sense, ordinary places of instruction for young persons, there are two kinds—those which are maintained by private means, and common or public schools. Abb. L. Dict.

In Omaha Medical College *v.* Rush, 22 Neb. 453, the court said: "The defendants contend with considerable earnestness that the 'school purposes' mentioned in the statute apply only to the lower grade of institutions of learning, and do not include higher institutions, like colleges. We can see no good reason for thus limiting the meaning of the words mentioned. An examination of any work in which the subject is fully discussed will show that the word 'school' in its broad sense is applied to any institution of learning, and it evidently is used in that sense in the statute."

For a construction of the words "establish a school," in a will, see Attorney Gen'l *v.* Soule, 28 Mich. 157.

Schoolhouse.—"A schoolhouse, according to Webster, is a 'house appropriated to the use of schools, or for instruction,' and according to Worcester, 'a house or building in which a school is kept.' The statute [prohibiting town insurance companies from insuring schoolhouses without a majority vote of the members] unquestionably used the term 'schoolhouse' in its generally accepted meaning, according to these standards, and did not use it in the restricted sense of a district schoolhouse; for the reason of the law, if there was any, and we must presume there was, would be as applicable to any other schoolhouse. That reason evidently was that this class of buildings might be more hazardous, or more likely to be burned through negligence than a dwelling." Luthe *v.* Farmers', etc., Ins. Co., 55 Wis. 543.

1. In the *United States*, the term public school designates one of the schools established by law, maintained at the expense of the State, county or other local organization, and open to the children of the inhabitants at large, free of individual charge for tuition. Merrick *v.* Amherst, 12 Allen (Mass.) 509. Such schools are to be distinguished from schools established by private enterprise, in which pupils must be supported by private liberality, or by payments for the various pupils, and which pupils become entitled to enter only by private contract. The public school laws of any State are the laws establishing and regulating these schools, and any high schools, normal schools or colleges incidental to the system. Abb. L. Dict. So "teachers of common schools" means teachers in the free common schools of the State established by law. Milford *v.* Simpson, 11 Ind. 520.

"Without being able to give any accurate definition of a 'common school' it is safe to say the common understanding is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies and universities devoted exclusively to teaching advanced pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges." Powell *v.* Board of Education, 97 Ill. 378; 37 Am. Rep. 123.

In Merrick *v.* Amherst, 12 Allen (Mass.) 508, the court, by Bigelow, C. J., said: "The phrases 'public schools' and 'common schools' have acquired under the legislation and practice of this State a well settled signification. They are never applied to the higher seminaries of learning, such as incorporated academies and colleges. These, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations, and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the 'public or common schools' is, that the latter are supported by general taxation; that they are open to all free of expense, and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city."

Again, in Jenkins *v.* Andover, 103 Mass. 97, the court, by Chapman, C. J.,

said: "'Public schools,' as those words are used in the constitution and laws of *Massachusetts*, are not limited to schools of the lowest grade. The addition of 'grammar schools,' in the article of the constitution, just quoted, is rather by way of specifying one kind of public schools than by way of contradistinction. In the general laws of the commonwealth, for years before the adoption of the 18th amendment of the constitution, the words 'public schools' were used as including all schools, from those lower than grammar schools to those commonly known as high schools, established and maintained in the several cities and towns as part of the general system of popular education. . . . Nor can the term 'public schools' be confined to those supported exclusively by municipal taxation. Town schools have been for many years in part supported by legislative grants out of the school fund of the commonwealth, as the constitutional amendment in question recognizes. Nor can they be limited to schools wholly supported by the public; for the original statute of 1647, as we have already seen, provided for the support of the schoolmaster, at the discretion of the selectmen, by a contribution from the parents of the scholars, or the masters of such as were under apprenticeship, instead of by a uniform tax upon all the inhabitants of the towns; and they may, in later times, derive support from voluntary contributions. These are the schools to which the eighteenth article applies; schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education, and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them. This class of schools does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not especially intended for, nor limited to, the inhabitants of a particular locality."

In Willard *v.* Pike, 59 Vt. 202, the words, "or other public schools" were held to include colleges and academies, the words from their connection being used in the sense in which academies are regarded as public institutions.

A high school is a school of a higher grade and is included in the provision of the *Kansas* constitution, art. 6, § 2, declaring that the legislature shall establish "a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments." Koester *v.* Atchinson Co., 44 Kan. 141.

A "high school" is a school where the higher branches of a common school education are taught. Whitlock *v.* State, 30 Neb. 815.

The words "common" and "public" are synonymous and used interchangeably when applied to schools. Jenkins *v.* Andover, 103 Mass. 98; Roach *v.* St. Louis Public Schools, 77 Mo. 484. See also Richards *v.* Raymond, 92 Ill. 612; 24 Am. Rep. 151; Cushing *v.* Newburyport, 10 Met. (Mass.) 508.

A school may still be a "public school," although tuition is charged. A school carried on by the corporation of London, not for the purpose of profit, but for the benefit of a large portion of the public, notwithstanding that fees were charged, was a public school within the meaning of an act exempting public schools from certain taxes if occupied under certain specified conditions. Blake *v.* Mayor, etc., of London, 19 Q. B. Div. 79; *affirming* 18 Q. B. Div. 443. See also Jenkins *v.* Andover, 103 Mass. 99.

What are not Public Schools.—"A normal school is not a public school within the meaning of the statutes providing for the selection of the best scholar 'from each academy and each public school,' in the respective counties and cities of this State, as a candidate for a free scholarship at Cornell University. By the words 'public schools', the legislature intended 'common' schools only, and that 'normal' schools were not included. It is true that in an enlarged sense normal schools are public schools, inasmuch as any citizen of the State possessing the requisite qualifications and being selected as provided by law, may be admitted to them. In the same sense, colleges are public schools, but clearly they are not embraced in the act." People *v.* Crissey, 45 Hun (N. Y.) 19.

A school kept by a Roman Catholic Orphan Asylum Society of Brooklyn is not a "common school," within the meaning of the constitution. People *v.* Board of Education, 13 Barb. (N. Y.) 400. Nor is an orphan house open only to poor orphan children, although controlled by a city, a "free public

II. TEACHER—1. Qualification and Certificate.—A teacher in a public school in most of the States must obtain from the proper official a certificate of his qualification before entering upon his duties.[1] The highest order of talent and ability is not required

school." *In re* Malone's Estate, 21 S. Car. 435; State *v.* Dovey, 19 Nev. 396.

The control of the "Alabama University for the Colored People," being vested in a board of trustees, the university is not a public school, but a private institution, and an act establishing the university is void for diverting public school funds to private uses. Elsberry *v.* Seay, 83 Ala. 614; so "Hall's Free School," being controlled by trustees, is not a part of the uniform system of free schools. Hall's Free School *v.* Horne, 80 Va. 470.

Free School.—Under a conveyance of land "for the use, maintenance, and support of a free school, and for no other purpose," it was held that the word "free" in the conveyance did not mean free in respect to the universal admissibility of the children of all classes of inhabitants of the district, but free in a pecuniary sense, and in respect to the expenses or charges of tuition to be bestowed therein. Le Couteulx *v.* Buffalo, 33 N. Y. 333.

Origin of Public School System.—The free public school was of New England origin and was first established in *Massachusetts*. 2 Kent. Com. 196; Jenkins *v.* Andover, 103 Mass. 94; Com. *v.* Dedham, 16 Mass. 141; Com. *v.* Sheffield, 11 Cush. (Mass.) 178.

1. Casey *v.* Baldridge, 15 Ill. 65.

Although a teacher has not obtained the statutory certificate, his authority cannot be contested by the pupils or their parents. Kidder *v.* Chellis, 59 N. H. 473. The town alone can raise the objection. Dore *v.* Billings, 26 Me. 56. *Compare* Barr *v.* Deniston, 19 N. H. 170; Perkins *v.* Wolf, 17 Iowa 228. One employed by the school trustees as superintendent, not being a teacher, is not required to have such certificate. Davis *v.* School Dist. No. 1, 81 Mich. 214.

"Every teacher of a town or district school shall, before he opens such school, obtain from the school committee a certificate in duplicate of his qualifications, one of which shall be deposited with the selectmen before any payment is made to such teacher on account of such services." *Massachusetts* Pub. Sts., ch. 44, § 29.

The requirement is mandatory and cannot be waived. Goodrich *v.* School Dist. No. 1, 26 Vt. 115; Baker *v.* School Dist. No. 1, 12 Vt. 192; Welch *v.* Brown, 30 Vt. 586; Barr *v.* Deniston, 19 N. H. 170; Board of Education *v.* Arnold, 112 Ill. 11; Kuenster *v.* Board of Education, 134 Ill. 165. But *Compare* Hale *v.* Risley, 69 Mich. 596.

Refusal to Examine.—A teacher is not authorized to teach, and cannot recover pay without the requisite certificate of the superintending school committee, even though all the members neglect or wantonly refuse to examine him. Jackson *v.* Hampden, 29 Me. 37.

Form—Contents.—The *Illinois* law does not require a teacher's certificate to state upon its face that an examination was had or what the examination was. It is sufficient if it states that the person to whom it is given is qualified to teach the branches enumerated. Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595.

In *Vermont*, it was held, in Wells *v.* School Dist. No. 2, 41 Vt. 354, that no particular form was prescribed or required for a teacher's certificate of qualification to teach school. The superintendent having certified that the party was examined and approved by him on a given day, is sufficient.

Validity of the Certificate.—The certificate of a majority of the superintending school committee of the town was held a valid certificate under the provisions of the Rev. Sts. of *Maine*, ch. 17 (1847), although that majority did not act together in the examination. Stevens *v.* Fassett, 27 Me. 286.

A *Maine* statute provided that the teacher's certificate was to be obtained from the superintending school committee of the town "where the schoolhouse of such district is situated or has been located, or where the school is kept." A union school district lying partly in F and partly in C, with a school house in F, in its last vote fixed its location within the latter town. It was held that the teacher was justified in obtaining her certificate from the superintending school committee of F. Brown *v.* Chesterville, 63 Me. 241.

Under the *Michigan* statute (How.

of a teacher, but only average qualifications for and common attention to the discharge of his duties; and of these, the teacher's certificate is *prima facie* evidence.[1] A contract for the employment in a public school of a teacher who does not hold such a certificate, is generally void;[2] and for services rendered

Sts., § 5154), which provides that the secretary of the school board may grant a special certificate, to continue in force until the time of the next public examination by the board of school examiners, it was held that a special certificate granted by the secretary to one who had failed to pass the public examination four days previous to its issuance was void. Lee *v.* School Dist. No. 2, 71 Mich. 361.

In Barnhart *v.* Bodenhammer, 31 Mo. 319, where a statutory provision required that a certificate in order to be valid for more than one year should be indorsed by the commissioner, it was held that, although the approval of the commissioner was not indorsed in writing on the certificate, yet where he signified his approval in words and declared the teacher competent, the spirit of the law was complied with.

Where the county superintendent issues a certificate authorizing the person named therein to teach school in such county, the county superintendent of any other county may indorse such certificate, which will render the certificate valid in the county where indorsed for such time as the superintendent shall determine, not to exceed two years nor longer than the certificate was originally intended. State *v.* Grosvenor, 19 Neb. 494.

Renewal.—In *Illinois* there need be no second examination of a teacher, upon the granting of a renewal certificate, the original certificate issued to him upon examination having expired by statutory limitation. Doyle *v.* School Directors, 36 Ill. App. 653.

1. Neville *v.* School Directors, 36 Ill. 71; School Directors *v.* Reddick, 77 Ill. 628; Barngrover *v.* Moalk, 46 Mo. App. 407; Com. *v.* Lyndall, 2 Brew. (Pa.) 425.

See also Hamrick *v.* Board of Education, 28 Kan. 385.

A school committee is not confined to moral character and literary qualities of a teacher in determining his fitness. School Dist. No. 10 *v.* Mowry, 8 Allen (Mass.) 94.

A certificate of qualification from a county superintendent is *prima facie* evidence of capacity to teach, and though it may be overcome by a proof of incompetency, it cannot be impeached in an action brought by a teacher for salary due. Doyle *v.* School Directors, 36 Ill. App. 653. And in that case it was held that a teacher holding a certificate and suing for his compensation could not be asked the question, "what would three and seven-eighths pounds of butter cost at eleven and one half cents a pound?" See also School Directors *v.* Reddick, 77 Ill. 628.

It has been held that the fact of a teacher's certificate having been issued without an examination by the county superintendent, is no defense in an action by the teacher for his services. George *v.* School Dist. No. 8, 20 Vt. 495.

Collateral Attack.—In Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595, it was held that the certificate could not be invalidated by proof that no personal examination of the teacher was had, in a suit for services. The certificate being in the nature of a commission cannot be attacked collaterally. See also State *v.* Grosvenor, 19 Neb. 494.

2. Putnam *v.* Irvington, 69 Ind. 80; Butler *v.* Haines, 79 Ind. 575; Ryan *v.* School Dist. No. 13, 27 Minn. 433; School Directors *v.* Jennings, 10 Ill. App. 643; Wells *v.* People, 71 Ill. 532; Blandon *v.* Moses, 29 Hun (N. Y.) 606.

Failure to File.—A *Michigan* statute (How. St., § 4969) provides that a certificate of the State Normal School shall qualify a person for teacher in the schools of the State *after it has been filed*. It was held that one whose contract had been made before the filing of her certificate might recover if before entering upon the duties of the office the certificate was filed. Smith *v.* School Dist. No. 2, 69 Mich. 589.

Indictable Offense. — In *Tennessee* it has been held an indictable offense under the code, § 1019, for the common school commissioners to employ a teacher who has no certificate. Robinson *v.* State, 2 Coldw. (Tenn.) 181.

under such contract, an unlicensed teacher cannot recover.[1] The contract is not ratified by the subsequent issuance of the certificate to the teacher.[2] But where a teacher was entitled to a certificate which was withheld through inadvertence it was held that his title to compensation was not impaired.[3] For maliciously or wantonly revoking or withholding a teacher's certificate the superintendent of schools is liable in damages.[4] In an action to re-

1. Casey *v.* Baldridge, 15 Ill. 65; Botkin *v.* Osborne, 39 Ill. 101; Stevenson *v.* School Directors, 87 Ill. 255; Harrison Tp. *v.* Conrad, 26 Ind. 337; Putnam *v.* Irvington, 69 Ind. 80; Perkins *v.* Wolf, 17 Iowa 228; Jackson *v.* Hampden, 20 Me. 37; Devoe *v.* School Dist. No. 3, 77 Mich. 610; Lee *v.* School Dist. No. 2, 71 Mich. 361; Ryan *v.* School Dist. No. 13, 27 Minn. 433; Jenness *v.* School Dist. No. 31, 12 Minn. 448; School Dist. No. 8 *v.* Estes, 13 Neb. 52; Barr *v.* Deniston, 19 N. H. 170; Blandon *v.* Moses, 29 Hun (N.Y.) 606; Goose River Bank *v.* Willow Lake School, 1 N. Dak. 26; Robinson *v.* State, 2 Coldw. (Tenn.) 181; Welch *v.* Brown, 30 Vt. 586. But see Kuenster *v.* Board of Education, 134 Ill. 165, where a teacher who had been examined and employed by the board of education was held entitled to his salary although he had not received a certificate of qualification from the county superintendent.

Where money has been paid to a teacher who did not have the statutory certificate of qualification, it cannot be recovered from him or set off in a suit by him for wages due at a term when he had such certificate. School Dist. No. 8 *v.* Estes, 13 Neb. 52.

Warrant Void.—In Goose River Bank *v.* Willow Lake Tp., 1 N. Dak. 26, it was held that a warrant issued to a teacher who had not the certificate required by law, was void and non-negotiable.

2. Putnam *v.* Irvington, 69 Ind. 80; Butler *v.* Haines, 79 Ind. 575; Wells *v.* People, 71 Ill. 532; Jenness *v.* School Dist. No. 31, 12 Minn. 448.

But see Hotz *v.* School Dist. No. 9 (Colo. 1891), 27 Pac. Rep. 15. And where one had received a certificate at the time she signed a contract to teach, it was held that she might recover though she had no certificate at the time of her application and at the date of the contract. School Dist. *v.* Stilley, 36 Ill. App. 153.

In Scott *v.* School Dist., 46 Vt. 452, it was held, where one entered upon the duties of teacher without a certificate and afterwards received one and continued the school with the consent of the prudential committee, that an implied contract arose for future services, and the fact that the express contract was void, would not render void the implied contract.

In Paul *v.* School Dist. No. 2, 28 Vt. 575, the certificate was obtained on the evening of the day on which the school opened. This was held a substantial compliance with the statute requiring a certificate to be obtained before the commencement of the school. And where the teacher had a certificate at the commencement of the school it was held that she might recover for her services, though the certificate expired before the end of the term. Holman *v.* School Dist. No. 4, 34 Vt. 270.

3. School Dist. No. 9 *v.* Brown, 55 Vt. 61. See also Blanchard *v.* School Dist. No. 11, 29 Vt. 433.

Where the certificate, on its face, shows that it was seasonable, and the evidence, *aliunde*, shows that the teacher seasonably applied for it, that she in fact subjected herself to the direction and convenience of the superintendent, acting in good faith, the objection that she did not in fact obtain the certificate, and was not examined, till some time after she began to teach school, cannot avail to defeat her claim for wages. Wells *v.* School Dist. No. 2, 41 Vt. 353.

4. Love *v.* Moore, 45 Ill. 12; Elmore *v.* Overton, 104 Ind. 348; 54 Am. Rep. 343.

It is not necessary that the teacher should show actual hatred or ill-will. Elmore *v.* Overton, 104 Ind. 348; 54 Am. Rep. 343.

Canceling Certificate.—The county superintendent canceling the teacher's certificate without the concurrence of the local trustees, does not deprive him of compensation if he still teaches until the end of the term. Jamison *v.* Senter, 56 Miss. 194.

In Finch *v.* Cleveland, 10 Barb. (N.

cover for breach of a contract of employment brought by the teacher, it is not necessary to aver in the declaration that the plaintiff had procured the proper certificate of qualification.[1] This rule, however, is not universal. And in some jurisdictions, there must be an averment that the proper certificate of qualification was exhibited to the school directors.[2] The fact that a teacher had no certificate is not a defense to an action brought by him against persons presenting a groundless and malicious petition against his appointment to a school.[3]

2. Contract.—In general, the school directors or trustees are authorized to employ teachers in the manner prescribed by law.[4]

Y.) 290, it was held that under a *New York* statute the town superintendent of common schools had no right to annul a certificate given by his predecessor to a person engaged in teaching a school until at least ten days previous notice in writing should have been given to the teacher holding the certificate and to the trustees of the district in which he was employed.

In *People v.* Board of Education, 17 Barb. (N. Y.) 299, it was held that the city superintendent for the city and county of New York had power to annul a certificate granted to a teacher. See *infrà*, this title, *Discharge*.

1. Doyan *v.* School Dist. No. 3, 35 Vt. 520.

In Rolfe *v.* Cooper, 20 Me. 154, it was held that proof by the master of a school that he was employed by the regular authorized agent of the school district, and actually performed the services contracted for, *prima facie* entitled him to the stipulated compensation, and that if the town wished to avail itself of the want of the requisite certificates as a defense, it must prove such want.

In Ellis *v.* Sharp, 42 Hun (N. Y.) 179, it is held that it is not necessary for a teacher to allege in an action brought to recover wages that he was a qualified teacher. If the plaintiff was not qualified, the disqualifying facts should be alleged in the answer.

When Objection Should be Taken.—In an action brought by a teacher to recover of the trustees of a school district for services as teacher, an objection that the plaintiff was not the holder of a proper teacher's certificate, in full force and effect, cannot be made after the evidence is closed and while the cause is being summed up. Sproul *v.* Smith, 40 N. J. L. 314.

2. Botkin *v.* Osborne, 39 Ill. 101; Casey *v.* Baldridge, 15 Ill. 65; Smith *v.* Curry, 16 Ill. 147; Ryan *v.* School Dist. No. 13, 27 Minn. 433.

To entitle a school teacher to recover under a contract to teach, in a case where the directors refused to allow him to teach, he must prove or offer to prove possession of a certificate authorizing him to teach at the time of his employment. Stevenson *v.* School Directors, 87 Ill. 255.

In Goetz *v.* School Dist. No. 59, 31 Minn. 164, it was held that an allegation that the plaintiff was "a duly qualified teacher of and in the public schools of the State" was sufficient.

3. Vanarsdale *v.* Laverty, 69 Pa. St. 103.

4. Crawfordsville *v.* Hays, 42 Ind. 200; School Dist. *v.* Colvin, 10 Kan. 283; Jones *v.* Nebraska City, 1 Neb. 176; Bays *v.* State, 6 Neb. 167; Subschool Dist. No. 7 *v.* Burton, 26 Ohio St. 421; Parker *v.* School Dist. No. 38, 5 Lea (Tenn.) 525; Althearn *v.* Millersburg Ind. Dist., 33 Iowa 105.

The employment of a school-teacher by the school committee of a district after the territory constituting the district had been by statute created a graded school district under the management of a board of trustees, was held unauthorized in *North Carolina*. Skinner *v.* Baleman, 96 N. Car. 5.

In *Indiana* it has been held that the trustee of a civil township, though also the trustee of a school district occupying the same territory, cannot as trustee of the former employ a teacher. Greensboro Tp. *v.* Cook, 58 Ind. 139. See also Harrison Tp. *v.* McGregor, 67 Ind. 380.

In *Iowa* the contract must be made by the sub-director and approved by the president of the board. Place *v.* Colfax, Dist. Tp., 56 Iowa 573; Gambrell *v.* Lenox Dist. Tp., 54 Iowa 417. Subject to the rules of the board of directors.

The individuals composing the board have no power to act so as to bind the district except when they are convened as a board; and any contract made by them when not thus convened, unless it is afterwards fully approved and affirmed when legally in session, is invalid.[1]

Potter *v.* Fredericksburg Dist. Tp., 40 Iowa 369.

In *Connecticut* the employment and dismissal of teachers is primarily in the school district. Gilman *v.* Bassett, 33 Conn. 298; Wilson *v.* Waltersville School Dist., 46 Conn. 400; Wilson *v.* Waltersville School Dist., 44 Conn. 157. If the district fails to act, the district committee may employ teachers; but where the district acts, its action is conclusive. Gilman *v.* Bassett, 33 Conn. 298.

The power of employing and dismissing teachers in school districts is in *Vermont* by law vested in the prudential committee, and the districts have no power over the subject. Mason *v.* School Dist. No. 14, 20 Vt. 487; School Dist. No. 13 *v.* Harvey, 56 Vt. 556. See also Cobb *v.* School Dist. No. 1, 63 Vt. 647.

In *New Hampshire* it has been held that a school district cannot, by vote, deprive the prudential committee of the power to provide board for teachers. School Dist. No. 7 *v.* Currier, 45 N. H. 573.

A contract between the president and secretary of the board and a teacher without the concurrence of the board has been held invalid in *Pennsylvania*, where the statute requires that the teacher shall be selected by the school board. School Dist. *v.* Padden, 89 Pa. St. 395.

In Kingsley *v.* School Directors, 2 Pa. St. 28, it was held that the inhabitants of a school district might choose a teacher, but if they did not the directors might appoint one.

In *Ohio* it has been held that the authority conferred by statute upon the local directors to employ teachers and certify the amount due them for services, could not be controlled or interferred with by the township board. State *v.* Wilcox, 11 Ohio St. 326.

In *Nebraska* the teacher may be employed by the school director with the assent either of the moderator or treasurer, or if the moderator and treasurer agree upon a teacher, they may require the director to employ him. No meeting of the school board is necessary to the validity of the contract with the teacher. Russel *v.* State, 13 Neb. 68.

A contract made between a teacher and the school-district clerk, in the name of the district, with the consent of the director or treasurer, is *prima facie* valid, and the burden of showing its invalidity, or that it has been lawfully terminated, is on the district. Webster *v.* School Dist. No. 4, 16 Wis. 316.

School Agent.—Where a statute vested the power to employ teachers in a school agent, it was held that the school committee had no authority to hire a schoolmaster. Moor *v.* Newfield, 4 Me. 44.

In Patterson *v.* Mayor, etc., of Butler, 83 Ga. 606, it was held that where a statute authorized the mayor and council of a city to employ teachers, the citizens could not against the will of these officers employ a teacher, though the schoolhouse was built partly by their subscriptions.

Texas.—Under the *Texas* act, Feb. 4, 1884, two systems of public schools are established: One known as the "district," the other as "community" system. Under the former system, contracts with teachers are to be made by the trustees and must be approved by the county judge; under the latter, contracts are made by the trustees and the approval of the county judge is not necessary. Caviel *v.* Coleman, 72 Tex. 550.

1. Milford *v.* Powner, 126 Ind. 528; Fayette *v.* Chitwood, 8 Ind. 504; Ohio *v.* Liberty Tp. Treasurer, 22 Ohio St. 144; Hazen *v.* Lerche, 47 Mich. 626; School District *v.* Bennett, 52 Ark. 511; Aikman *v.* School Dist. No. 16, 27 Kan. 129.

But see Althearn *v.* Millersburg Ind. Dist., 33 Iowa 105; Hull *v.* Independent Dist., 82 Iowa 686; Russell *v.* State, 13 Neb. 68.

Where the minutes of a school board show that at a meeting, at which a quorum has been present, a resolution has been passed unanimously employing a teacher, this is such a substantial compliance with the provisions of the *Pennsylvania* act of April 11th, 1862,

Statutory regulations as to the manner of the formation of the contract must be complied with.[1]

Contracts for teaching may be made by the school directors to extend beyond their own term of office, if the contracts are made in good faith and not for the purpose of forestalling the action of their successors.[2] And where the intention of the old board

§ 4 (P. L. 472), as will bind the school district. Genesee Tp. Ind. School *v.* McDonald, 98 Pa. St. 444. See also Tobin *v.* Morgan, 70 Pa. St. 229.

The signing of a teacher's contract by the members of the district board gives rise to the presumption that the contract was authorized by vote of the board at a meeting. The fact that the members signed at different times will not rebut this presumption. Dolan *v.* Joint School Dist. No. 13, 80 Wis. 155. See also Armstrong *v.* School Dist. No. 3, 28 Mo. App. 169.

If the school board, in session, hire a teacher, the contract with him may be signed at different times; and a signing by a majority of the trustees is sufficient. Milford *v.* Zeigler, 1 Ind. App. 138. See also Wilson *v.* Waltersville School Dist., 46 Conn. 400; School District *v.* Bennett, 52 Ark. 511; Crane *v.* School Dist. No. 6, 61 Mich. 299; M'Guiness *v.* School District, 39 Minn. 499.

Ratification. — The members of a board cannot, by a pre-arrangement or contract entered into when not in session, bind themselves afterwards to ratify or confirm any contract or engagement thus entered into. McCortle *v.* Bates, 29 Ohio St. 419.

In Milford *v.* Powner, 126 Ind. 528, where one of the school trustees signed a contract of employment with the teacher and at a called meeting the contract was adopted by the board and signed by another member, this was held a sufficient ratification and a valid contract. And see Crane *v.* School District No. 6, 61 Mich. 299.

An *Iowa* statute requires that the contract with the school-teacher shall be in writing, specifying the length of the time school shall be taught and other matters. In Cook *v.* North-McGregor Ind. School Dist., 40 Iowa 444, it was held that a contract invalid at its inception might be ratified by a part performance. See Althearn *v.* Millersburg, Ind. Dist., 33 Iowa 105. But there must be an acceptance of the services to work a ratification. Place *v.* Colfax Dist. Tp., 56 Iowa 573.

In Jones *v.* School District No. 47, 8 Kan. 362, it was held that although the statute required teacher's contracts to be in writing, the teacher who performed services under an oral contract was entitled not to the stipulated price but the reasonable value of the services actually performed.

1. Gambrell *v.* Lenox Dist. Tp., 54 Iowa 417; Place *v.* Colfax Dist. Tp., 56 Iowa 573; Dyberry School Dist. *v.* Mercer, 115 Pa. St. 559. See also Everett *v.* Fractional School Dist. No. 2, 30 Mich. 249.

2. Wilson *v.* East Bridgeport School Dist., 36 Conn. 280; Wait *v.* Ray, 67 N. Y. 36; Milford *v.* Zeigler, 1 Ind. App. 138; Webster *v.* School Dist. No. 4, 16 Wis. 336; Tappan *v.* School Dist. No. 1, 44 Mich. 500; Gillis *v.* Space, 63 Barb. (N. Y.) 177; Silner *v.* Cummings, 7 Wend. (N. Y.) 181. See also Reubelt *v.* Noblesville School Town, 106 Ind. 478; Cleveland *v.* Amy, 88 Mich. 374.

The prudential committee acting in good faith with the district can make a contract for the services of a teacher that lap over a reasonable time upon the official year of a successor. Chittenden *v.* School Dist., 56 Vt. 551; Loomis *v.* Coleman, 51 Mo. 21.

School directors have no power to make contracts for the employment of teachers for terms to commence beyond the expiration of the current school year, but they may make a contract for teaching a term extending a reasonable time beyond the current school year when made in good faith and not for the purpose of divesting their successors of the power to select a teacher. See also Davis *v.* School Directors, 92 Ill. 293; School Directors *v.* Hart, 4 Ill. App. 224. In Cross *v.* School Directors, 24 Ill. App. 191, it was held that the school directors have no power to employ a teacher just before the expiration of the school year for a term extending three months into the ensuing year. To the same effect is Loomis *v.* Coleman, 51 Mo. 21; Taylor *v.* School Committee, 5 Jones (N. Car.) 98.

is to forestall their successors, if the teacher is innocent of such illegal intent the contract is not avoided.[1]

A teacher's contract with *de facto* school officers is valid.[2]

A contract with a teacher to teach cannot be annulled by abolishing the school he was to have taught.[3] Where a teacher is selected and employed, the contract is for the personal services of the teacher so employed, and he cannot fulfill the contract by hiring a substitute, however competent.[4]

As the duties of school trustee and teacher are incompatible, if a trustee is employed by his fellows as teacher, he thereby vacates his office.[5]

3. Compensation.—A school teacher engaged for a specified term, who is discharged without cause, may recover compensation.[6]

The measure of damages ordinarily is the amount of the stipulated wages, though the recovery is always subject to mitigation by proof either of earnings or their possibility.[7]

Term.—The teachers of the public schools of New Orleans cannot, under the law, be appointed for a longer term than one year. Golden *v.* Board of Directors, 34 La. Ann. 354.

Where no term was provided by the contract but the commissioners agreed to pay the teacher with the "available funds" for one year, it was held that the contract was for a year. Commissioners *v.* Criswell, 6 Ala. 565.

1. Milford *v.* Zeigler, 1 Ind. App. 138.

2. Barrett *v.* Sayer, 58 Hun (N. Y.) 608; O'Neil *v.* Baitie (Supreme Ct.), 15 N. Y. Supp. 818; DeWolf *v.* Watterson, 37 Hun (N. Y.) 111; Milford *v.* Zeigler, 1 Ind. App. 138; Milford *v.* Powner, 126 Ind. 528; Woodbury *v.* Knox, 74 Me. 462.

3. Milford *v.* Zeigler, 1 Ind. App. 138.

4. School Directors *v.* Hudson, 88 Ill. 563.

5. Ferguson *v.* True, 3 Bush (Ky.) 255.

6. School Dist. No. 3 *v.* Hale, 15 Colo. 367; Scott *v.* Joint School Dist., 51 Wis. 554; Tripp *v.* School Dist., 50 Wis. 651; Arnold *v.* School Dist., 78 Mo. 226; Armstrong *v.* School Dist., 19 Mo. App. 462; Swartwood *v.* Wolbridge, 57 Hun (N. Y.) 33; Ewing *v.* School Directors, 2 Ill. App. 458.

Where, however, upon an illegal discharge the teacher accepts a half month's salary and voluntarily gives up the school, he cannot recover. Frazier *v.* School Dist., 24 Mo. App. 250. *Compare* Richardson *v.* School Dist. No. 10, 38 Vt. 602.

Where a teacher is rightfully discharged, he cannot recover for teaching done in defiance of such decision, and pending a possession of the schoolhouse acquired by force. Pierce *v.* Beck, 61 Ga. 413.

But in *Massachusetts*, where, by statute, a teacher may be discharged at any time, he cannot recover compensation for the remainder of the time. Knowles *v.* Boston, 12 Gray (Mass.) 339; Wood *v.* Medfield, 123 Mass. 545.

7. School Dist. No. 3 *v.* Hale, 15 Colo. 367; Beriac *v.* Berlitz (Pa.), 26 W. N. C. 495; School Directors *v.* Kimmel, 31 Ill. App. 537.

If wrongfully dismissed, or if he leaves the school because of the unjustifiable action of the school directors, he may recover compensation for the whole time of his contract less what he might have earned. Ewing *v.* School Directors, 2 Ill. App. 458; McCutchen *v.* Windsor, 55 Mo. 149; Scott *v.* School Dist. No. 2, 46 Vt. 452.

In Doyle *v.* School Directors, 36 Ill. App. 656, an instruction imposing upon the teacher the burden of proving that he had tried and failed to get other employment was held erroneous. And in that case, it was said that though he had obtained other employment and had earned as much as he could have done under his contract with the school directors, yet he was entitled to nominal damages for the breach of that contract. See also School Dist. No. 4 *v.* Stilley, 36 Ill. App. 133. But it has been held that in an action by a teacher for a breach of a contract of hiring, the plaintiff must introduce some evidence as to his efforts to obtain other employment and as to

In an action against a school township by a teacher to recover his salary, it is not necessary to allege or prove that the township has funds on hand wherewith to pay the plaintiff's claim.[1]

Where the compensation of a public school teacher is neither fixed by statute nor by his contract, he may recover on a *quantum meruit*.[2]

The authorities have not been harmonious as to a teacher's right to compensation during the time of the closing of the school on account of want of money, or the prevalence of a contagious disease, or the burning down of the schoolhouse.[3] There should be no deduction in teacher's pay for recognized holidays.[4]

whether he earned money during the remainder of his term. McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362. See on this subject, MASTER AND SERVANT, vol. 14, p. 797.

A school teacher alleged that he had been wrongfully discharged by the school directors, and from such discharge appealed to the county superintendent whose decision was final and in the teacher's favor. It was held that during the pendency of the appeal he was entitled to recover wages, but after the final decision in his favor, it was his duty to offer to teach the school for the remainder of the term, and without such offer he could not recover wages for such remainder. Park *v.* Independent School Dist. No. 1, 65 Iowa 209.

1. Harmony School Tp. *v.* Moore, 80 Ind. 276; Harrison School Tp. *v.* McGregor, 96 Ind. 185.

The directors of a school district cannot violate or abandon a contract made with a teacher according to law, because there are not sufficient funds in the treasury, or collectible, to pay the compensation agreed upon. Rudy *v.* School Dist., 30 Mo. App. 113.

Personal Liability of Treasurer, Trustees, etc.—In *Wisconsin* it has been held that if the treasurer of a school district had money in his hands properly applicable to the payment of a teacher's salary and refused to pay it upon a proper order and demand, he became personally liable to the teacher; but the complaint must allege that the defendant had moneys in hand with which to pay such an order. Edson *v.* Hayden, 18 Wis. 627.

It has been held in *Kentucky* that it is the duty of the trustees of a district school to raise, according to law, whatever amount the public funds lack of paying the teacher of a common school; and if the trustees fail to do so, they are personally liable to the teacher for the amount they agreed to pay. Ferguson *v.* True, 3 Bush (Ky.) 255.

In *North Carolina* it has been held that school committeemen are public officers and are not personally liable on a contract made with a teacher in the line of their duty. Robinson *v.* Howard, 84 N. Car. 151.

2. Miahle *v.* Fournet, 13 La. Ann. 607; Offut *v.* Bourgeois, 16 La. Ann. 163.

Where a professor was advertised in the university catalogue as a professor, he can recover for his services, although there was no contract, Tyler *v.* Tualatin Academy, 14 Oregon 485; but such recovery should be on a *quantum meruit*. Offut *v.* Bourgeois, 16 La. Ann. 163; Tyler *v.* Tualatin Academy, 14 Oregon 485.

A teacher teaching in a school without a written contract is entitled to receive the reasonable value of the services performed. Jones *v.* School Dist. No. 47, 8 Kan. 462.

Employment by a de facto Officer.—A teacher may recover for his services, although employed by a school trustee or by a school agent who is only such *de facto*. Woodbury *v.* Knox, 74 Me. 462; DeWolf *v.* Watterson, 35 Hun (N. Y.) 111.

3. That he may not so recover is asserted by Moreley *v.* Power, 10 Lea (Tenn.) 219; Goodyear *v.* School Dist. No. 5, 17 Oregon 517; Gilroy *v.* School District, 17 Oregon 522; Hall *v.* School Dist. No. 10, 24 Mo. App. 213. But in School Directors *v.* Crews, 23 Ill. App. 367; Corn *v.* Board of Education, 39 Ill. App. 446; Budy *v.* School Dist., 30 Mo. App. 113; Cashen *v.* School Dist. No. 12, 50 Vt. 30; Dewey *v.* Union School Dist., 43 Mich. 480, it has been held that a recovery for the full term should be allowed, less a deduction for money earned otherwise.

4. Holloway *v.* School Dist. No. 9, 62

A teacher, to be entitled to compensation, must perform the ordinary duties pertaining to his office, together with those specially stipulated for in his contract,[1] and statutory provisions must be complied with.[2]

Mandamus has been held sometimes a proper remedy to compel payment of a public school teacher's salary.[3]

Mich. 153; School Dist. No. 4 *v.* Gage, 39 Mich. 484; 33 Am. Rep. 421.

1. Board of School Comr's *v.* Adams, 43 Md. 349.

Where by the contract the teacher is required to make a certain report and such report is a condition precedent to his salary, he must show that he has complied with this requirement in order to recover. Owen School Tp. *v.* Hay, 107 Ind. 351.

Merely closing the school for a few days without the consent of the prudential committee will not prevent a teacher from recovering compensation upon his contract for the time he actually taught. Mason *v.* School Dist. No. 14, 20 Vt. 487.

The wrongful exclusion of a pupil from the benefits of a common sub-district school by a teacher, under the direction of the local directors, does not defeat the right of such teacher to his wages, duly certified by the local directors. State *v.* Blain, 36 Ohio St. 429.

2. Owen School Tp. *v.* Hay, 107 Ind. 351; Board of School Com'rs *v.* Adams, 43 Md. 349.

Thus, where the school law provides that until a properly certified schedule is filed with the township treasurer he shall not pay any teacher, nor shall any two members of the board of directors draw an order in favor of a teacher, it was held that an order drawn before such filing is void even in the hands of a purchaser for value. School Directors *v.* First Nat. Bank, 3 Ill. App. 349.

In *Massachusetts* it was held that a teacher could not recover compensation for his services where he had not completed the register required by the statute of 1849. Jewell *v.* Abington, 2 Allen (Mass.) 592.

The teacher of a public school is not entitled to pay for his services until he has made a report to the superintending committee, in compliance with the statute. School Dist. *v.* Tuttle, 26 N. H. 470.

In Owen School Tp. *v.* Hay, 107 Ind. 351, a complaint to recover on a contract for teaching, which averred that the plaintiff "performed all and singular her duties according to the contract," was held not to be bad for failing to aver specifically that she had filed the report required by law.

An ordinance was passed prohibiting the city comptroller from countersigning any warrant for teachers' salaries until a scale of salaries had been agreed upon by the proper authorities. It was held that until such scale had been adopted, a suit brought against the city by a teacher for salary was premature and could not be sustained. Philadelphia *v.* Johnson, 47 Pa. St. 382.

Where a statute provided for the payment of outstanding school certificates and declared that such teachers' certificates as might not be presented in pursuance of the act should be deprived of the benefits of the provision, it was held that this did not relieve a county from the payment of valid claims which were not presented under the act because mislaid. Douglas *v.* Downing (Miss. 1891), 9 So. Rep. 297.

But if through the fault of the prudential committee, the teacher is unable to comply with the law she may recover. Scott *v.* School Dist. 2, 46 Vt. 452. See also Cobb *v.* School Dist. No. 1, 63 Vt. 647.

A teacher does not forfeit any right under his contract, or under the law, by failing to make monthly reports when, by action of the directors, the school has been closed, and there is, therefore, nothing to report. Rudy *v.* School Dist., 30 Mo. App. 113.

Admission of Children excluded by law has been held a good defense to a teacher's action. Chalmers *v.* Stewart, 11 Ohio St. 386.

3. **Mandamus.**—A school teacher who has rendered services, according to the requirements of the school law, and is refused compensation out of the fund specially provided for that purpose, is entitled to a *mandamus* to compel the proper officers to perform their duty and make payment of what is justly due. Apgar *v.* School Dist. No. 4, 34 N. J. L. 398.

In Howard *v.* Bamford, 3 Oregon 566, it was held, that where the clerk

4. Discharge.—A teacher may be discharged by the proper authorities[1] for incompetency, neglect of duty,[2] or immoral con-

of a school district had money in his hands applicable to the payment of the warrant, which upon presentation he refused to pay, the proper remedy was by *mandamus*.

In Case *v.* Wresler, 4 Ohio St. 561, a *mandamus* was held the proper remedy to enforce an order drawn by the clerk of the board of education upon the township treasurer for a teacher's wages.

In *Pennsylvania* a *mandamus* has been held the proper remedy for a teacher whose certificate is wrongfully withheld by the controllers. McManus *v.* School Controllers, 7 Phila. (Pa.) 23.

In *Georgia* it has been held that for refusal by a county commissioner to audit a teacher's claim for compensation, *mandamus* will lie to compel him to do so. Cheney *v.* Newton, 67 Ga. 477.

Mandamus is the proper remedy to compel a school committee in *North Carolina* to give an order on the county treasurer for a teacher's compensation. Robinson *v.* Howard, 84 N. Car. 151.

An order on the treasurer of the district having been duly issued to the plaintiff for the amount due her as teacher, and the same having been duly presented, and payment demanded and refused, an action may be maintained against the district, even although a writ of *mandamus* might lie against the treasurer to compel him to pay the order. Martin *v.* Elwood, 35 Minn. 309.

In *Illinois* it has been held that the proper remedy of a school teacher to recover his wages, is an action against the school directors of the district, and upon a recovery to take out the special execution provided, and enforce it by attachment or *mandamus*. *Mandamus* against the township treasurer is not the proper remedy. Rogers *v.* Brewer, 68 Ill. 154. See also Cotton *v.* Reed, 20 Ill. 606.

In People *v.* Board of Education (Supreme Ct.), 15 N. Y. Supp. 308, it was held that *mandamus* for a school teacher to the board of education to pay the salary of the relator, will not lie, as relator's claim in such case is only a common law demand for money due on contract, for which his remedy is by action. But see People *v.* Coffey, 62 Hun (N. Y.) 86. An order drawn upon the treasurer of the district by the school committee and delivered to the teacher, has been held a cash payment of salary for the current month. Seymour *v.* Over River School Dist., 53 Conn. 502. See also Randall *v.* Wetherell, 2 R. I. 120; Douglass *v.* Downing (Miss. 1891), 9 So. Rep. 297. MANDAMUS, vol. 14, pp. 88–174.

1. Under the present law the board of directors of a public school district have no power to discharge a teacher for cruel treatment and profane and abusive language used toward pupils. The law gives the county school commissioner power to revoke his certificate for "incompetency or immorality proven," and when this is done he is disqualified from further teaching in the public schools of that county. Such treatment and language used toward pupils fall within the definition of "incompetency or immorality," and the remedy is through action by the commissioner. Arnold *v.* School Dist., 78 Mo. 226. See also Armstrong *v.* School Dist., 19 Mo. App. 462.

The superintendent of public instruction has no power to remove the principal of a normal school established under New York act of 1866 (ch. 466, Laws of 1866), without the concurrence of the local board. People *v.* Hyde, 89 N. Y. 11.

A teacher in a public school in New York City cannot be removed by the trustees of the ward in which such school is situated, except by the approval in writing of a majority of the inspectors of the district, and the approval on appeal of the board of education; and a transfer involving loss of rank and pay, is a removal from a position occupied within the meaning of the statute. *In re* Gleese, 50 N. Y. Super. Ct. 473.

2. See also *supra*, this title, *Compensation;* Bays *v.* State, 6 Neb. 167; School Dist. *v.* Murray, 53 Ark. 471; Directors of Sub-school Dist. No. 7 *v.* Burton, 26 Ohio St. 421; School Dist. No. 23 *v.* McCoy, 30 Kan. 268; Crawfordsville *v.* Hays, 42 Ind. 200; School Directors *v.* Hudson, 88 Ill. 563.

See also Scott *v.* Joint School Dist. No. 16, 51 Wis. 554.

A teacher may be discharged for refusing to receive back a pupil whom he has suspended after his action has been overruled by the school directors. Parker *v.* School Dist. No. 38, 5 Lea (Tenn.) 525.

duct,[1] notwithstanding that his employment was for a time certain.[2] But the school trustees or directors have no power to discharge a teacher without good cause shown.[3] And although

A prudential committee of a school district has full authority and power as matter of law to dismiss a teacher, but it should be for just cause or the contract will continue operative and binding upon the district. Holden *v.* Shrewsbury School Dist. No. 10, 38 Vt. 529.

The *New York* statute of 1864 vests the power of removal of a teacher in the trustees, subject only to the approval of the inspectors, and where they are satisfied as to the incompetency of the teacher, with or without evidence, their power to remove him therefor cannot be questioned. People *v.* Board of Education, 3 Hun (N. Y.) 178.

A failure to manage and govern the school was held to constitute sufficient ground for the dismissal of a teacher, although he was not unfaithful in efforts to discharge the duties assumed. Eastman *v.* Rapids Dist. Tp., 21 Iowa 590.

If a school teacher employed to teach in the public school of an incorporated town or city, for a definite length of time, proves to be incompetent, and unable to teach the branches of study which he or she has been engaged to teach, either from a lack of learning or incapacity to impart learning to others, or if, in any other respect, there is a failure to discharge the obligations assumed by the contract, or implied from the nature of the employment, the school trustees of the town or city may dismiss the teacher from such employment. Crawfordsville *v.* Hays, 42 Ind. 200.

" Under the common law the teacher would be subject to discharge if he failed to perform his duty in any material point." Tupp *v.* School Dist., 50 Wis. 657.

Dispossession of Schoolhouse.—And after a teacher has been discharged, sufficient force may be used to prevent him from entering the schoolhouse; and if discharged without cause his remedy is on his contract, and the district will be liable to him for damages. Swartwood *v.* Walbridge, 57 Hun (N. Y.) 33; Scott *v.* Joint School Dist. No. 16, 51 Wis. 554.

1. School Dist. *v.* Maury, 53 Ark. 471; McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362.

In Tingely *v.* Vaughn, 17 Ill. App. 347, the teacher was under an indictment for an attempt to commit rape at the time of his discharge, and his explanation to the school directors, while acquitting him of any criminality, left him in an unenviable position. It was held that this justified his dismissal. The court said: " If suspicion of vice or immorality be once entertained against a teacher, his influence for good is gone. The parents become distrustful, the pupils contemptuous, and the school discipline, essential to success, is at an end."

" The delicate nature of the duty devolved upon the trustees, to see to it that unfit or incompetent persons are not put or kept in charge of the children who attend the common schools, forbids the idea of a trial with the formality and strictness that belong to courts. It is only necessary to suggest that they must often act upon moral convictions, rather than established facts, and upon evidences of unfitness, physical, mental or moral, that would not, in courts, be such proof as would justify a verdict of guilt of specific offenses or immoralities." People *v.* Board of Education, 3 Hun (N. Y.) 181.

2. School Directors *v.* Reddick, 77 Ill. 628; Bays *v.* State, 6 Neb. 167.

3. McCutchen *v.* Windsor, 55 Mo. 153; Learsmont *v.* Farwell, 3 Me. 450; Ewing *v.* School Directors, 2 Ill. App. 458; School Dist. No. 3 *v.* Hale, 15 Colo. 367.

Under the political code of *California* boards of education in cities can remove a teacher " when elected " only for the violation of the rules of the board of education, or incompetency, or for unprofessional and immoral conduct, especially where the time of employment is not fixed by contract. Kennedy *v.* Board of Education, 82 Cal. 483.

The trustees of a school district have no power to dismiss a teacher without cause and against his consent, before the expiration of the term of his contract, Finch *v.* Cleveland, 10 Barb. (N. Y.) 290; and a removal of a teacher to a lower grade is as much a violation of the statute forbidding a discharge, except for cause, as if he had been dismissed. Kennedy *v.* Board of Education, 82 Cal. 483.

for an illegal discharge, if acting within the scope of their duty and without malice or wantonness, school directors are not personally liable,[1] still if they exceed their authority or act oppressively, they are so liable.[2] Where a contract with the teacher provides for his discharge if he does not give "satisfaction," the school authorities may discharge him at pleasure and are not confined to statutory causes for dismissal, if they act honestly and in good faith.[3]

But in *New York*, it has been held that a school teacher may be discharged at the pleasure of the trustees, and the only remedy is an action upon the contract. Swartwood *v.* Walbridge, 57 Hun (N. Y.) 33. See also People *v.* Board of Education, 3 Hun (N. Y.) 176; Dunavon *v.* Board of Education, 47 Hun (N. Y.) 13.

It has been held that, under the *Pennsylvania* laws, if the school directors acting in good faith discharge a teacher for incompetency she cannot recover her salary on the ground that the dismissal was without cause. The directors exercise a *quasi* judicial power. McCrea *v.* Pine Tp. School Dist., 145 Pa. St. 550; Whitehead *v.* North Huntingdon School Dist., 145 Pa. St. 418. And so in *Nebraska* it has been held that under the statutes, 1866, a teacher may be discharged at pleasure by the school board notwithstanding the terms of his employment. Jones *v.* Nebraska City, 1 Neb. 176; Bays *v.* State, 6 Neb. 167.

In Board of Regents *v.* Mudge, 21 Kan. 223, it was held that the regents of the Kansas agricultural college might discharge a professor at will; but if such discharge was without due cause, they will be liable to him on his contract for the full term of his employment.

In *Massachusetts*, where, by statute, a teacher may be discharged at any time, he cannot recover compensation for the remainder of the time. Knowles *v.* Boston, 12 Gray (Mass.) 339; Wood *v.* Medfield, 123 Mass. 545.

In *Missouri* it has been held that a by-law of a school board that a teacher may be discharged at will by a majority of the board is reasonable. McLellan *v.* St. Louis Public Schools, 13 Mo. App. 362.

In Directors of Sub-school Dist. No. 7 *v.* Burton, 26 Ohio St. 421, it was held that there was no redress against school directors in their official capacity, or against a district for dismissing a teacher for an insufficient cause. A teacher who is so dismissed is therefore left to his remedy at common law against the officers personally. See also Gregory *v.* Small, 39 Ohio St. 348.

1. McCutchen *v.* Windsor, 55 Mo. 153; Morrison *v.* McFarland, 51 Ind. 206.

In Gregory *v.* Small, 39 Ohio St. 346, it was held that the directors of a school district are not personally liable for dismissing in good faith, and in the honest discharge of official duty, a person found in the possession of the schoolhouse, on the ground that he had not been legally employed.

An action of case cannot be sustained against school directors for discharging a teacher, acting within the scope of their authority unless malice is shown. Burton *v.* Fulton, 49 Pa. St. 151.

2. Thus in McCutchen *v.* Windsor, 55 Mo. 149, where the plaintiff was discharged by the directors without due cause it was intimated that he could not recover on the contract against the directors personally; but it was held that he might so recover in damages for a forcible dispossession of the plaintiff of the schoolhouse, that not being within the scope of the directors' authority.

Appeal to Superintendent.—In *Iowa* it is held that the remedy for a teacher who has been wrongfully discharged is by appeal to the county superintendent, and until he has made such an appeal he cannot recover for breach of contract. Kirkpatrick *v.* Liberty Ind. School Dist., 53 Iowa 585.

3. School Directors *v.* Ewington, 26 Ill. App. 379. See also Richardson *v.* School Dist. No. 10, 38 Vt. 602. See also School Dist. *v.* Colvin, 10 Kan. 283; Armstrong *v.* Union School Dist. No. 1, 28 Kan. 345. But in Tripp *v.* School Dist., 50 Wis. 651, it was held that a clause in a contract of hiring between the school district board and teacher, by which the board declares that "we reserve the right to close the school at

It has been held in some cases that a teacher cannot be dismissed for cause, unless notice is given him and trial had.[1] It has been held that *mandamus* is the proper remedy to compel the school authorities to reinstate a teacher who has been illegally discharged.[2]

III. Pupil — 1. Admission—*a.* In General. — Public schools must provide instruction for all of legal school age.[3]

any time, if not satisfactory to us," was unauthorized by law and inoperative. And to the same effect see Frazier *v.* School Dist., 24 Mo. App. 250. See also School Dist. No. 3 *v.* Hale, 15 Colo. 367.

1. Edinboro Normal School *v.* Cooper, 150 Pa. St. 78; Morley *v.* Power, 10 Lea (Tenn.) 219; 5 Lea (Tenn.) 691. And in that case it was held that a notice to the teacher that the school authorities would try his "fitness," is insufficient. See also Murdock *v.* Phillip's Academy, 12 Pick. (Mass.) 244.

A discharge by any other proceeding than that prescribed by statute is illegal and wrongful. Hall *v.* Independent Dist., 82 Iowa 686.

But in People *v.* Board of Education, 52 N. Y. Super. Ct. 520, it was held that a teacher might be dismissed without cause ascertained or shown, or opportunity to be heard against removal, under the Laws of 1882, ch. 410. See also People *v.* Board of Education, 3 Hun (N. Y.) 177; Dunavon *v.* Board of Education, 47 Hun (N. Y.) 13. And the same has been held in *Kansas*, School Dist. No. 23 *v.* McCoy, 30 Kan. 268; Armstrong *v.* Union School Dist. No. 1, 28 Kan. 345.

2. Morley *v.* Power, 10 Lea (Tenn.) 219; People *v.* Hyde, 89 N. Y. 11; Kennedy *v.* Board of Education, 82 Cal. 483.

It has been held in *New York* that mandamus is a proper remedy to compel the reinstatement of a teacher who has been illegally discharged. People *v.* Van Siclen, 43 Hun (N. Y.) 537.

3. Constitution of *Iowa*, art. 9, §§ 2, 7; *Kansas*, art. 6, § 2; *Nebraska*, art. 8, § 6; *Minnesota*, art. 8, § 2; *Virginia*, art. 8, § 8; *Mississippi*, art. 8, § 1; *Pennsylvania*, art. 10, § 1; *North Carolina*, art. 9, § 2; *Arkansas*, art. 14, § 1; *Colorado*, art. 9, § 2; *Oregon*, art. 8, § 4; *Wisconsin*, art. 10, § 3; *New Jersey*, art. 4, §§ 7, 6; *Nevada*, art. 11, § 3; *Louisiana*, art. 2, § 24; *Missouri*, art. 11, § 1; *Alabama*, art. 3, §§ 2, 3; *Florida*, art. 8, § 7.

In *Iowa*, *Kansas*, *Nebraska*, *Minnesota*, *Virginia* and *Mississippi*, the legal school age is between five and twenty-one. In *Pennsylvania*, *Arkansas* and *Colorado*, it is between six and twenty-one. In *Oregon* and *Wisconsin* it is between four and twenty. In *New Jersey* between five and eighteen. In *Nevada* and *Louisiana* between six and eighteen. In *Missouri* between six and twenty. In *Alabama*, between seven and twenty-one, and in *Florida* between four and twenty-one. See citations above.

But in *New York*, the right to be educated in the common schools of the State is one derived entirely from legislation, and as such is subject to such limitations as the legislature may, from time to time, see fit to make. It is not a constitutional right. Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 240.

An inhabitant cannot claim for his children the absolute right to select such a school for them as he pleases, in disregard of the regulations of the board of public instruction. People *v.* Easton, 13 Abb. Pr. (N. Y.) 159.

A *Pennsylvania* statute provides that the directors shall furnish schools for all children who may apply for admission. It was held that this did not compel the directors to furnish additional schools for children who might attend but had not applied for admission. Nicklas' Petition, 146 Pa. St. 212.

Scholars must be under twenty-one to be within the legal school age. Needham *v.* Wellesley, 139 Mass. 372.

Scholars who are not within the legal school age are not entitled to free tuition in the public schools. Draper *v.* Cambridge, 20 Ind. 268; Roach *v.* St. Louis Public Schools, 77 Mo. 484.

Liability of Teacher in Refusing to Receive a Scholar.—Teacher is not liable to an action by a pupil or his parent for refusing to teach the pupil. Stuckey *v.* Churchman, 2 Ill. App. 584; Spear *v.* Cummings, 23 Pick. (Mass.) 224; 34 Am. Dec. 53; Learock *v.* Putnam, 111

b. RESIDENCE.—In general, children whose parents are non-residents of a district are not permitted to attend the schools

Mass. 499. But in *Ohio* it was held that such an action would lie. Roe *v.* Deming, 21 Ohio St. 666. And in Stephenson *v.* Hall, 14 Barb. (N. Y.) 222, it is said that if an action can be maintained in such case, it should be brought in the name of the child.

Secret Societies.—School directors cannot refuse admission to one otherwise entitled to admission because he refuses to sign a pledge not to join a secret college society. State *v.* White, 82 Ind. 278; 42 Am. Rep. 496.

Mandamus.—It has been held that the courts by *mandamus* may compel the directors of a school to admit a pupil who has been unlawfully excluded. Perkins *v.* Board of Directors, 56 Iowa 476; see also Board of Education *v.* Helston, 32 Ill. App. 300; Ward *v.* Flood, 48 Cal. 36; 17 Am. Rep. 405.

In *New York* it has been held that where a child is wrongfully excluded from a public school by the principal, his remedy is by an appeal to the board of trustees, and such an appeal must have been taken before *mandamus* will lie. People *v.* Board of Education, 4 N. Y. Supp. 102.

In Draper *v.* Cambridge, 20 Ind. 268, it was held that the complaint in an application for a mandate to enforce the admission of a person to a common school must affirmatively show that the applicant is within the legal school age, unmarried, and white.

Temporary Exclusion.—In People *v.* Board of Education, 26 Ill. App. 476, it was held that the board of education might exclude pupils from a certain school within the sub-district in which they board, and compel them to attend a school situated in the same district and in the sub-district where their parents reside, where the former school was crowded. It is held that children may be excluded temporarily for want of room. People *v.* McFall, 26 Ill. App. 319.

Chinese Pupils.—It has been held in *California* that a chinese pupil could not be excluded. Tape *v.* Hurley, 66 Cal. 473.

Male and Female.—In *Kansas* by the constitution it is provided that no distinction shall be made between the rights of males and females to attend the public schools. *Kansas* Const. art. 2, § 23.

A student cannot be rejected from the University of California or the Hastings College of Law connected therewith on the ground that she is a female. Foltz *v.* Hodge, 54 Cal. 28.

Tuition.—A statute which provides that no student shall pay any fees for tuition must be construed as prohibiting only fees for instruction, and allows a charge for heating and lighting the halls and rooms of the university. State *v.* Regents of the University, 54 Wis. 159.

Compulsory Education.—Compulsory education has been established in *Connecticut*, *New Hampshire*, *New Jersey*, *New Mexico*, *Massachusetts*, *Montana*, *Vermont*, *Washington*, and *Wyoming*. In *Wisconsin*, pupils between the ages of seven and thirteen must attend school twelve weeks in each year; and by *Wisconsin* Laws, ch. 187, p. 217, truancy is defined and punishments therefor are prescribed. In *Rhode Island*, children between the ages of seven and fifteen years are required to attend for twelve weeks each year some public school, or private school, approved by the committee, where the teaching is in English.

In *Ohio*, by laws of 1890, p. 326, § 11, it is provided that "the compulsory school attendance" law "shall not be operative in any school district where there are not sufficient seating accommodations to seat children compelled to attend school under the provisions of this act." In Quigley *v.* State, 5 Ohio Cir. Ct. Rep. 638, it was held that in a prosecution against the principal of a private school for failure to enforce such attendance, the burden of proof was upon him to show the want of proper accommodations in that district.

In *Massachusetts* it is provided "if three or more towns in any county so require, the county commissioners shall establish at the expense of the county, at convenient places therein other than the jail or house of correction, truant schools for the confinement, discipline, and instruction of minor children convicted under the provisions of sections ten and twelve." (Pub. Stat. ch. 48, § 14).

The word "towns" as used in this section has been held to include cities. Synn *v.* County Com'rs, 148 Mass.

therein.[1] But the trustees of the school district are frequently

148; Synn *v.* County Com'rs, 153 Mass. 40.

1. People *v.* Board of Education, 26 Ill. App. 476; School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; State *v.* Joint School Dist. No. 1, 65 Wis. 631; 56 Am. Rep. 653.

In Haverhill *v.* Gale, 103 Mass. 104, it was held that towns and cities are not authorized by law to open their schools to children whose parents or guardians reside in another State, and if they do so, no promise express or implied of the parents or guardians to pay for tuition can be enforced; but children whose parents do not reside in a district, if the parents are residents of the State, may be permitted by the school committee to attend the schools.

A minor who is neither an orphan nor an apprentice, and whose parents reside without the school district, is not entitled to attend the school of the district, although he has a home more or less permanent within the district. Binde *v.* Klinge, 30 Mo. App. 285.

In School Dist. No. 1 *v.* Bragdon, 23 N. H. 507, it was held that children who were sent into a district by their father to reside with an aunt, under indentures of apprenticeship, but which were made only for the purpose of sending the children to the school, were trespassers and liable to an action by the district.

Under the *Connecticut* statute it was held that a child whose parents are non-residents of the district, but who makes her permanent home with the consent of her parents with others who are residents of the district, is entitled to attend school in that district. Vale *v.* West Middle School Dist., 59 Conn. 489.

In Wheeler *v.* Burrow, 18 Ind. 14, it was held that parents residing in another State, by sending their children into *Indiana* for the purpose of procuring an education, did not obtain for them the right of admission in the common schools of the State.

The mother of a minor child had been deserted by her husband, was a school-teacher, having no permanent home, and unable to keep the child with her. The child worked for its board in W and had no other home or residence, and was not sent to W for the purpose of attending school. It was held that the child had such a residence in W as entitled him to the privileges of the public school therein. State *v.* Thayer, 74 Wis. 48.

Where one owned a farm which had been his domicile, took his family to a city for the purpose of taking advantage of its school facilities, it was held that his children did not acquire a residence entitling them to the privilege of the city schools. Gardner *v.* Board of Education, 5 Dakota 259.

In School Dist. No. 7 *v.* Patterson, 10 Mont. 17, it was held that where the census returned children as residents of one district whose fathers resided, and who attended schools in other districts, it was proper for the superintendent to transfer them to the latter districts and apportion the money accordingly.

In *Pennsylvania* it was held that school directors had discretionary power to send children to the schools of an adjoining district, but such power should be carefully exercised, as the abuse of this discretion by directors would be official misconduct. Freeman *v.* School Directors, 37 Pa. St. 385.

In *Iowa*, under the statute, children residing in one school may attend school in another with the consent of the directors of the latter, provided their own school is not in session, and also provided they have not had the privilege of attending school twenty-four weeks in the year in their own district, and for such attendance their own district is liable to the district where they may attend. Horton Dist. Tp. *v.* Ocheyedan Dist. Tp., 49 Iowa 231.

Where the directors of the district in which the children reside, upon being notified of their attendance elsewhere, determine they will not pay their tuition, no further demand upon them is necessary, and the account may then be filed with the auditor. Horton Dist. Tp. *v.* Ocheyedan Tp., 49 Iowa 231.

United States Naval Station.—Children of persons who reside on lands ceded to the United States for navy yards, forts, etc., are not entitled to the benefits of the common school. Opinion of the Justices, 1 Mass. 580.

Children in Poor Houses.—The minor children of paupers, supported at a county poor house, have a right to attend the public school in the district in which such county farm is located. School Dist. No. 2 *v.* Pollard, 55 N. H. 503. *Compare* State *v.* School Dist. No. 14, 10 Ohio St. 448.

authorized by statute to admit the children of non-resident parents under certain conditions.[1]

c. COLORED PUPILS. — In some States it is provided that colored children shall be educated at schools other than those attended by white pupils. If these colored schools afford equal privileges and educational facilities, no constitutional rights are infringed by the separation and discrimination.[2] By constitu-

1. In a local statute authorizing the establishment of public schools in a town a provision that the local board may admit pupils, not residents of the town, on such terms as the board may prescribe, is not to be construed as allowing the board to prescribe terms which would cast upon the town or its inhabitants any part of the expense of educating non-resident pupils. Such pupils cannot be received at a less rate per scholar than the inhabitants of the town pay by taxation for their children, nor can they be received at all to the exclusion of resident children who would otherwise attend. But an unconstitutional requirement which exacts an incidental fee annually of all pupils, thereby including resident as well as non-resident pupils, will not necessarily vitiate a whole statute, the main purpose of which is to establish and maintain a system of public schools in a town. Irvin *v.* Gregory, 86 Ga. 605.

A *Kentucky* act establishing public schools in a town authorized the trustees to admit children residing outside the district "upon such terms and conditions and upon payment of such charges as the said board may deem right." It was held that under this act the admission of children outside of the district who were required to pay for their tuition was unobjectionable. Rogers *v.* Graded Schools (Ky. 1890), 13 S. W. Rep. 587.

The *Mississippi* act which provides for the admission of non-resident pupils to the schools of an incorporated town on payment by the county in which such pupils reside of "the actual *pro rata* cost of tuition for all such children," was held to mean such a proportionate part of the entire cost of tuition in the separate school district as the number of outside pupils bears to the number of scholars attending such school. State *v.* Hamilton (Miss. 1892), 10 So. Rep. 57.

Where the school inspectors of a city may, in their discretion, divide the city into school districts and forbid the children of the residents of one district to attend a school situated in another, the courts will not interfere with this discretion unless a plain violation of law is attempted. Board of School Inspectors *v.* People, 20 Ill. 525.

To recover payment for instruction given to children of one school district in the schools of another district, there must have been a previous arrangement between the directors of the respective districts, under the laws of *Pennsylvania*. Cascade School Dist. *v.* Lewis School Dist., 43 Pa. St. 318.

2. Cooley Const. Law, p. 230; Cory *v.* Carter, 48 Ind. 327; 17 Am. Rep. 738; State *v.* Gray, 93 Ind. 303; State *v.* Cincinnati, 19 Ohio 178; Union Co. Ct. *v.* Robinson, 27 Ark. 116; Maddox *v.* Neal, 45 Ark. 121; 55 Am. Rep. 540; People *v.* Easton, 13 Abb. Pr. (N. Y.) 159. See also State *v.* Duffy, 7 Nev. 342; 8 Am. Rep. 713; People *v.* McFall, 26 Ill. App. 319; McMillan *v.* School Committee, 107 N. Car. 609. By the constitutions of *Alabama*, *Georgia*, *Missouri*, *North Carolina*, *Tennessee*, *Texas*, and *West Virginia*, white and colored children may not be taught in the same public schools.

Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. Equality of rights is not necessarily identity of rights. Bertonneau *v.* Board of Directors, 3 Woods (U. S.) 177; State *v.* McCann, 21 Ohio St. 211.

In Van Camp *v.* Logan Board of Education, 9 Ohio St. 407, it was held that the act of March 14, 1853, was to be construed as a law of classification and not of exclusion, even though its effect might in some cases be exclusive, by reason of the limited number of colored persons in a district. See also Lehew *v.* Brummell, 103 Mo. 546; 23 Am. St. Rep. 895. In Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 249, an

tional or legislative provisions in some States colored pupils cannot be excluded from any school on account of race or color.[1] If separate schools are not provided, colored pupils cannot legally be excluded from other schools, and a writ of mandamus will lie to compel the school authorities to receive pupils thus debarred from educational privileges.[2]

action for damages was brought by a colored pupil who had been evicted from the white school. Separate schools exclusively for white and colored pupils had been established, and it was held that she could not recover. The court said: "The right to be educated in the common schools of the State, is one derived entirely from the legislation of the State; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment."

In Roberts *v.* Boston, 5 Cush. (Mass.) 108, a case decided before the adoption of the 14th amendment to the Constitution of the United States, Shaw, C. J., conceding that colored persons in the commonwealth of *Massachusetts* were entitled to equal rights, constitutional and political, civil and social, held that a regulation which provided separate schools for colored children was not a violation of any of those rights.

Appropriations for Separate Schools. —In Elsberry *v.* Seay, 83 Ala. 614, an act to establish the Alabama University for colored people was held unconstitutional upon the ground that this university could not be considered a public school; and that the act was, therefore, an unauthorized perversion of that portion of the school fund set apart for the maintenance of public schools for colored persons.

In Puitt *v.* Gaston Co., 94 N. Car. 709, it was held that a law which allowed a tax paid by the persons of each color, to be used exclusively for the education of pupils of that color, was unconstitutional. In Reid *v.* Mayor, etc., of Eatonton, 80 Ga. 755, the same question arose, but the case was dismissed by the court upon the ground that the petition to enjoin the sale of bonds, on account of unjust discrimination against the colored race, was brought by a white person having no interest in the matter.

1. See People *v.* Board of Education, 101 Ill. 308; 40 Am. Rep. 196; Board of Education *v.* State, 45 Ohio 555; Kaine *v.* Com., 101 Pa. St. 490; State *v.* Union Dist. School, 46 N. J. 76.

In *Iowa*, under a section of the *Iowa* constitution (art. 9, § 12), which declares "The Board of Education shall provide for the education *of all youths of the State*, through a system of common schools," the court held that the defendant could not deny a colored pupil admission to a school on account of color, nationality, religion, or the like; and that mandamus would be the proper remedy to compel the board to receive such pupil. Clark *v.* Board of Directors, 24 Iowa 266. This decision was followed in Smith *v.* Directors of Ind. School Dist., 40 Iowa 518, and Dove *v.* Keokuk Ind. School Dist., 41 Iowa 689.

In *Michigan*, under an act which provides, "all residents of any district shall have an equal right to attend any school therein" (State Laws 1867, vol. 1, p. 43), it was held that school boards could make no regulations which would exclude any resident of the district from the school because of race or color. And, further, that the application for a mandamus was properly made by the child's father, as its natural guardian, and the person entitled to place the child in school. Per Cooley, J., in People *v.* Board of Educaton, 18 Mich. 399.

In *California*, by legislation subsequent to the decision of the court in Ward *v.* Flood, 48 Cal. 36; 17 Am. Rep. 405, the right of colored children to admission in all schools, subject only to the same regulations applying to all other pupils, was established. By this act (amend. 1880, p. 47), former sections providing for separate schools were repealed and the word "white" appearing before the word "children" in a previous section was struck out. So in Wysinger *v.* Crookshank, 82 Cal. 588, a writ of mandate to compel a teacher to admit the relator, a colored pupil, was allowed to issue. See also Tape *v.* Hurley, 66 Cal. 473.

2. State *v.* Duffy, 7 Nev. 342; 8 Am. Rep. 713; Board of Education *v.* Tin-

2. Punishment—*a.* CORPORAL.—It is the duty of the teacher to enforce the rules and regulations adopted by the school directors for the government of the school, and to maintain discipline in the school. And in order to maintain discipline or to compel obedience to any lawful regulation, the teacher may inflict corporal punishment upon a pupil, since the teacher for the time being stands *in loco parentis*, and has such a portion of the powers of the parent delegated to him, namely, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[1]

non, 26 Kan. 1. In this case it was held that boards of education are not authorized to establish separate schools for colored pupils unless such power be given by statute; that in the absence of any legislative enactments providing separate schools and requiring colored pupils to attend these, the court, by writ of mandamus, will compel the boards of education to admit pupils unlawfully excluded on account of color. To the same effect was the decision in Knox *v.* Board of Education, 45 Kan. 152.

In U. S. *v.* Bunton (Ohio C. C.), 13 Fed. Rep. 360; Baxter, J., charged the jury that if a separate school for colored scholars was too remote, or did not afford substantially equal advantages, a colored pupil might not be excluded from the white schools.

See also Com. *v.* Williamson, 10 Phila. (Pa.) 490.

In *Ohio* it had been held that persons of more than half white blood could not be excluded from the common schools. But these decisions were based upon the ground that such persons would be considered white within the meaning of that word, as used in a law providing that the common schools should be free to all *white* children. Lane *v.* Baker, 12 Ohio 238; Williams *v.* Directors of School Dist. No. 6, Wright (Ohio) 579. But see Van Camp *v.* Logan Board of Education, 9 Ohio St. 407.

In Stewart *v.* Southard, 17 Ohio 402; 49 Am. Dec. 463, the right of the plaintiff to sue for an alleged injury resulting from the admittance by the defendant into his school of colored pupils, whereby the plaintiff's children were prevented from attending, was denied.

In Chase *v.* Stephenson, 71 Ill. 383, the court held that the trustees had no power to establish a separate school solely to instruct three or four colored pupils who could be accommodated in the schoolhouses provided for white pupils. See also State *v.* Grubb, 85 Ind. 213.

In Lehew *v.* Brummell, 103 Mo. 546; 23 Am. St. Rep. 895, Black, J., said: "The common school system of this State is a creature of the State constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States, as such. It is a right created by the State, and a right belonging to citizens of this State, as such." See People *v.* Gallagher, 93 N. Y. 438; 45 Am. Rep. 232; State *v.* McCann, 21 Ohio St. 198.

See generally, CONSTITUTIONAL LAW, vol. 3, pp. 713, *et seq.*

1. 1 Bl. Com. 453. See ASSAULT, vol. 1, p. 794 n.; 2 Kent's Com. 205; FALSE IMPRISONMENT, vol. 7, p. 666; Danenhoffer *v.* State, 69 Ind. 295; 35 Am. Rep. 216; Sheehan *v.* Sturges, 53 Conn. 481; Deskins *v.* Gose, 85 Mo. 485; 55 Am. Dec. 387; Davis *v.* Boston, 133 Mass. 103; Patterson *v.* Nutter, 78 Me. 509; 57 Am. Rep. 818; Cooper *v.* McJunkin, 4 Ind. 290; State *v.* Mizner, 45 Iowa 248; 24 Am. Rep. 769; Starr *v.* Liftchild, 40 Barb. (N. Y.) 541; State *v.* Pendergrass, 2 Dev. & B. (N. Car.) 365; 31 Am. Dec. 416; Hintage *v.* Dodge, 64 N. H. 297. In State *v.* Burton, 45 Wis. 150, the court said: "While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being *in loco parentis* to his pupils, and because of that relation he must

The authority of a teacher over his pupil being regarded as a delegation of at least a portion of the parental authority, the presumption is in favor of the correctness of the teacher's action in inflicting corporal punishment upon the pupil.[1] The teacher necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law and is subject to it, whether it has or has not been reenacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. So too the teacher is responsible for the discipline of his school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order and to require of his pupils a faithful performance of their duties. If he fails to do so he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils."

In Loco Parentis.—The old cases place the authority of a school teacher over the pupil, while it exists, upon the same footing as that of a parent over his child. In the Yearbook 7, Edward IV., the position of the schoolmaster appears to be that of a temporary guardian, and though in Yearbook 2, Edward IV., it seems to have been questioned whether the teacher could chastise his pupil, the case is supported by no authority. Hawkins says that there are some actual assaults on the person of another which do not forfeit a recognizance of good behavior; as, where a parent reasonably chastises his son, or a master his servant, or a schoolmaster his scholar. Hawkins Pl. Cr. 150. Fitzgerald *v.* Northcote, 4 F. & F. 656.

In Fitzgerald *v.* Northcote, 4 F. & F. 656, Cockburn, C. J., says: "Now, as to this I have to tell you, that the authority of the schoolmaster is, while it exists, the same as that of the parent. A parent when he places his child with a schoolmaster, delegates to him all his own authority so far as it is necessary for the welfare of the child." But that rule has been questioned and the tendency of the modern cases is to hold that a teacher has only such a portion of the powers of the parent as may be necessary to answer the purposes for which he is employed. 1 Bl. Com. 453; Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156; Rulison *v.* Post, 79 Ill. 567; State *v.* Webber, 108 Ind. 31; 58 Am. Rep. 30; State *v.* Mizner, 50 Iowa 145; 32 Am. Rep. 128; Morrow *v.* Wood, 35 Wis. 59; 17 Am. Rep. 471.

"The parent, unquestionably, is answerable only for malice or wicked motives, or an evil heart, in punishing his child. This great, and to some extent irresponsible, power of control and correction, is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. . . . This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning. The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise." Lander *v.* Leaver, 32 Vt. 114; 76 Am. Dec. 156.

Texas.—It is provided by statute in *Texas* that reasonable chastisement inflicted by a school teacher upon a pupil shall not constitute assault and battery. Penal Code of *Texas*, art. 490, sub. div. 1; Hutton *v.* State, 23 Tex. App. 386; 59 Am. Rep. 776; Bolding *v.* State, 23 Tex. App. 172.

1. State *v.* Pendergrass, 2 Dev. & B. (N. Car.) 365; 31 Am. Dec. 416; Anderson *v.* State, 3 Head (Tenn.) 455;

must not have been actuated by malice,[1] nor have inflicted the punishment wantonly.[2] For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury and he acts in good faith, the teacher is not liable.[3] By voluntarily attending school after his majority, a pupil is under the same restrictions and liabilities as if within the school age, and the teacher has authority to punish such pupil for misconduct.[4]

In no case can punishment be justifiable unless it is inflicted for some definite offense or offenses which the pupil has com-

Com. *v.* Seed, 5 Pa. L. J. 78; Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156; Hathaway *v.* Rice, 19 Vt. 102.

1. Boyd *v.* State, 88 Ala. 169; 16 Am. St. Rep. 31.

2. Anderson *v.* State, 3 Head (Tenn.) 455.

3. Heritage *v.* Dodge, 64 N. H. 297; State *v.* Pendergrass, 2 Dev. & B. (N. Car.) 365; 31 Am. Dec. 416; State *v.* Alford, 68 N. Car. 322; Com. *v.* Seed, 5 Pa. L. J. 78; State *v.* Burton, 45 Wis. 150; 35 Am. Rep. 706.

"It may be laid down as a general rule that teachers exceed the limit of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain." State *v.* Pendergrass, 2 Dev. & B. (N. Car.) 365; 31 Am. Dec. 416.

In Reg. *v.* Hopley, 2 F. & F. 202, the teacher wrote to the parent of the child proposing to punish him severely for obstinacy, and, on receiving the parent's permission, beat the boy for two hours and a half secretly in the night with a thick stick until he died. It was held that he was guilty of manslaughter and not murder, no malice being proved. See also HOMICIDE, vol. 9, p. 592.

Other authorities hold that the teacher must use a reasonable discretion and in every case be governed as to the severity of the punishment by the nature of the offense, the age, size and endurance of the pupil. Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156; Com. *v.* Randall, 4 Gray (Mass.) 36; Anderson *v.* State, 3 Head (Tenn.) 455; Cooper *v.* McJunkin, 4 Ind. 290; Vanvactor *v.* State, 113 Ind. 276; Sheehan *v.* Sturges, 53 Conn. 481.

The teacher is liable if he inflicts a punishment which the general judgment of reasonable men would call clearly excessive. Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156; Patterson *v.* Nutter, 78 Me. 512; 57 Am. Rep. 818.

"Both of these views establish the same uttermost limit of punishment, that a teacher may not overstep. They differ in this, that while the first view allows the limit to be reached whenever the teacher, acting without malice, thinks it necessary, the other requires different degrees of punishment to be graduated to different offenses. In the one case, to find a teacher guilty of an assault, it is sufficient for the jury to become satisfied that he acted without the exercise of reasonable judgment and discretion; in the other, they must find that he acted maliciously. This latter view appears the more correct. The qualification that the schoolmaster shall not act from malice will protect his pupils from outbursts of brutality, whilst upon the other hand he is protected from liability for mere errors of judgment." 31 Am. Dec. 419n. See also Reeves' Dom. Rel. (4th ed.) 357.

This view is approved in Boyd *v.* State, 88 Ala. 172; 16 Am. St. Rep. 31. The court in that case said: "A more correct view, however, and the one better sustained by authority, seems to be that when in the judgment of reasonable men the punishment inflicted is immoderate or excessive, and a jury would be authorized from the facts of the case to infer that it was induced by legal malice or wickedness of motive, the limit of legal authority may be adjudged to be past. In determining this question, the nature of the instrument of correction used may have a strong bearing on the inquiry as to motive or intention. The latter view is indorsed by Mr. Freeman in his note to the case of State *v.* Pendergrass, 31 Am. Dec. 416, as the more correct."

4. State *v.* Mizner, 45 Iowa 248; 24 Am. Rep. 769; Stevens *v.* Fassett, 27 Me. 266.

mitted, and the pupil is given to understand what he is being punished for.[1] It is a question for the jury upon the facts of the case whether or not punishment was excessive.[2] The rule for the infringement of which the punishment is inflicted must be a reasonable one and instituted by proper authority.[3]

b. EXPULSION AND SUSPENSION.—The power to expel or suspend a pupil from school for sufficient cause has been conferred by statute in some States upon the school directors.[4] And even where the authority of the school directors is not defined by statute, they nevertheless have power to expel or suspend the pupil from school for sufficient cause.[5]

A teacher also has the inherent power to suspend a pupil whenever necessary for the interests of the school, unless he has been deprived of the power by statute or the affirmative action of the proper authorities.[6]

If the school directors act in good faith, they are not liable for an error of judgment in expelling a pupil.[7]

Expulsion or suspension may be incurred by a breach of a reasonable rule or regulation properly prescribed by the school authorities;[8] and where there has been no infraction of a positive

1. State *v.* Mizner, 50 Iowa 149; 32 Am. Rep. 128.

2. Com. *v.* Randall, 4 Gray (Mass.) 36; Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156.

But in State *v.* Mizner, 50 Iowa 145; 32 Am. Rep. 128, it was said: "Any punishment with the rod which leaves marks or welts on the person of the pupil for two months after or much less time, is immoderate and excessive, and the court would have been justified in so instructing the jury."

3. See *infra*, this title, *Rules and Regulations*.

4. McClain's Rev. St. of *Iowa*, 1888, § 2850; *Maine* Rev. St., ch. 11, § 87; *Missouri* Rev. St. 1889, § 7993.

School directors may "expel any obstinately disobedient disorderly scholar after a proper investigation of his behaviour, if found necessary for the peace and usefulness of the school, and restore him on satisfactory evidence of his repentance and amendments." *Maine* Rev. St., ch. 11, § 87.

5. Rulison *v.* Post, 79 Ill. 557; Burdick *v.* Babcock, 31 Iowa 562; Murphy *v.* Board of Directors, 30 Iowa 429; Spear *v.* Cummings, 23 Pick. (Mass.) 226; 34 Am. Dec. 53; Roberts *v.* Boston, 5 Cush. (Mass.) 198; Sherman *v.* Charlestown, 8 Cush. (Mass.) 160; Spiller *v.* Woburn, 12 Allen (Mass.) 127; Hodgkins *v.* Rockport, 105 Mass. 475; Sewell *v.* Board of Education, 29 Ohio St. 89; Ferriter *v.* Tyler, 48 Vt. 444; 21 Am. Rep. 133.

6. State *v.* Burton, 45 Wis. 151; 35 Am. Rep. 706; Ferriter *v.* Tyler, 48 Vt. 444; 21 Am. Rep. 133.

Expulsion.—It is the duty of a teacher to maintain proper and necessary discipline in school; and to that end a teacher may, when necessary, expel a scholar; and if the prudential committee insist upon the return of such scholar to the school, when his presence would be fatal to the maintenance of such discipline, the teacher may lawfully quit the school. Scott *v.* School Dist. No. 2, 46 Vt. 452.

And the power of a private school teacher has been held even broader. State *v.* Williams, 27 Vt. 755. *Compare* Starr *v.* Liftchild, 40 Barb. (N. Y.) 541.

A third person will be justified, at the request of the teacher, in using the necessary force for removing a scholar from the schoolhouse for misconduct. State *v.* Williams, 27 Vt. 755.

7. McCormick *v.* Burt, 95 Ill. 263; 35 Am. Rep. 163; Churchill *v.* Fewkes, 13 Ill. App. 520; Donahoe *v.* Richards, 38 Me. 376; 61 Am. Dec. 256; Dritt *v.* Snodgrass, 66 Mo. 286; 27 Am. Rep. 343; Stephenson *v.* Hall, 14 Barb. (N. Y.) 222.

8. See *infra*, this title, *Rules and Regulations*.

rule a pupil still may incur suspension by conduct detrimental to the school discipline.[1]

1. The power of expulsion is not limited to cases of infraction of the rules, but extends to cases where the interests of the school require such expulsion; and where a pupil transgresses unwritten, but well defined, rules of conduct prescribed by a common sense of decency and propriety, he may be expelled. State *v.* Hamilton, 42 Mo. App. 24; Stevens *v.* Fassett, 27 Me. 266. So, in order to maintain the purity and discipline of the school, the school directors may expel therefrom a pupil who is of a licentious and immoral character, although such character is not manifested by any acts of immorality within the school. Sherman *v.* Charlestown, 8 Cush. (Mass.) 160. So where the misconduct of the pupil injuriously affects the discipline and management of the school, although such misconduct "did not consist of a refusal to obey commands of the teachers of said school, or of any outrageous proceeding, but of such acts of neglect, carelessness of posture in his seat and in recitation, tricks of playfulness, and inattention to study and the regulations of said school in minor matters," which tended to cause confusion and distract the attention of other scholars from their studies and recitations, the school committee have power to determine whether the welfare of the school requires his exclusion. Hodgkins *v.* Rockport, 105 Mass. 475. See Fitzgerald *v.* Northcote, 4 F. & F. 656.

It has been held that a pupil may be suspended for refusing to inform the school directors of the name of another pupil whom he knows has been guilty of a breach of the rules. Board of Education *v.* Helston, 32 Ill. App. 300. But such suspension does not extend beyond the current school year. Board of Education *v.* Helston, 32 Ill. App. 300. Nor can a pupil be suspended from school on account of insubordination at a former term of the school. State *v.* School Dist. No. 1, 31 Neb. 552.

The defendant, a member of a district school committee, being at the school just before the opening of school, a pupil used profane language in his presence and was by him ejected from the house. It was held that he was justified in so doing, and that such ejectment did not amount to an expulsion, the committeeman having no power to expel a pupil. Peck *v.* Smith, 41 Conn. 442.

An exclusion for immorality was sustained in Sherman *v.* Charlestown, 8 Cush. (Mass.) 163.

Action for Damages.—The school committee has authority, not subject to revision if exercised in good faith, to exclude a pupil from a public school for misconduct which injures its discipline and management; and the expulsion of such pupil from the school by a part of the committee, unanimously ratified afterwards by the full committee, is not an irregularity in the exercise of the authority which gives the pupil a right of action against the town. Hodgkins *v.* Rockport, 105 Mass. 475.

In *Ohio* it has been held that the father of a child, entitled to the benefits of the public school, may maintain an action against the teacher and the local directors for damages for wrongfully expelling the child from school. Roe *v.* Deming, 21 Ohio St. 666.

But in Stephenson *v.* Hall, 14 Barb. (N. Y.) 222, it is held that in such a case an action would not lie in behalf of the parent against trustees of a school district, but, if it could be maintained at all, must be brought in the name of the child and for his or her benefit.

In Donahoe *v.* Richards, 38 Me. 376, it was held that the *parent* could not maintain an action. See also Sherman *v.* Charlestown, 8 Cush. (Mass.) 161; Spear *v.* Cummings, 23 Pick. (Mass.) 224; 34 Am. Dec. 53.

In *Massachusetts* it was held that where a pupil is dismissed wrongfully he cannot maintain his action against the city until he has appealed to the school authorities. Davis *v.* Boston, 133 Mass. 103. The remedy then is by an action against the city and not against the school committee. Learock *v.* Putnam, 111 Mass. 499; Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

Reinstatement.—By gross profanity and vulgarity to the board, the pupil may forfeit his right, if any, to reinstatement. Board of Education *v.* Helston, 32 Ill. App. 301.

Mandamus will lie to compel a board of education to reinstate a pupil in the public school. Board of Education *v.* Helston, 32 Ill. App. 301; Perkins *v.*

c. OFFENSES OUT OF SCHOOL.—The power of punishment on the part of the teacher is not necessarily limited to acts done during school hours, but may extend to acts done while the pupil is going to school or returning therefrom, or even in some instances to acts done at other times. [1]

IV. RULES AND REGULATIONS—1. By Whom Made.—The school directors have power to make rules requiring prompt attendance,

Board of Directors, 56 Iowa 476; Murphy *v.* Board of Directors, 30 Iowa 429; State *v.* Osborne, 24 Mo. App. 309; 32 Mo. App. 536.

1. Lander *v.* Seaver, 32 Vt. 114; 76 Am. Dec. 156. In that case the court, by Aldis, J., said: "It is conceded that his right to punish extends to school hours, and there seems to be no reasonable doubt that the supervision and control of the master over the scholar extend from the time he leaves home to go to school till he returns home from school. Most parents would expect and desire that teachers should take care that their children, in going to and returning from school, should not loiter, or seek evil company, or frequent vicious places of resort. But in this case, as appears from the bill of exceptions, the offense was committed an hour and a half after the school was dismissed, and after the boy had returned home and while he was engaged in his father's service. When the child has returned home, or to his parent's control, then the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish. It is claimed, however, that in this case 'the boy, while in the presence of other pupils of the same school, used toward the master, and in his hearing, contemptuous language, with a design to insult him, and which had a direct and immediate tendency to bring the authority of the master over his pupils into contempt and lessen his hold upon them and his control over the school.' This, under the charge of the court, must have been found by the jury. This misbehavior, it is especially to be observed, has a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination. It is not misbehavior generally, or towards other persons, or even towards the master in matters in no ways connected with or affecting the school for as to such misconduct committed by the child after his return home from school, we think the parents, and they alone, have the power of punishment. But where the offense has the direct and immediate tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with a design to insult him, we think he has the right to punish the scholar for such acts if he comes again to school."

"The view that acts, to be within the authority of the school board and teachers for discipline and correction, must be done within school hours, is narrow and without regard to the spirit of the law and the best interests of our common schools." Burdick *v.* Babcock, 31 Iowa 567.

So for acts of licentiousness or immorality committed out of school the pupil may be expelled. Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

A pupil may be punished for misconduct either going to or coming home from school. Deskins *v.* Gose, 85 Mo. 485; 55 Am. Dec. 387; Hutton *v.* State, 23 Tex. App. 386; 59 Am. Rep. 776; Burdick *v.* Babcock, 31 Iowa 562. See also Bolding *v.* State, 23 Tex. App. 172. But neither the school directors nor the teacher have any control over pupils after they have returned to their homes. Dritt *v.* Snodgrass, 66 Mo. 286; 27 Am. Rep. 343; State *v.* Osborne, 24 Mo. App. 309.

While the board of directors of a school district have power under the statute to dismiss a pupil for gross immorality, or for persistent violation of the regulations of the school, it has not power to dismiss or suspend for conduct short of this, as for acts done out of school, which, though having a tendency to incite ridicule of the directors, and insubordination in the school, are not immoral, or prohibited by any rule or regulation. Murphy *v.* Board of Directors, 30 Iowa 429. *Compare* Burdick *v.* Babcock, 31 Iowa 567.

diligence in study, and proper deportment within and without the schools; but such rules must be reasonable.[1]

It is the right of the teacher; in the absence of rules established by the school board or other proper authority, to make all necessary and proper rules for the good conduct and order of the school, and it is his duty to see that order is maintained and the rules observed. It frequently happens that emergencies arise which require prompt action and for which the rules do not provide. In such cases the teacher must act, and his act is binding until the board direct otherwise.[2] But against the order of the board of trustees the teacher cannot enforce his rules.[3]

2. Reasonable Rules.—What are reasonable rules is a question of law.[4] In some States it is considered a reasonable rule to require pupils to pursue particular studies.[5]

For examples of rules which have been sustained as reasonable, and for others which have been held unreasonable and void, see note.[6]

1. Ward *v.* Flood, 48 Cal. 36; 17 Am. Rep. 405; Rulison *v.* Post, 79 Ill. 567; Danenhoffer *v.* State, 69 Ind. 295; 35 Am. Rep. 216; Fertich *v.* Michener, 111 Ind. 472; 60 Am. Rep. 709; Sherman *v.* Charlestown, 8 Cush. (Mass.) 116; Donahoe *v.* Richards, 38 Me. 376; Holman *v.* School Dist. No. 5, 77 Mich. 605; King *v.* Jefferson City School Board, 71 Mo. 628; 36 Am. Rep. 499; Bourne *v.* State (Neb. 1892), 52 N. W. Rep. 710; Dritt *v.* Snodgrass, 66 Mo. 286; 27 Am. Rep. 343; Roe *v.* Deming, 21 Ohio St. 666; Sewell *v.* Board of Education, 29 Ohio St. 89; Guernsey *v.* Pitkin, 32 Vt. 225; 76 Am. Dec. 171.

It is the duty of the teacher to familiarize himself with the rules of the school. McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362; Ellis *v.* North Carolina Ins., 68 N. Car. 427.

If, in the exercise of the powers of the board of education, the rules and orders made are reasonable, necessary, and such as best afford all children of school age within the district the benefits of proper instruction, they will be sustained by the courts. People *v.* Board of Education, 26 Ill. App. 476.

2. Sheehan *v.* Sturges, 53 Conn. 481; Sherman *v.* Charlestown, 8 Cush. (Mass.) 163; Russell *v.* Lynnfield, 116 Mass. 366; Hodgkins *v.* Rockport, 105 Mass. 476; Huse *v.* Lowell, 10 Allen (Mass.) 150; Kidder *v.* Chellis, 59 N. H. 473; State *v.* Burton, 45 Wis. 150; 35 Am. Rep. 706; Danenhoffer *v.* State, 69 Ind. 295; 35 Am. Rep. 216; Deskins *v.* Gose, 85 Mo. 485; 55 Am. Dec. 387; State *v.* Hamilton, 42 Mo. App. 24. Teacher may take a pistol from pupil. Metcalf *v.* State, 21 Tex. App. 174.

3. Parker *v.* School Dist. No. 38, 5 Lea (Tenn.) 525.

4. Thompson *v.* Beaver, 63 Ill. 353; Roberson *v.* Troutt, 17 Ill. App. 386; Fertich *v.* Michener, 111 Ind. 472; 60 Am. Rep. 709; State *v.* Vanderbilt, 116 Ind. 11; 9 Am. St. Rep. 820.

5. State *v.* Webber, 108 Ind. 31; 58 Am. Rep. 30; State *v.* Mizner, 50 Iowa 145; 32 Am. Rep. 128; Sewell *v.* Board of Education, 29 Ohio St. 89; Guernsey *v.* Pitkin, 32 Vt. 225; 76 Am. Dec. 171.

And in *Indiana* and *Iowa* it has been held that while a pupil may not be punished for refusing to pursue a study to which his parent objects, he may be expelled. State *v.* Webber, 108 Ind. 31; 58 Am. Rep. 30; State *v.* Mizner, 50 Iowa 145; 32 Am. Rep. 128. But in *Illinois*, *Nebraska* and *Wisconsin* it has been held that a rule requiring a pupil to pursue a study when the parent requests that he be excused from so doing is unreasonable so long as the failure of the pupil thus excepted to study all the branches of the prescribed course does not prejudice the equal rights of other pupils. Rulison *v.* Post, 79 Ill. 569; Trustees of School Dist. *v.* People, 87 Ill. 303; 29 Am. Rep. 55; Morrow *v.* Wood, 35 Wis. 59; 17 Am. Rep. 471; State *v.* School Dist. No. 1, 31 Neb. 552.

6. **Rules Held Unreasonable.**—A pupil cannot be suspended for refusing to comply with a rule that each scholar shall bring into the school room each

3. Bible in Schools.—The practice of opening school exercises by reading from the Scriptures has been attacked as sectarianism. Generally, however, the constitutionality of the practice has been upheld.[1]

day a stick of wood for the fire. State *v.* Board of Education, 63 Wis. 234; 53 Am. Rep. 282. Or a rule that a scholar living with her parents shall not go to a party. State *v.* Osborne, 24 Mo. App. 309. See also Dritt *v.* Snodgrass, 66 Mo. 286; 27 Am. Rep. 343; State *v.* Osborne, 32 Mo. App. 536.

A rule requiring a pupil to pay for damage done by him to school property under penalty of expulsion is unreasonable. Perkins *v.* Board of Directors, 56 Iowa 476; State *v.* Vanderbilt, 116 Ind. 11; 9 Am. St. Rep. 820. A rule providing that "pupils who shall in any way deface or injure" school property shall be suspended until the damage is repaired is unauthorized under the *Michigan* laws, as it would include careless and negligent acts. Holman *v.* School Dist. No. 5, 77 Mich. 605.

A rule prohibiting an expelled student from attending public exhibitions given at the normal school of the State cannot be enforced, if the party conducts himself properly at the exhibition. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

Rules Held Reasonable.—In Burdick *v.* Babcock, 31 Iowa 562, Beck, J., says: "Any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper."

A rule which makes it the duty of a teacher to keep a record of the standing of each pupil in the studies pursued by him, of his attendance and deportment, to send each month by the pupil a written report of the same to his parent or guardian, and which requires such parent or guardian to sign and return the same to the teacher, is a reasonable one. Bourne *v.* State (Neb. 1892), 52 N. W. Rep. 710.

In *Vermont*, it has been held that a pupil may be expelled from school for absence, although such absence was requested by the parent and spiritual adviser of the child in order that he might attend religious exercises. Ferriter *v.* Tyler, 48 Vt. 444; 21 Am. Rep. 133. And in other jurisdictions it has been held that a pupil may be expelled or suspended for continual absence from school except for sickness or other unavoidable cause. Burdick *v.* Babcock, 31 Iowa 562; Russell *v.* Lynnfield, 116 Mass. 365. And a rule that "any pupil absent six half days in four consecutive weeks, without satisfactory excuse, shall be suspended from school," is reasonable and proper. King *v.* Jefferson City School Board, 71 Mo. 628; 36 Am. Rep. 499. See also Churchill *v.* Fewkes, 13 Ill. App. 520.

Tardiness.—A rule providing for the suspension of a pupil for tardiness has been held reasonable and proper. Burdick *v.* Babcock, 31 Iowa 562.

In Russell *v.* Lynnfield, 116 Mass. 365, it was held that the rule against tardiness promulgated by one member of a school committee, and afterwards assented to by the others, was valid although not recorded.

But a rule barring the doors of the schoolhouse to little children coming a great distance in winter for tardiness, is unreasonable and cruel. Thompson *v.* Beaver, 63 Ill. 353. A rule that a child who is tardy shall wait in a warm entrance until the opening exercises are concluded is not unreasonable on its face, though in a particular case it may be shown to be so. Fertich *v.* Michener, 111 Ind. 472; 60 Am. Rep. 709.

Vaccination.—It is competent for the legislature to require scholars of the public schools to be vaccinated. Abeel *v.* Clark, 84 Cal. 226.

Although otherwise entitled to admission, any person not vaccinated may be excluded from school. *Maine* Rev. Stat., ch. 11, § 87; *Massachusetts* Pub. Stat., ch. 47, § 9.

Course of Study.—In *Illinois* it has been held that under the school law the modern languages may be taught in the public schools. Powell *v.* Board of Education, 97 Ill. 375; 37 Am. Rep. 123. In *Michigan* it has been held that the classics and modern languages may be taught. Steuart *v.* School Dist. No. 1, 30 Mich. 69. And see, upon the question of when German must be taught in a school under Rev. Stat. of *Indiana* 1881, § 4497. Board of School Comr's *v.* State, 129 Ind. 14.

1. In *Maine*, it was held in Donahoe

V. TEXT BOOKS.—Statutes sometimes provide for a uniform series of text books,[1] and delegate the power of adoption or

v. Richards, 38 Me. 379; 61 Am. Dec. 256, that a requirement by the superintending committee that the Protestant version of the Bible should be read in the schools by scholars able to read, was in violation of no constitutional provision and binding upon all members of the schools, though composed of divers religious sects.

In *Massachusetts*, it was held in Spiller *v.* Woburn, 12 Allen (Mass.) 127, that the committee might require the schools to be opened each morning with reading from the Bible and with prayer.

To the same effect was a decision of a *Massachusetts* inferior court in 1859. Com. *v.* Cooke, 7 Am. Law Reg. 417.

In *Illinois*, in McCormick *v.* Burt, 95 Ill. 263; 35 Am. Rep. 163, a similar view was taken.

In *Iowa*, a statute providing that the Bible should not be excluded from any school or institution in the State was held constitutional. Moore *v.* Monroe, 64 Iowa 367; 52 Am. Rep. 444. Here it was held to be a matter of individual option with the teachers as to whether or not they would use the Bible in their schools, such option being only restricted by the provision that no pupil should be required to read it contrary to the wishes of his parents or guardian.

In *Ohio*, it was decided that the constitution of the State did not *require* religious instruction, or the reading of religious books, in the public schools, and that the legislature having placed the management and control of the schools exclusively in the hands of the board of education, the courts could not enjoin them from enforcing a resolution discontinuing the reading of the Bible during school exercises, the constitutionality of the rule requiring the Bible to be read not being touched upon. Board of Education *v.* Minor, 23 Ohio St. 211; 13 Am. Rep. 233.

The only decision directly holding the practice of reading the Bible in the public schools to be unconstitutional, is a recent decision in *Wisconsin*, and this was founded, to some extent, on particular constitutional and statutory provisions existing in that State. State *v.* District Board of School Dist. No. 8, 76 Wis. 177; 20 Am. St. Rep. 41. It was here held that the use of any version of the Bible as a text book in the public schools, and the stated reading thereof by the teachers, without restriction, though unaccompanied by any comment, had "a tendency to inculcate sectarian ideas" within the meaning of § 3, ch. 251, *Wisconsin* Laws of 1883, which provides that "no text books shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas;" that it also amounted to "sectarian instruction" within the meaning of § 3, art. 10, of the State constitution providing that no sectarian instruction should be allowed in the district schools of the State; that the fact that children whose parents objected were at liberty to withdraw from the school-room during the reading, did not remove the ground for complaint; that the stated reading of the Bible as a text book in the public schools is "worship," and the school-room therefore made a place of worship within the constitutional prohibition that no man shall be compelled to erect or support a place of public worship; and that under a compulsory education law existing in the State, children of poor parents who were practically obliged to attend the public schools, would, if such reading were permitted, be compelled to attend a place of worship contrary to the constitution. But it was also held that text books founded upon the fundamental teachings of the Bible or which contain extracts therefrom, and such portions of the Bible as are not sectarian, might be used in the secular instruction of the pupils and to inculcate good morals.

1. In the recent *Indiana* case of State *v.* Haworth, 122 Ind. 462, the constitutionality of the School act of March 2, 1889, underwent considerable discussion. This act provided that the State board of education should select or procure the compilation of school text books, and fixed a standard as to the matter and quality of such books. The act provided for proposals from publishers and authors, and contemplated that the State should incur no liability to the contractor who should furnish the books, but that his compensation should be derived from the proceeds of the sale of the books. It was urged, by way of objection to the act,

that it created a monopoly and infringed the right of local self-government. These objections were thought tenable by one of the judges, who delivered a dissenting opinion; but the judgment of the court asserted the constitutionality of the act. In reviewing the authorities the court cited Cooley's Const. Lim. (5th ed.) 225, note 1, where it was said: "It is held competent for the State to contract with a purchaser to supply all the schools of the State with text books of a uniform character and price." The court said further: "In Curryer *v.* Merrill, 25 Minn. 1; 33 Am. Rep. 450, it was held that the State might purchase books and compel the patrons of the school to buy the books from its officers. The question was presented in Bancroft *v.* Thayer, 5 Sawy. (U. S.) 502, in substantially the same general form that it is here, and it was held that a State may provide by legislation that a designated person shall have the exclusive privilege of furnishing all the text books needed for the use of the public schools. This decision was made upon the constitution of *Oregon*, which is very similar to ours, and the right to make such a contract is referred to the police power, the court saying: 'To authorize and provide that, by means of contract or legislative grant, a particular person or persons shall have the exclusive right to do or furnish a particular thing, upon certain conditions, for the use and convenience of the public, has always been a common mode of exercising the police powers of the State.' In the case of State *v.* Board of Education, 18 Nev. 173, the power of the legislature to require the adoption and use of the books of a designated publisher was assumed to exist by court and counsel, and this is true of the case of People *v.* Board of Education, 55 Cal. 331. The court held in People *v.* State Board of Education, 49 Cal. 684, that the decision of the State board of education as to the text books that should be used was final, and must be obeyed by all the local boards and officers. These authorities, and those to which we have heretofore referred seem to us to so conclusively settle the question as to leave no room for debate. If it be true, as the decided cases all affirm, that the State may itself contract for the books and require the patrons of the schools to buy from its officers at a designated price, it must be true that the State can contract with an individual to supply the books, for the underlying principle is precisely the same. It can make no difference whether the State buys the books and then requires the patrons of the schools to purchase from its officers, or whether it vests the exclusive privilege in an individual by contract, for the decision of the question does not depend upon the parties, but upon the character of the act or transaction. Whether the right to sell is asserted by the State itself or conferred upon an individual can make no difference, since in either case the privilege is exclusive. If the State can itself exercise such a privilege, it can certainly authorize its exercise by an individual."

In Ivison *v.* Board of School Com'rs, 39 Fed. Rep. 735, a case arising in the *Indiana* circuit, an injunction was asked for to restrain the substitution of books to be supplied by contractors under the act of 1889 aforesaid for books already in use and furnished by the complainants in the injunction suit. The injunction was refused on the ground that the complainant failed to show a contract which would be violated by the proposed order of substitution.

In Curryer *v.* Merrill, 25 Minn. 1; 33 Am. Rep. 450, the *Minnesota* act of 1877, to provide uniform and cheap text books for the public schools, underwent a discussion. This statute provided that certain designated State officers should make a contract on behalf of the State with the defendant for furnishing to the State for the period of fifteen years suitable text books for use in the public schools. The maximum prices were fixed by the act and the quality of the books was designated and an approval by a commission provided for. It was held that this act was constitutional.

In Baltimore School Comrs. *v.* State Board of Education, 26 Md. 505, it was held that a mandamus against the school commissioners of Baltimore should issue, commanding them to use in the public schools of that city such text books as had been or might be prescribed by the State board of education as the uniform series of text books to be used in the schools of the State. Here the act of 1865 was attacked for unconstitutionality, but unsuccessfully.

change to boards of education, State[1] or local.[2] Statutes

1. In Jones *v.* Board of Education, 88 Mich. 371, it was held that the power to adopt text books was conferred by law upon the board of education and could not be affected by any rule of the board fixing a time for the reconsideration of motions and resolutions; and that after the publishers and patrons of the school had acted upon the faith of an adoption of books by such board, the board could not at a subsequent time reconsider this action when the statute prohibited a change of text books within five years from the time of their adoption. See also State *v.* Board of Education, 35 Ohio St. 368.

Effingham *v.* Hamilton, 68 Miss. 523, was an application for a mandamus to compel the county superintendent to contract with the plaintiffs in pursuance of the action taken by the county committee in legally adopting the plaintiffs' text books for use in the schools (under Miss. Acts 1890, p. 86). The court refused the mandamus upon the ground that other books having already been adopted, a contract made with other publishers for their supply, and the books introduced into the schools, the public would be injuriously affected by any change. The court said: "It is settled by numerous decisions that a sound discretion is to be used, and where circumstances make it unwise and inexpedient to allow this writ, to refuse it when sought to enforce merely private rights.

Where school trustees were empowered to provide "furniture, apparatus, and other articles and educational appliances necessary for the thorough organization and efficient management of said schools," the court held that this did not authorize a trustee to purchase text books on behalf of the township. Honey Creek School Tp. *v.* Barnes, 119 Ind. 213. See also Jackson School Tp. *v.* Hadley, 59 Ind. 534.

In Collins *v.* Henderson, 11 Bush (Ky.) 75, it was held that an appropriation by the legislature for the purpose of supplying each school district with one copy of a certain history, was in violation of the constitutional provision requiring that certain school moneys should be used in aid of the common schools, but for no other purpose.

2. Trustee *v.* People, 87 Ill. 303; Curryer *v.* Merrill, 25 Minn. 1; 33 Am. Rep. 450; Third Ward School Dist. *v.* City Board of School Inspectors, 23 La. Ann. 152; People *v.* Board of Education, 55 Cal. 331. In the latter case, § 7, art. 9, of the constitution of *California*, which provides for the adoption of text books by local boards of education, was held to be self-executing and to repeal a former statutory provision prohibiting any change in books until otherwise provided by statute.

An adoption of text books by a board of education, in order to be valid, must be made legally and at a regular meeting, and any necessary formalities or statutory requirements must be complied with. Maloney *v.* Rogers (Pa. C. P.), 2 Kulp 289. In the absence of allegations to that effect, it will be presumed that a meeting of school directors for the adoption of text books was a regular one, and if by mutual agreement all the members attended, this constituted a waiver of notice. People *v.* Frost, 32 Ill. App. 242. In regard to the sufficiency of a bond required to be given by publishers, see Maynard *v.* Olson, 48 Kan. 565.

Change of Text Books.—In *Ohio*, by section 52, 70 Ohio Laws 209, it is provided as follows: "Each board of education shall determine the studies to be pursued and the text books to be used in the schools under their control; and no text book shall be changed within three years after its adoption, without the consent of three fourths of the members of the board of education given at a regular meeting," etc. In State *v.* Board of Education, 35 Ohio St. 368, where the board had by vote adopted books, and upon a subsequent day by a bare majority assumed to reconsider its action, it was held that the board could not thus rescind their former action, and that the books already adopted must be used.

In State *v.* Board of Education, 18 Nev. 173, it was held that under a provision that text books should not be changed oftener than once in four years, the State board could reconsider a former resolution and rescind its action at any time before the books prescribed had been adopted by the different school districts.

The vote of a board directing a change may be reconsidered during the same session. State *v.* Womack (Wash. 1892), 29 Pac. Rep. 939. In

prescribe sometimes that the books shall be furnished free of cost to parent or pupil.[1]

VI. School Districts—1. Nature and Purpose.—School districts are those subdivisions of towns or townships made for the purpose of maintaining schools. They are not bodies politic or corporate with the general powers of corporations, but may be considered as *quasi* corporations with limited powers co-extensive with the duties imposed upon them by statute or usage, and therefore, the strict principles of law respecting corporations generally cannot in all cases be applied to these aggregate bodies created usually by statute.[2]

People *v.* State Board of Education, 49 Cal. 684, where the statutory requirement that six months' notice of any proposed change should be given had not been complied with, the court set aside the proceedings upon a writ of review. In People *v.* Board of Education, 54 Cal. 375, it was held that a writ of *certiorari* would not lie to review the action of the board of education in changing a series of text books, the action of the board being legislative rather than judicial, and so not reviewable on *certiorari*. In Dodds *v.* Stauffer, 24 Kan. 127, the court held that a mandamus would not lie to prohibit a change of books, without a previous demand shown; and the parties plaintiff to such a suit must have identity of interests. See also School Dist. No. 1. *v.* Shadduck, 25 Kan. 467, in which case it was held that if an injunction is desired for the protection of the interests of the entire public, this can be granted only at the instance of the proper public officers.

1. Provisions of this kind have been adopted in *Delaware* (Laws of 1891, ch. 66, p. 181); *Indiana* (Laws of 1891, ch. 80, p. 99); *New Mexico* (Laws of 1891, ch. 64, p. 119). By the school boards in *Nebraska* (Laws of 1891, ch. 46, p. 334), in Board of Education *v.* Detroit, 80 Mich. 548, the court refused, upon petition of the board of education, to allow a writ of mandamus to issue to compel the common council to allow an item for free text books. The court said: "It has never been claimed, so far as we are aware, that school boards had the power to furnish free text books except by virtue of special legislation. That this has been the common understanding is evidenced by the fact that this power has been specially conferred upon the same municipal corporations, and the policy of its general adoption has been discussed in the legislature, and bills have been introduced for that purpose. Such a bill was passed in 1889, Act No. 147, Laws of 1889. By section 6 of this act it is provided that school districts in cities organized under special charters shall be exempt from the provisions of the act unless the boards are authorized to proceed under it by a majority vote of the qualified electors of such districts. No such vote has been obtained, and the relator has taken no steps to submit the question to a vote of the electors. Its action, therefore, in providing for free text books was absolutely void."

In Hartwell *v.* Littleton, 13 Pick. (Mass.) 229, under a statute (Stat. 1826, ch. 143, § 7) which provided that "the school committee shall determine what class books shall be used, and shall procure, at the expense of the town, and to be paid for out of the town treasury, a sufficient supply of class books," etc., Shaw, C. J., held that this provision not only authorized a committee to make a contract with some third person, for the purchase of books on the credit of the town, but that they might purchase the books with their own money, and charge them to the town, so as to make themselves the creditors; also that where the statute required that notice should be given of the place where the books could be obtained, it was sufficient if they were deposited with the masters and notice thereof given to the schools.

2. Fourth School Dist. *v.* Wood, 13 Mass. 193, where Parker, C. J., said: "The same may be said of all the numerous corporations which have been, from time to time, created by various acts of the legislature, all of them enjoying the power which is expressly bestowed upon them, and perhaps in

2. Formation.—School districts may be formed directly by the legislature itself,[1] or by the school trustees or other officers under authority conferred upon them by an act of the legislature,[2] or,

all instances where the act is silent, possessing, by necessary implication, the authority which is requisite to execute the purposes of their creation." See School Com'rs *v.* Aikin, 5 Port. (Ala.) 169; Trustees of Schools, etc., *v.* Tatman, 13 Ill. 27; Wharton *v.* School Directors, 42 Pa. St. 358; State *v.* Powers, 38 Ohio St. 54; Horton *v.* Garrison, 23 Barb.(N. Y.) 176; Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175; Maynard *v.* Woodard, 36 Mich. 423; State *v.* Hulin, 2 Oregon 307.

School townships being created and continued only for educational purposes, and not for the purpose of exercising any of the functions of government, are not municipal corporations in their nature or purpose. People *v.* Trustees, 78 Ill. 136. And again, in Stroud *v.* Stevens Point, 37 Wis. 367, it was said that school districts are not formally chartered corporations, but are *quasi* corporations variable in organization and extent, and having corporate existence only by force of their public functions. School Dist. No. 3 *v.* Macloon, 4 Wis. 79; Bush *v.* Shipman, 5 Ill. 186.

But in *Minnesota* a school district is said to be a municipal corporation, created for a special purpose, and with powers expressly limited by statute. School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

In *Iowa*, prior to 1859, school districts were not corporations, and liable to be sued as such. Runyan *v.* School Dist., 12 Iowa 184.

In *Missouri* the trustees of a school district are not a corporation, so as to be liable to an action subjecting the school property to execution. Allen *v.* Trustees of School Dist., 23 Mo. 418. See State *v.* Vaughan, 99 Mo. 332.

The *Maine* act of 1821, ch. 117, to provide for the education of youth, made each school district a "body corporate," as well those existing *de facto* merely as those created by a legal vote of the town; the limits of those not already certain, to be defined by the town. Whitmore *v.* Hogan, 22 Me. 564.

1. Schofield *v.* Watkins, 22 Ill. 66; Com. *v.* Gardner, 23 Pa. St. 417; School Dist. No. 13 *v.* Dean, 17 Mich. 223.

In *West Virginia* it has been held that the legislature has the exclusive power to create independent school districts without the assent of the citizens residing therein, and to authorize by law the election of a board of education for such districts by the qualified voters resident therein, and to give such board power to make the annual levies for buildings and support of schools. Kuhn *v.* Board of Education, 4 W. Va. 499.

By *Texas* Gen. Laws, 18th Assem., p. 43, § 29, it is provided that "it shall be the duty of the county commissioners' court of all counties not exempt from the section to *subdivide* their respective counties into convenient school districts." The word "subdivide" in this section is used with reference to the existing division of the State into counties. Reynolds Land, etc., Co. *v.* McCabe, 72 Tex. 57.

Where the terms of an act of assembly designed to establish a separate school district are so uncertain that the boundaries of the district cannot be definitely ascertained, it is inoperative and void. Com. *v.* Gardner, 23 Pa. St. 417.

If a new district is without fixed boundaries, and without the means of ascertaining them, its existence as a district is necessarily suspended until its boundaries are designated by law. Williams *v.* Crook, 17 Pa. St. 199.

In *Missouri*, by § 7022 Rev. Stat., only unorganized territory may be formed into a school district. Perryman *v.* Bethune, 89 Mo. 158.

In a late *Pennsylvania* case, *In re* Mt. Pleasant Tp. Ind. School District, 10 Pa. Co. Ct. 588, it was held that in order to erect an independent school district a case must be shown coming clearly within the acts authorizing their erection, and the petition must set forth every fact made indispensable to such erection by statute. Further that such district will not be erected when the effect is to separate the wealthier and poorer portions of the district to the disadvantage of the latter, save in a case of extreme necessity.

2. Grove *v.* Board of School Inspectors, 20 Ill. 532; *Michigan* Laws, 1840, ch. 215.

Until the appointment of trustees, the town superintendent has full power to make and alter school districts; but

in some cases, by the inhabitants of the town or township where the district is proposed to be created, under a like authority.[1] Statutes providing for the formation of school districts, generally make such formation dependent upon the wishes of a majority of the people in the district, as ascertained by their votes in an election of which due notice is given.[2] Upon the trustees or other specified officials devolves the duty of arranging and laying out the territory in proper divisions, in the performance of which duty they may use wide discretion; nor will the courts interfere

after their appointment the alteration must be by the act of the superintendent, either jointly with them, or at least not until after they have had full notice and opportunity to act if they desire. State *v.* Reeves, 28 N. J. L. 520; State *v.* Browning, 28 N. J. L. 556.

School districts, embracing parts of different townships, cannot be formed without the concurrence of a majority of the trustees of each township, upon the petition of a majority of the citizens residing in the contemplated district. State *v.* Wright, 17 Ohio 32.

In *Pennsylvania* a sub-school district can be formed under § 17, act of 1849, only by the school directors of the proper district, and the only evidence of their action on the subject is the minutes of their boards on which should be entered the bounds of the sub-districts. Com. *v.* Gardner, 23 Pa. St. 417.

1. Fry *v.* School Dist. No. 1, 4 Cush. (Mass.) 250.

In *Iowa*, under Rev. Stat. 1860, ch. 88, incorporated cities and towns and villages containing not less than 300 inhabitants, are authorized to organize as separate school districts. Fort Dodge City School Dist. *v.* Wahkansa Dist. Tp., 15 Iowa 434.

If a town, in dividing a school district, includes in one of the new districts a part of another district, which it is not authorized to do by the warrant, a mere stranger cannot take advantage of the irregularity to avoid the whole proceedings. Whitmore *v.* Hogan, 22 Me. 564.

2. Dartmouth Sav. Bank *v.* School Dists. 6 and 31, 6 Dakota 332.

Thus in State *v.* Wilcox, 45 Mo. 458, it was held that a State legislature could pass an act to prescribe a mode of organizing schools, leaving it to the people of each county or other locality to determine by vote whether they will organize under the law. And such an act does not involve any improper delegation of the legislative power. See also King *v.* Phillips, 1 Lans. (N. Y.) 421.

A school district cannot be formed so as to possess corporate powers but by vote of the town. The appointment by the town of an agent for a district otherwise formed, gives it no legal existence, and such district cannot authorize the assessment of taxes for any purpose. Tucker *v.* Wentworth, 35 Me. 393.

In order to establish a school district out of contiguous portions of two towns, it is necessary that both should co-operate in their corporate capacity to effect this purpose. And, therefore, where it appeared that one of two such towns did not vote on the question, the vote of the other must be regarded as inoperative and void. Butterfield *v.* School Dist. No. 6, 61 Me. 583.

The inhabitants of a town, at a legal town meeting, voted to divide the town into school districts, and appointed the selectmen a committee to make such division. The selectmen divided the town, but their proceedings were never legally ratified by the town. It was held that the town was not legally divided into districts. School Dist. No. 2 *v.* Gilman, 3 N. H. 168.

A school district which was formed by giving notice to and taking the rates of only a part of the residents therein has no authority as an organization; and it makes no difference that the number of votes cast exceeded the number of residents who were not notified to vote. Fort Dodge City School Dist. *v.* Wahkansa Dist. Tp., 17 Iowa 85.

In *Missouri*, by section 7022 Rev. Stat., power is conferred upon three resident tax payers to call a meeting for the purpose of organizing a school district, of which meeting they must give proper notice. If such notice be given by unqualified persons it is of no effect. Perryman *v.* Bethune, 89 Mo. 158.

with their action except in palpable cases of violation of law.[1] As a rule the district must contain a certain number of pupils, must be laid out by certain geographical lines, and not merely by a designation of inhabitants or householders,[2] and in some States must coincide in boundaries with the divisions of counties into townships.[3]

1. The trustees of schools have power under the school law of *Illinois* to district their township into proper divisions according to the wishes and convenience of a majority of the inhabitants thereof for school purposes. In this they may use large discretion and the courts will not attempt to interfere except in a palpable case of a violation of law. School Directors *v.* Trustees, 66 Ill. 247.

The manner of laying off the township into districts is left by the law to the sound discretion of the trustees elected for that purpose. If there be a flagrant abuse of such discretionary power or any corrupt conduct, equity will interpose to afford requisite relief. Thompson *v.* Beaver, 63 Ill. 353.

2. School Dist. No. 3 *v.* Aldrich, 13 N. H. 139; Pierce *v.* Carpenter, 10 Vt. 480; Sawyer *v.* Williams, 25 Vt. 311; Withington *v.* Eveleth, 7 Pick. (Mass.) 106; Perry *v.* Dover, 12 Pick. (Mass.) 206; Nye *v.* Marion, 7 Gray (Mass.) 244; Independent School Dist. *v.* Board of Supervisors, 25 Iowa 305.

School districts must be composed of territory and have geographical limits; these limits must be defined by a vote of the town meeting, or such directions must be given by the vote as that the limits may be ascertained. Pierce *v.* Carpenter, 10 Vt. 480; Gray *v.* Sheldon, 8 Vt. 403. Unless so defined, the survey should not be recorded. Sawyer *v.* Williams, 25 Vt. 311.

Where the inhabitants of a town, in the exercise of the power conferred upon them by the act of 1789, ch. 19, § 2, to determine and define the limits of school districts, established the several districts therein by an enumeration of the inhabitants belonging to each, but without any geographical or territorial division, and the districts so established were in fact in existence when the act of 1817, ch. 14, was passed, by which school districts were made bodies corporate for certain purposes, it was held that such districts were not thereby established as legal districts. Fry *v.* School Dist. No. 1, 4 Cush. (Mass.) 250.

Where, in defining a school district, the town directed that certain persons named should compose the district (the probable intention of the town that the lands occupied by those persons should form the district not being expressed in the town records), it was held that the limitation of the district was invalid. Withington *v.* Eveleth, 7 Pick. (Mass.) 106.

In the formation of a school district, it is not necessary that all the territory included in it should be within continuous geographical lines. Where a district is laid out by such lines, and then certain individuals, with their polls and estates, are added thereto, this operates as a permanent annexation of those individuals and their real estates to the district, and does not violate the rule which requires districts to be established by geographical limits. Alden *v.* Rounseville, 7 Met. (Mass.) 218; Weeks *v.* Batchelder, 41 Vt. 317. See Independent School Dist. *v.* Board of Supervisors, 25 Iowa 305.

The boundary of a school district is well established by a reference to its boundaries on a former division of the town into districts, though there might be defects in the records of the former town meeting. Wilson *v.* School Dist. No. 4, 32 N. H. 118.

It has been held, where two independent districts were organized, embracing certain common territory, such territory should be included in the limits of the district whose organization was first commenced. Sheldon Ind. Dist. *v.* Sioux Co., 51 Iowa 658.

3. In *Iowa* the school law of the State contemplates that school districts shall coincide in boundary with civil townships, and the only exception is provided for by § 1797 of the code, which provides that where by reason of streams or other natural obstacles any portion of the inhabitants of any school district cannot, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in that township, the said superintendent, etc., may attach such part of said township to an adjoining township. But no such restriction exists upon the

The formation and existence of a school district may be proved by reputation ;[1] and the legality of the original formation of a district will be presumed without resort to record evidence, where it has been in continued existence for a number of years, with the acquiescence of the inhabitants therein ;[2] nor can the regularity of its organization be called in question in a merely collateral suit.[3]

formation of independent districts which may be created from two or more civil townships or parts of the same situated in adjoining counties. Union Dist. Tp. *v.* Greene Ind. Dist., 41 Iowa 30. See Troy Dist. Tp. *v.* Doyle Dist. Tp., 53 Iowa 667.

The policy of the school laws in *Pennsylvania* is that the school districts shall correspond with the division of the counties into townships. Wilkins Tp. School Dist., 70 Pa. St. 108.

When Formation Takes Effect.—When a new school district is formed, it is not, by the terms of the *Pennsylvania* act of April 7, 1849, to be recognized as an independent district until the termination of the current school year; the directors chosen during the current year are to act during that term, and the president of the board may issue his warrant for the collection of taxes assessed during said year, and before the election of directors for the new district. Williams *v.* Crook, 17 Pa. St. 199.

1. Barnes *v.* Barnes, 6 Vt. 388; State *v.* Williams, 27 Vt. 755.

2. Sherwin *v.* Bugbee, 16 Vt. 439; Thomas *v.* Gibson, 11 Vt. 607; Bowen *v.* King, 34 Vt. 156; Rice *v.* McClelland, 58 Mo. 116; Robie *v.* Sedgwick, 4 Abb. App. Dec. (N. Y.) 73; State *v.* School District No. 24, 13 Neb. 78. *Compare* School Dist. No. 1 *v.* Union School Dist., 81 Mich. 339; School Dist. *v.* School Dist., 63 Mich. 51.

But in *Maine* the act of 1850, art. 2, ch. 193, § 3, providing that "every school district shall be presumed to be legally organized after exercising the privileges of a district for one year," does not raise a presumption of legal organization which is conclusive, as against proof of fraud and corruption, but only as against irregularities and informalities which are technical in their character, and which do not go to the merits of the case. Call *v.* Chadbourne, 46 Me. 206. The fact, however, that an attempt to establish the district, confessedly abortive, had been made, is not sufficient to rebut the presumption arising from the exercise of the franchise and privileges of a district by the defendants for more than a year prior to the time when the schoolhouse was built. Collins *v.* School Dist. No. 7, 52 Me. 522.

The fact of the existence and continued operation of a school district, for the purpose of raising a presumption of its legal organization, may be shown by witnesses on the stand when the loss of the records of the district is shown. Sherwin *v.* Bugbee, 16 Vt. 439.

Proof that trustees are acting in discharge of the duties required by statute is sufficient *prima facie* evidence of the organization of the school district. Swails *v.* State, 4 Ind. 416.

Under *Maine* Laws 1850, art. 2, ch. 193, § 2, it will be presumed, in a suit against a district to recover for building a schoolhouse therein, that the district was legally organized, when for more than a year previous to the erection of the schoolhouse there had been a summer and winter school, and said school has been kept in the schoolhouse since it was built, and when the expenses of the schools have been paid by money drawn from the town treasury, on town orders, drawn in the usual way, and the district has had a clerk and agent who, before the schoolhouse was built, certified to the town assessors that the district had raised a certain sum for defraying the expenses of building a schoolhouse therein, and thereupon the assessors assessed the amount on the polls and estate in said district, and certified the same to the town treasurer, who committed proper lists to the collector by whom a portion of the tax was collected. Collins *v.* School Dist. No. 7, 52 Me. 522.

3. Stockle *v.* Silsbee, 41 Mich. 615; Clement *v.* Everest, 29 Mich. 19; Bird *v.* Perkins, 33 Mich. 30; Voss *v.* School Dist., 18 Kan. 467; School Dist. *v.* School Dist., 45 Kan. 543; School Dist. No. 25 *v.* State, 29 Kan. 57; Atkinson, etc., R. Co. *v.* Wilson, 33 Kan. 223; State *v.* Central Pac. R. Co. (Nev. 1890), 25 Pac. Rep. 296.

3. Alteration.—Provision is generally made in the school laws for the alteration, by the superintendent or other specified officer or officers, of existing school districts, either by uniting or dividing them, or otherwise changing their limits, to suit better the convenience of the inhabitants.[1] In most cases, where it is sought to divide a district or to change its limits in any way, this

The legal organization and existence of a school district cannot be tested by *certiorari* to the assessor. Jaquith *v.* Hale, 31 Mich. 430. See Moede *v.* Stearns Co., 43 Minn. 312.

In the case of a school district which has assumed to possess and exercise all the rights and franchises of a regularly organized corporation for thirteen years, and in which every one has acquiesced, such district is not liable to have the regularity of its organization called into question by a merely private collateral suit. And where the organization claimed and asserted by the district is that of a union school district, the presumption of organization arising from its user of corporate powers must be that of such an organization as its user indicates; and whether or not an acquiescence for the statutory period of two years will raise a presumption of regular organization, one of thirteen years certainly will. Stuart *v.* School Dist. No. 1, 30 Mich. 69.

In Lord *v.* Every, 38 Mich. 405, it was held that there should be some special and extraordinary reason to justify interference by *quo warranto* with the organization of a school district, as the statutes of *Michigan* (Comp. L., § 3734–6) provide a speedier remedy by an appeal from the district board to the township board.

Some of the inhabitants of a school district, having officers appointed to establish and manage the schools therein, may file a bill, in behalf of themselves and the other inhabitants, to test the constitutionality of the law constituting the district, and the legality of the proceedings of the officers under it. Bull *v.* Read, 13 Gratt. (Va.) 78.

1. Richards *v.* Dagget, 4 Mass. 534; School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62; Converse *v.* Porter, 45 N. H. 385; Hewett *v.* Miller, 21 Vt. 401; Scoville *v.* Mattoon, 55 Conn. 144; Bull *v.* School Committee, 11 R. I. 244; Parker *v.* Titcomb, 82 Me. 180; People *v.* Hooper, 13 Hun (N. Y.) 638; School Dist. No. 57 *v.* Board of Education, 16 Kan. 536; Lowe *v.* Hardy (Utah, 1891), 26 Pac. Rep. 982; State *v.* Miller, 65 Mo. 50; Canton Union School *v.* Meyer, 9 Ohio St. 580; Albin *v.* Board of Directors, 58 Iowa 77; Connor *v.* Board, 10 Minn. 439; Grove *v.* Board of School Inspectors, 20 Ill. 532; Greenleaf *v.* Trustees of Tp. No. 41, 22 Ill. 236; People *v.* Davidson, 2 Dougl. (Mich.) 121; McCormac *v.* Commissioners, 90 N. Car. 441; Porter *v.* State, 78 Tex. 591; Board of Education *v.* Board of Education, 30 W. Va. 424.

But a town cannot, without the consent of the district, alter it so far as to destroy the corporation, nor as to annul or impair the obligation of its contracts. Waldron *v.* Lee, 5 Pick. (Mass.) 323. See Doxey *v.* Township Board of School Inspectors, 67 Mich. 601.

In *Tennessee* the act of March 6, 1873, has been held to take the place of all former legislation on the subject of public schools; and since it gives neither the county court nor the school directors the power to alter districts, and school commissioners, who by a previous act were allowed to make such alterations, are nowhere mentioned in it, no established districts can be altered by the officers mentioned or by the court. Rodemer *v.* Mitchell, 90 Tenn. 65.

The court will not interfere with the action of school trustees in altering the school districts except in cases of gross injustice; certainly not where there has been an acquiescence in their action by the complainants. Metz *v.* Anderson, 23 Ill. 463; 76 Am. Dec. 704. See Heard *v.* School Directors, 45 Pa. St. 93.

The fact that inspectors of school districts were interested parties as tax payers and residents, does not affect the validity of the action of such inspectors in changing the boundaries of school districts. Clement *v.* Everest, 29 Mich. 19.

The *Maine* Rev. Stat. 1852, ch. 11, § 26, authorizing school districts to unite with each other without the action of the town, is not repealed by the act of 1854, ch. 104, § 1, which provides that

towns may determine the number of school districts, and may divide and discontinue such districts, so far as to invalidate a union of two districts made under the former statute, although after the passage of the latter one. Call *v.* Chadbourne, 46 Me. 206. The vote of a town to discontinue one district and annex it to another, under the above act is not void because of an omission to make any disposition of the schoolhouse on the territory of the discontinued district. Grindle *v.* School Dist. No. 1, 64 Me. 44.

In *New Hampshire*, under the act of July 4, 1861, towns may be divided into school districts, which, from time to time may be altered by vote of the town, "provided that no alteration of existing districts shall be made" without previous written recommendation of the superintending school committee and selectmen, etc. It was held that this law applied where all the districts were altered and the town redistricted. Neal *v.* Lewis, 46 N. H. 276.

Under notice to a district and warning to a town meeting for annexation of adjoining districts in *Connecticut*, where the town meeting refused the change, but on appeal the court decreed that a part only should be annexed, the decree was not error. Gravel Hill School Dist. *v.* Old Farm School Dist., 55 Conn. 244. And a setting aside an action of a town, dividing a school district, by appellate court, but making no further order, does not preclude the town from further altering. Sixteenth School Dist. *v.* Eighteenth School Dist., 54 Conn. 50.

The fact that the citizens of an incorporated city had once, under *Missouri* Gen. Stat. 1865, ch. 47, p. 274, voted down a proposition to organize their city into a separate school district, did not prevent them from subsequently organizing it in pursuance of a vote taken at a subsequent election. Ewing *v.* Board of Education, 72 Mo. 436.

The validity of the action of the selectmen and school committee in altering the boundaries of school districts does not depend upon the correct apportionment of the debts and property of the districts so affected. School Dist. No. 6 *v.* Carr, 55 N. H. 452.

In *Iowa* it is said that territory once organized for school purposes must always remain within some jurisdiction, and may not be detached from the jurisdiction to which it belongs, without at the same time becoming all or part of another jurisdiction for school purposes. Center Dist. Tp. *v.* Independent Dis. (Iowa, 1891), 47 N. W. Rep. 1034. *Compare* Shattuck *v.* Phillips, 78 Mo. 80.

The extension of the limits of a city or town does not have the effect of enlarging the school district existing in such city or town prior to the extension of its limits. State *v.* Independent School Dist. No. 6, 46 Iowa 425. But see Winona *v.* School Dist. No. 82, 40 Minn. 13.

Iowa Code, § 1809, provides that when an independent district has been formed under the civil township or townships, the remainder of such townships or of each of them shall constitute a district township and the boundaries between such district township and independent district may be changed or the independent district abandoned at any time with the concurrence of their respective boards of directors. Under this section, it was held, in an action to compel the board of directors of a district township to take action on the proposition of an independent district to change its boundaries, that the fact that the independent district is co-extensive with a village, does not deprive it of the benefits of the act. Center Dist. Tp. *v.* Independent Dist. (Iowa, 1891), 47 N. W. Rep. 1034.

A change of boundaries of sub-districts is different from the change of boundaries of independent districts. Sub-districts are governed by common boards, independent districts are not; therefore § 1796 of *Iowa* Code providing that the board of directors of a district township may change the boundaries of sub-districts, is not applicable where the boundaries of an independent district are sought to be changed. Such changes can only be made, if at all, by the county superintendent. Eason *v.* Douglass, 55 Iowa 390; Mount Vernon Ind. Dist. *v.* Harris Grove Ind. Dist., 65 Iowa 590.

But in Union Ind. Dist. *v.* Cedar Rapids Ind. Dist., 62 Iowa 616, it was held that the county superintendent of schools has no authority to detach territory from one independent school district and annex it to an adjoining one, unless by reason of some natural obstacle the inhabitants of the detached territory cannot enjoy the advantages of the schools in the district from which it is sought to be detached, nor unless

the directors of the district to be deprived of the territory agree to the change. In this case it was also held that the legislature may, by a curative act, validate a void order of the county superintendent changing the boundaries of school districts, in a case where a general law could not be made to apply. See Troy Dist. Tp. *v.* Doyle Dist. Tp., 53 Iowa 667.

Restoration of Territory.—Where territory has been detached from one district and annexed to an independent district, it may, under *Iowa* Code, § 1798, upon a petition of two-thirds of the electors therein, be restored to the district to which it belonged, by the concurrent action of the respective boards; and where they refuse to do this the remedy of the petitioners is by appeal to the county superintendent, not by mandamus. Barnett *v.* Board, etc., of Independent School Dist., 73 Iowa 134. Under the same section of the code the boundaries of an independent district as originally formed may be changed as readily as when territory is afterwards attached to it. Albin *v.* Board of Directors, 58 Iowa 77.

Effect of Alteration.—A school district loses none of its rights by being divided, and changing its name, but the various districts into which it is divided may unite in a suit in the name which the district had before division, to maintain any rights which accrued to the district before such division. School Dist. No. 3 *v.* Macloom, 4 Wis. 79.

Where a village was incorporated in such a way as to include only part of an existing school district, the rest being left in the town, and the act of incorporation did not indicate an intention to destroy the organization of the district, it was held that the effect of the act was to create a joint district in the town and village, and that the duty of the town clerk upon the order of the school district board was to collect from the tax-payers of that part of the district lying within the town their proportion of the district tax. State *v.* Wolfrom, 25 Wis. 468.

If the boundary of a school district is changed conformably to a legal petition, the consequent change of the boundary of the adjoining district is valid without petition. Nutter *v.* Trustees of School Dist., 4 Blackf. (Ind.) 351.

The vote of a town to annex one school district to another abolishes the former district and enlarges the latter, leaving it in continued existence without the necessity of any new organization or action on the part of either. Greenbanks *v.* Boutwell, 43 Vt. 207.

Under the *Ohio* Common School Laws of 1853 and 1867 it was held that an incorporated village was not withdrawn from the school jurisdiction of the township by a mere act of incorporation. The whole of the sub-school district which includes the village continues to be a sub-school district until the actual appointment of a separate school board. Cist *v.* State, 21 Ohio St. 339; Strong *v.* State, 21 Ohio St. 352.

Where two or more school districts unite, under the provisions of the statute for that purpose, they do not, by so doing, abolish the old districts, nor create a new one. Tucker *v.* Wentworth, 35 Me. 393.

Where a town was divided and another created and organized out of it, a school district of the first town became thereby a joint school district of the two towns, and the joint action of the supervisors of both towns was required to alter or regulate. State *v.* Rice, 35 Wis. 178. See State *v.* Wolfrom, 25 Wis. 468.

By the operation of the act of 1862, the style of "Sub-district No. 1 of the town Anoka" was changed to "School District No. 1 of the county of Anoka," no other change being effected. The mere change of name does not affect the existence or character of the corporation, nor the rights of parties dealing with it. Robbins *v.* School Dist. No. 1, 10 Minn. 340.

If the new organization of a district is irregular and void as to any part of the inhabitants of the district, it is so as to all, and a person is not prevented from contesting the proceedings under such organization, or the authority of the officers, because he was moderator of a meeting under such new organization. Thomas *v.* Gibson, 11 Vt. 607.

Effect in Regard to Taxation.—One school district had been illegally absorbed in another. Thereafter school taxes were assessed on property lying in that district. Certain persons feeling aggrieved thereby brought *certiorari* to have the whole tax set aside. But the court held that ample relief could be afforded the prosecutors by setting aside so much as aggrieved them; that the whole should not be set aside, though the alteration was illegal,

can be done only on a petition signed by a majority of its inhabitants, or on showing by some other means that such alteration is their wish ;[1] and so where two or more districts are to be united, their mutual co-operation must be obtained.[2] Various other requirements necessary to be complied with, in order to effect a change, are to be found in the statutes of the several States, the decisions upon which are given in the notes.[3] When all the

and the notice to the assessor defective. State *v.* Browning, 27 N. J. L. 527.

Where the town superintendent and the trustees undertook to join to their own district another incorporated district, which they had no power to do, and the tax was assessed upon the inhabitants of both districts as though they had been legally united, it was held that the tax was entirely void. State *v.* Reeves, 28 N. J. L. 520.

In Fifield *v.* Swett, 56 N. H. 432, it appeared that citizens of a school district in 1872 voted a tax for the purpose of building a schoolhouse. In the same year the lines of the district were changed so as to include the dwelling house and other real estate of the plaintiff, but the tax already voted was not assessed until 1873, and was then assessed upon the list of 1873, which included the plaintiff and his property. It was held that such tax was legally assessed against the plaintiff.

But in Hassan *v.* Edwards, 49 Vt. 7, it was held that a school district that was in debt, and that was enlarged in 1873 by the annexation of part of an adjoining district, could not vote to assess a tax on the list of the property as taken the year before, but that it should have been assessed on the list pleaded the following year.

Persons and property annexed to a school district in an adjoining town are subject to schoolhouse taxes in the district to which they are annexed, and not elsewhere, although previous to such annexation the town within whose limits they were constituted one school district; and if the town or city containing the district to which they are annexed be subsequently consolidated into one district, they will be subject to schoolhouse taxes therein, and not elsewhere. Pickering *v.* Coleman, 53 N. H. 424.

Where a district was divided subsequently to levy of taxes for the purposes of building schoolhouses and for other expenses, the district that has been set off cannot by a bill in equity enjoin the collection of such taxes. Dyer *v.* School Dist. No. 1, 61 Vt. 96.

1. Junction City School Incorporation *v.* School Dist. No. 6, 81 Tex. 148; State *v.* Deshler, 25 N. J. L. 177; Dartmouth Sav. Bank *v.* School Dist. No. 6 and 31, 6 Dakota 332; Boone *v.* People, 4 Ill. App. 231; State *v.* Grimshaw (Mo. 1886), 1 S. W. Rep. 363; State *v.* Compton, 28 Neb. 485. See Coulter *v.* Board of School Inspectors, 59 Mich. 391.

It is not a delegation of its authority for a town, in discontinuing or reconstructing its school districts, to make its action depend on the wishes of the districts to be affected. Smith *v.* Titcomb, 31 Me. 272.

But under *Arkansas* Laws, § 75, acts of 1887, p. 286, it is not necessary that the petition should be signed by a majority of the electors of each of the districts to be divided. Hudspeth *v.* Wallis, 54 Ark. 134.

The *New Hampshire* act of 1870, ch. 8, entitled "An act enabling towns to abolish school districts in certain cases," gives authority to such towns at any time to abolish the school districts therein, and constitute the town a single district. It only takes effect in such towns as by vote, at a legal meeting, shall adopt its provisions. Child *v.* Colburn, 54 N. H. 71.

2. How St. *Michigan*, §§ 5033, 5041; Jones *v.* Camp, 34 Vt. 384; Sayre *v.* Thompkins, 23 Mo. 443; State *v.* Browning, 27 N. J. L. 527; State *v.* Wright, 17 Ohio 32; Butterfield *v.* School Dist. No. 6, 61 Me. 583. *Compare* Fairview Ind. Dist. *v.* Durland, 45 Iowa 53.

In Gentle *v.* Board of School Inspectors, 73 Mich. 40, it was held that under a statute requiring the consent of a majority of the tax-payers of a school district to be obtained before such district can be divided, a return by the board of school inspectors which states that the persons are a majority of such tax-payers is conclusive, although the consent which has been filed by the district does not make such statement.

3. Thus, in *Illinois*, by § 33 of the school

law of 1872, the school district cannot be divided which has a bonded debt or where the new district line will be brought nearer than one mile to any schoolhouse. The petition must be signed by all the voters of the new district and must show that such district contains not less than five families. School Trustee *v.* People, 71 Ill. 559; Trumbo *v.* People, 75 Ill. 561; Potter *v.* Trustees, 10 Ill. App. 343. See Carrico *v.* People, 123 Ill. 198; Webb *v.* People, 11 Ill. App. 358. This does not require five families to be resident in the particular territory taken from any one district. Boone *v.* People, 4 Ill. App. 231. The provision of the *Illinois* statute requiring a map and list of the tax-payers resident in the newly organized district is mandatory and not merely directory. Potter *v.* Trustees, 10 Ill. App. 343. But a failure to do this would not prevent there being a *de facto* organization. People *v.* Trustees, 87 Ill. 41.

Under *Iowa* Laws, 1882, ch. 172, § 84, as amended by Act of 1866, ch. 143, contiguous territory to be embraced in the new district erected in a city, town, or sub-district, need not be confined to the same township in which such town, etc., is situated; nor is it necessary that the boundaries should be fixed by the concurrent action of the two townships. Granville Ind. School Dist. *v.* Board of Supervisors, etc., 25 Iowa 305. The extent of territory which may be added to a town or city district for school purposes is not limited by law in *Iowa*. Fort Dodge City School Dist. *v.* Wahkansa Dist. Tp., 15 Iowa 434.

In *Maine*, in order to divide a district by vote of the inhabitants, a written statement of facts was required to be submitted by the selectmen. Where no such statement was submitted a vote to divide was unauthorized and void. Parker *v.* Titcomb, 82 Me. 180; School Dist. No. 1 *v.* Stearns, 48 Me. 568. See Webber *v.* Stover, 62 Me. 512. There must also be a written recommendation of the municipal officers and superintending school committee. Allen *v.* Archer, 49 Me. 346. But in the recommendation of town officers favoring an alteration in certain school districts, it is not necessary that the definite and exact changes contemplated be given. Nor was any action relative to the schoolhouse necessary as a condition of discontinuance. Grindle *v.* School Dist. No. 1, 64 Me. 44.

In such recommendation, a recital to the effect that although a division of the district would not be advisable if the inhabitants could agree to forego it, yet the state of feeling actually existing was such as to require the division, was held to be a sufficient statement of facts upon which to base the action of the town. Webber *v.* Stover, 62 Me. 512.

In *New Hampshire* an act of the general court, incorporating part of a town with a part of another town into a school district, does not require, for its validity, that the legal existence of such a district as the one indicated should be proved, if the territory is known by that name. Rumney, etc., School Dist. *v.* Smart, 18 N. H. 268.

Territory embraced in a school sub-district outside of and adjoining an incorporated town may, under Wagner's *Missouri* Stat. 1262, be organized at the same time with that part within the corporate limits, and it is not necessary, in order that such organization be lawful, for the voters of the sub-district residing within and without the corporate limits to be in a certain proportion to each other, or that all or a given number of them shall vote at the election, provided a majority of the lawful voters are in favor of the organization. State *v.* Board of Education, 64 Mo. 53. Nor is any mutual agreement between the municipal and township boards necessary. State *v.* Heiser, 60 Mo. 540. See State *v.* Searl, 50 Mo. 268; Henry *v.* Dulle, 74 Mo. 443. And a resolution annexing outside territory to the city school district does not remain inoperative until the secretary and clerks perform their duties in causing the requisite changes to be made on the maps. Henry *v.* Dulle, 74 Mo. 443.

Under *Missouri* acts 1868, p. 64, it is held that the provision of Statutes 1865, p. 274, relating to the organization into one independent district of certain cities and towns is not confined to incorporated cities and towns. State *v.* Heath, 56 Mo. 231.

In *Missouri*, under § 7023, Rev. Stat., where two districts vote upon a proposition to change their boundaries, if one district vote against and the other for such change, the matter must be referred to the county commissioner for final decision, who shall proceed to inform himself as to the necessity of the proposed change, and his decision thereon shall be final. State *v.* Young, 84 Mo. 90. But in making

such decision the commissioner must confine himself to the question whether the change proposed shall or shall not be made. State *v.* Riley, 85 Mo. 156. By the terms of Rev. St. 1879, § 7023, the petition and notice for the redistricting of a town must show the exact changes proposed. And the commissioner on an appeal to his decision in such case has no authority to alter the boundaries of a district except as indicated in the petition. School Dist. No. 1 *v.* School Dist. No. 4, 94 Mo. 612.

Where a town simply authorized a division of a school district, without defining the boundaries of the new district, it was held that it was insufficient to show a legal division and organization of the new district, though the district voted to divide. But where a division was in fact made and recorded, and the town afterwards recognized and ratified the same, this was sufficient to render the division legal and binding upon the inhabitants of the town and district. Sawyer *v.* Williams, 25 Vt. 311.

The statute providing for the formation of new school districts does not require the order of apportionment to be filed by the superintendent of schools, either in his own office or with the town clerk. State *v.* Eaton, 11 Wis. 29.

By the terms of *Minnesota* Gen. Sts. 1878, ch. 36, § 12, the formation of new school districts, change of boundaries, or the uniting of districts can be accomplished only by the action of the county commissioners and with the approval of the county superintendent, upon the petition of a majority of the freeholding voters residing in each district to be affected thereby, and after notice and hearing in the manner prescribed. Under this statute a village constituting a part of an independent school district is not authorized at its own election to withdraw therefrom and organize as a separate independent school district. State *v.* Independent School Dist., 42 Minn. 357.

In *Michigan* it is provided by § 5033, How St., that no school district shall contain more than nine sections of land. It was held that a district which contains five whole sections and eight fractional sections was legal. People *v.* Gartland, 75 Mich. 143.

Under *Pennsylvania* act of April 17, 1876, lands in one township cannot be annexed to the school district of another when such lands are not contiguous to the latter, and a petition which does not set forth that the lands proposed to be annexed for school purposes are contiguous is fatally defective. *In re* Heidler, 122 Pa. St. 653.

Notice.—An order to commissioners to view for an independent school district in *Pennsylvania* must direct ten days' special notice at least to be given to the directors of the district from which the new one is to be taken, and the mere putting up of twenty printed notices ten days before the time of such meeting is not sufficient. Clearfield Ind. School Dist., 79 Pa. St. 419. See Wilkins Tp. School Dist., 70 Pa. St. 108; Independent School Dist. No. 8, 33 Pa. St. 297.

Under § 5040, How. *Michigan* Stat., which requires 10 days' notice of proceedings for organizing a new school district, a proceeding taken without such notice cannot be rendered valid by the filing of a consent by a majority of the inhabitants of the districts affected. Gentle *v.* Board of School Inspectors, 73 Mich. 40.

A notice of the proposed enlargement of a school district, by annexing territory taken from two contiguous districts which gives the exterior boundaries of the district before and after such enlargement, is sufficiently certain and definite without naming the contiguous districts. Dorough *v.* Dewey, 82 Mich. 309. And notice of the proposed formation of a new district need not describe the entire territorial boundaries of the new district. Mason *v.* Kennedy, 89 Mo. 23. But see School Dist. No. 1. *v.* School No. 4, 94 Mo. 612.

In *Nebraska*, under Comp. Sts., ch. 79, § 4, where a petition is presented to the county superintendent for a change in the boundaries of the school districts, it is indispensable that three notices containing an exact statement of the proposed change and the time when the petition will be presented be posted in each district affected, ten days prior to the presenting of the petition, and the affidavit of proof of such posting should state the place and time of posting. Dooley *v.* Neese, 31 Neb. 424.

As to notice required in *New York*, see People *v.* Hooper, 13 Hun (N. Y.) 638.

The requirement of the *Michigan*

conditions required by statute have been complied with, the trustees or directors, as a rule, have no discretion to refuse to act, and may be compelled to do so by mandamus;[1] and the legality of an alteration in school districts cannot be tested in a collateral proceeding, but only by an information in the nature of a *quo warranto* against the proper officers.[2]

statute (How. Stat., § 5040), for notice of the meeting of a township board of school inspectors to alter the boundaries of a district is jurisdictional, and until such notice has been given and proof of posting made, the inspectors have no power to act. Fractional School Dist. No. 3 *v.* Boards of School Inspectors, 63 Mich. 611; Coulter *v.* Board of School Inspectors, 59 Mich. 394. So in *Wisconsin* proof of notice for the alteration of a district must be given; the mere recital in the order of the board that due notice was given is not *prima facie* evidence of the fact. State *v.* Graham, 60 Wis. 395.

Meeting.—As to requirements in regard to calling a meeting to vote upon the consolidation of one independent district with another, see State *v.* Leverton, 53 Iowa 483.

By *Iowa* Laws 1862, ch. 172, § 81, it is provided that at an election held to vote upon the organization of an independent school district, the polls must be kept open from 9 A.M. to 4 P.M. Under this statute an election called for one o'clock was void. Hesper Dist. Tp. *v.* Burr Oak Ind. Dist., 34 Iowa 306.

A warning of a town meeting "to see if the town will vote to divide School District No. 9, in said town," was held sufficiently definite to make a valid division of that district. Weeks *v.* Batchelder, 41 Vt. 317. See Moore *v.* Beattie, 33 Vt. 219; Ovitt *v.* Chase, 37 Vt. 196.

By the terms of Wagn. *Missouri* Statutes, p. 1245, § 17, a school subdistrict cannot be lawfully formed out of territory situated in two townships without a joint meeting of the township boards of education, and the fact that one board held such meeting and that the individual members of the other signed a paper relinquishing the territory in their township, would not render the formation of the sub-district valid. Smith *v.* Township Board of Education, 58 Mo. 297.

Where the warrant of a meeting was "to see if the town will set off a part of" certain districts named therein, it is not competent for the town to set off a portion of a district not named in the warrant. Butterfield *v.* School Dist. No. 6, 61 Me. 583.

Reporting New District.—In reporting a new district the commissioners should annex a draft showing both the lines of the independent district and those of the district from which it is taken. Wilkins Tp. School Dist., 70 Pa. St. 108.

Unless the report of the division of counties into school districts is filed for record with the county clerk, the trustees have no authority to enforce the collection of taxes. Ringo *v.* Stewart, 4 B. Mon. (Ky.) 266.

1. Trustees *v.* People, 76 Ill. 621; Potter *v.* Trustees, 10 Ill. App. 343. See School Trustees *v.* People, 71 Ill. 559. See Hancock *v.* Perry Dist. Tp., 78 Iowa 550.

In *Illinois*, however, by the laws of 1879, p. 287, the discretionary power of trustees has been increased. Trustees *v.* Kay, 8 Ill. App. 30; Hildreth *v.* Heath, 1 Ill. App. 85.

In School Directors *v.* School Directors, 135 Ill. 464, it was held that in case trustees of schools refuse to perform their duties and conspire together to defeat the formation of a new district and to embarrass the directors in the discharge of their duties and to deprive them of their rights, a court of equity will have jurisdiction to enjoin the illegal acts of such trustees and to enforce the rights of the new district.

2. People *v.* Gartland, 75 Mich. 143; People *v.* Trustees, 87 Ill. 41; School Directors *v.* School Directors, 135 Ill. 464; Alderman *v.* School Directors, 91 Ill. 179; Frumbo *v.* People, 75 Ill. 561; Rawson *v.* Van Riper, 1 Thomp. & C. (N. Y.) 370; Lord *v.* Every, 38 Mich. 405; Clement *v.* Everest, 29 Mich. 18; People *v.* Board of Supervisors, 41 Mich. 647.

But it seems that the writ of *certiorari* will also lie to review proceedings of the directors or trustees. Potter *v.* Trustees, 10 Ill. App. 344; Miller *v.* Trustees, 88 Ill. 26; State *v.* Graham, 60 Wis. 395. But in Fractional School Dist. No. 1 *v.* Joint Board of School Inspectors, 27 Mich. 3, it was held that a *certiorari* to review proceedings

Upon an alteration of school districts, whereby those existing are abolished and new ones formed, the legal title to schoolhouses and other property belonging to the old districts vests in those of the new ones within whose territory such property happens to fall.[1] But where the boundaries between two existing districts are only changed, so that the schoolhouse is left out of the district to which it belonged, that district in which it was situated before the change retains its property therein.[2] As a rule, where a district is divided, there must be an apportionment of the assets, and this is left ordinarily to the board of directors or trustees to make.[3] Their judgment in such a matter is conclusive until

whereby a new school district has been created out of old districts must be applied for before the district has been organized and assumed the functions of a corporation.

In *Michigan* it is held that parties appealing under the statute from the action of the school directors in arranging school districts, to the town board, thereby waive those questions which require judicial review and submit themselves to the discretion of that body; and a *certiorari* to the town board does not open for review the doings of the inspectors. Brody *v.* Township Board, 32 Mich. 272.

1. Danvers School Dist. No. 6 *v.* Tapley, 1 Allen (Mass.) 49; School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62; Whitmore *v.* Hogan, 22 Me. 564; Board of Education *v.* Board of Education, 30 W. Va. 424. See *dictum* of Mitchell, J., in Winon *v.* School Dist. No. 82, 40 Minn. 20. See also Lowe *v.* Hardy (Utah, 1891), 26 Pac. Rep. 982.

2. Whittier *v.* Sanborn, 38 Me. 32; Winona *v.* School Dist. No. 82, 40 Minn. 13.

In *Indiana*, it has been held that real estate conveyed to, and paid for by a school township, remains the property of such township, although it has subsequently included any territory annexed to a city adjoining, where such annexation includes only part of such township. Reckert *v.* Peru, 60 Ind. 473.

This rule is supported by a *dictum* of Morton, J., in School Dist. No. 2 *v.* Richardson, 23 Pick. (Mass.) 68. "In the latter case [of a mere alteration], as the identity of the corporations would remain, it would seem that the property would not be divested, although the schoolhouse, by the newly assigned limits, might fall without the territory of the district and thus be rendered useless for the purpose for which it was made."

The general rule respecting such matters is that where a part of the school district is detached for any purpose, the original corporation still retains its property rights, powers and privileges and remains subject to its duty and obligations, unless some express provision to the contrary be made by the act authorizing the separation. Thus, where a school district was divided by an extension of city limits, and the schoolhouse being in that part of the district taken into the city by the extension, the board of education attempted to take possession of and control over it. The officers of the school district refused to allow this to be done and a temporary injunction was allowed, but on motion of the school district officers the order of injunction was vacated. It was held that such ruling was correct as the injunction was not equitable. Board of Education *v.* School Dist. No. 7, 45 Kan. 560. See Board of Education *v.* Board of Education, 30 W. Va. 424.

Public school property that has been set apart for the purpose of a public school of a higher grade than primary does not pass or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated. Board of Education *v.* Board of Education, 46 Ohio St. 595.

Where a new school district is formed from an existing district, the latter is trustee for the former for its share of school property and may maintain a bill in equity to collect the amount found due to it. School Directors *v.* School Directors, 16 Ill. App. 651.

3. School Directors *v.* School Direc-

set aside by a proper proceeding, and cannot be attacked in one merely collateral.[1]

If two school districts are united, thus forming a new district, the new district alone is liable for the debts of the old districts;[2]

tors, 73 Ill. 250; School Directors *v.* Miller, 49 Ill. 494; Albin *v.* Board of Directors, 58 Iowa 77; Oakville Ind. School Dist. *v.* Asbury Ind. School Dist., 43 Iowa 444; Lowell Ind. School Dist. *v.* Duser Ind. School Dist., 45 Iowa 391; State *v.* Rice, 35 Wis. 178; Lower Allen Tp. School Dist. *v.* Shiremanstown School Dist., 91 Pa. St. 182. See this subject more fully treated, *supra*, this title, *Funds*.

Upon the failure of the trustees to agree, the matter may be referred to arbitrators. Viola Dist. Tp. *v.* Audubon Dist. Tp., 45 Iowa 104; Lowell Ind. School Dist. *v.* Duser Ind. School Dist., 45 Iowa 391.

Where an award is made by the arbitrators, it has the force and effect of the verdict of a jury, and the court which renders judgment upon it must follow the award, and has no power to render a different judgment. Little Sioux Dist. Tp. *v.* Little Sioux Ind. Dist., 60 Iowa 141.

In People *v.* Hodge, 4 Neb. 265, it was held that upon the division of a school district, the old district has no authority to use property or funds to which the new one is entitled; but a mandamus will not lie against the treasurer of the old district if such funds are placed beyond his control by the action of its officers.

In District No. 6 *v.* District No. 5, 18 Mo. App. 266, it appeared that the plaintiff district was erected out of the defendant district and certain other territory. When the new district was formed the old was not indebted and had a credit of $300, or more, in the hands of the county treasurer, which had accumulated from the levying and collecting of taxes. After the formation of the new district it claimed a portion of the fund and brought suit to recover it. It was held that as the statute does not contemplate or provide for the raising of a surplus fund in the several school districts, but only provides for the raising of such sum as shall be sufficient for each current year, the presumption would be that all the children of the district had received their share of the benefit of the tax, and therefore the money collected would necessarily and properly remain on hand, and that there was no privity between the two districts; each was a distinct legal entity.

Under *Wisconsin* Laws 1885, ch. 234, § 2, where territory is detached from one school district and annexed to another, the latter is entitled to receive its just share of the credits of the former, including the value of its schoolhouses and uncollected taxes theretofore levied on all the property of the district, including that in the portion detached, less its existing debts and liabilities; and it is immaterial that the territory detached had neither schoolhouses nor inhabitants. Board of School Directors *v.* School Dist. No. 1, 81 Wis. 543.

Where everything pertaining to the formation of a new district was regular except that the superintendent did not at the time of the formation apportion the amount of the property to which each district was entitled, and a schoolhouse and other property remained in the old district, it was held that the apportionment was valid, notwithstanding it was not made at the time a new district was formed, but was made nearly seven months afterwards. School Dist. No. 13 *v.* State, 15 Kan. 43. A like decision was made in School Dist. No. 49 *v.* School Dist. No. 21, 32 Kan. 123, except that the apportionment was not made for three years after the formation of a new district.

1. Oakville Ind. School Dist. *v.* Asbury Ind. School Dist., 43 Iowa 444; Lowell Ind. School Dist. *v.* Duser Ind. School Dist., 45 Iowa 391, where it was also held that an appeal would lie directly from their adjudication to the county superintendent, the decision of which would be binding upon the parties and enforceable by an action at law.

By *Wisconsin* Rev. Stat., ch. 19, § 6, if on the division of school districts either district is dissatisfied with the apportionment of property, an appeal lies to the state superintendent; if not taken, it will be presumed that the decision of the town superintendent was acquiesced in. School Dist. No. 2 *v.* School Dist. No. 1, 3 Wis. 333.

2. Brewer *v.* Palmer, 13 Mich. 104; School Dist. No. 3 *v.* Greenfield, 64 N.

and where a part of the territory of one district is separated from it by annexation to another or by its formation into a new district, the old district, as a rule, remains subject to all its liabilities.[1]

4. Meetings—*a.* AUTHORITY TO CALL.—In some States the power to call meetings of school districts is vested in the selectmen, in others in the prudential committee, while in others, the district itself is authorized to name the persons who may exercise this power.[2] If the clerk is empowered by the district to call annual meetings thereof, this is a limitation upon his authority, and he cannot legally call any other than such meetings;[3] and where he is directed as to the manner of notifying future meetings, he is not thereby authorized to call a meeting, but merely to notify and warn a meeting called by competent authority.[4] It has been held that when authority is conferred upon a

H. 84; Thompson *v.* Abbott, 61 Mo. 176; Clother *v.* Maher, 15 Neb. 1. See *contra*, Needham *v.* School Dist. No. 6, 62 Vt. 176, under a statute which did not allow the districts to unite until all their debts were paid.

1. Winona *v.* School Dist. No. 82, 40 Minn. 13; Briggs *v.* School Dist. No. 1, 21 Wis. 348; Board of Education *v.* Board of Education, 30 W. Va. 424. See Board of School Directors *v.* Board of School Directors, 81 Wis. 428.

In Halbert *v.* School Dist. No. 2, 36 Mich. 420, it was held that where an existing district was divided up into several others, the latter could not be held jointly liable for debts of the former, but their liability is a several obligation pending on the valuation of the property to be divided.

Where one district has been reduced by detaching a part of its territory, the original district itself, and not the creditors, must obtain contribution from the new district, unless otherwise provided by statute. People *v.* Board of Education, 41 Mich. 547; Turnbull *v.* Board of Education, 45 Mich. 496. See also in this connection People *v.* Ryan, 19 Mich. 203; School Directors *v.* Miller, 49 Ill. 494.

2. In *Maine*, a meeting of a school district called by the school agent, on his own motion, without the written application of three or more legal voters, was held not to be in conformity with the requirements of the statute. School Dist. No. 5 *v.* Lord, 44 Me. 374. Where there is no agent, or he neglects or refuses to call a meeting, two selectmen may call it; but such vacancy or refusal must exist and be shown in order to render the proceedings of a meeting called by the selectmen valid. Starbird *v.* School Dist. No. 7, 51 Me. 101. And the meeting may be called by the selectmen on the written application of three or more qualified voters who are resident within the district, although they are not described as such in the application. Fletcher *v.* Lincolnville, 20 Me. 439.

In *New Hampshire*, it has been held that, where there is a prudential committee duly appointed and qualified, the selectmen have no authority to call and warn a district meeting, and the proceedings of a meeting called and warned by them will be void, unless the committee have neglected their duty. Giles *v.* School Dist. No. 14, 31 N. H. 304. But if three or more voters apply to the prudential committee to call a special meeting of the school district on a day named, and they refuse, but within ten days do call a meeting for the same purpose on a more distant day, it is such a refusal to call the special meeting as will authorize the selectmen to call it. Denniston *v.* School Dist., 17 N. H. 492.

In *New Jersey* special meetings of the voters of a school district must be called by the board of trustees regularly convened, and therefore a meeting called by two members of the board, without notice to, and in the absence of, the third member, is irregular. State *v.* Trustees of School Dist. No. 30, 43 N. J. L. 358.

3. Third School Dist. *v.* Atherton, 12 Met. (Mass.) 105.

4. Stone *v.* School Dist. No. 4, 8 Cush. (Mass.) 592.

"Warning" and "Calling" a Meeting Distinguished.— In the case just cited, the court, by Dewey, J., said: "Does

justice to call a meeting in the event of failure on the part of the proper officers to do so, he is empowered also to act when the proper officers have illegally called a meeting.[1]

b. How Called—Notice, etc.—The manner of calling meetings is generally prescribed by the statute.[2] In general, the statute provides that upon application[3] in writing by a designated number of inhabitants of the district to the proper officer, a meeting shall be called, and notice of the time, place and purpose[4] thereof published in a specified number of public

this vote of the district, prescribing the manner of warning meetings of the district, confer upon the clerk power to call the meeting? In common parlance the terms 'calling a meeting' and 'warning a meeting' have doubtless been used as expressing the same idea, but looking at these terms as used by the legislature in the revised statutes, and particularly in the sections above referred to, the distinction is most obviously taken between the terms 'calling a meeting' and 'warning a meeting.' Thus the forty-sixth section, after prescribing the duty of the selectmen and the prudential committees to issue a warrant for such committee, further directs them to require one of the persons applying for such meeting, to warn the members of the district to meet at the time and place ordered. Here 'to warn' clearly means nothing more than to notify a meeting appointed by other authority. In the forty-seventh section, warning is used in a like sense, but the forty-eighth section is still more explicit as to this matter, inasmuch as after having fully provided for the case of warning a meeting, it proceeds to provide for the calling of meetings, treating the two subjects as distinct."

1. Pickering *v.* De Rochemont (N. H. 1891), 23 Atl. Rep. 88.

2. In Hayward *v.* School Dist. No. 13, 2 Cush. (Mass.) 419, it was held that, if the inhabitants of a school district, in pursuance of the authority conferred upon them by *Massachusetts* Rev. Stat., ch. 23, § 48, prescribe the mode of warning future meetings, the mode so prescribed must be pursued so long as the vote therefor remains unrescinded, and meetings could not afterwards be called in the manner specified in sections 46 and 47, even though the officers of the district refused or neglected to pursue the mode prescribed.

Where a town has directed the mode of calling the meetings of school districts, it is necessary, in proving their transactions, to show that such directions have been pursued. To show that a meeting was held *de facto* by all the inhabitants who were qualified to attend, is not sufficient. Moor *v.* Newfield, 4 Me. 44.

3. In *Maine* it is not necessary to the validity of a warrant from the selectmen to call a school-district meeting, that the application therefor should be recorded, or produced, or that the fact that a proper application had been made should be recited in the warrant. Soper *v.* School Dist. No. 9, 28 Me. 193.

If a meeting of a school district be duly warned by the clerk, without any application to him in writing for that purpose, and a meeting be held pursuant to the warning, such meeting will be legal and valid. That provision of the statute which makes it the duty of the clerk to warn a meeting of the district, upon a written application to him for that purpose, was intended to act compulsorily upon the clerk, and not to withhold from him the power of calling meetings without such application. Mason *v.* School Dist. No. 14, 20 Vt. 487.

4. Where the purpose of a meeting was to decide whether the inhabitants should direct a suit to be commenced for damages lately done to the schoolhouse and its furniture, and appoint agents to conduct the suit, if necessary, and the notice, after mentioning the time and place of the meeting, stated this purpose nearly in those words, it was held to be sufficient, although it did not specify the nature or amount of the damages, or when or by whom done. South School Dist. *v.* Blakeslee, 13 Conn. 227.

Where the application was for a meeting to appraise damages caused by the appropriation of a lot, and the notice recited the purpose to be, "to hear the inhabitants of said district on

places,[1] a specified number of days before said meeting,[2] and that the officer giving the notice shall make return showing that this has been done,[3] and it is essential to the validity of the meeting that

the subject of their disagreement respecting a suitable place to be selected for the erection of a schoolhouse in said district, and of deciding where such schoolhouse shall be located, and lay out the same," the notice was held to be insufficient. Leavitt *v.* Eastman, 77 Me. 117.

A resolution for the call of a meeting of the voters of S A district, for the purpose of determining upon the erection of a schoolhouse or schoolhouses, and the purchase of a site or sites therefor, and the amount of money to be raised for the purpose, etc., is sufficiently specific under *Minnesota* act of 1860. State *v.* St. Anthony, 10 Minn. 433.

If an application for calling a meeting contain, in precise and enumerated articles, the objects of the meeting, and such application be annexed to the warrant for calling the meeting, and the person to whom the warrant is addressed is therein directed to warn the inhabitants of the district to meet for the purpose of acting on the articles named in such annexed application, the articles are a part of the warrant, and a statute requiring the subject matter of the meeting to be inserted in the warrant is complied with. George *v.* Second School Dist., 6 Met. (Mass.) 497.

In *Rhode Island* the object of a school district meeting must be stated in the notice of a special meeting, but need not be stated in the notice of the statutory annual meeting—and therefore a notice of such meeting "to decide what amount of money shall be raised by tax," without reciting for what use the money is intended, is valid. Seabury *v.* Howland, 15 R. I. 446.

1. The *Maine* act of 1834, ch. 129, § 11, required that school district meetings should be called by posting notices thereof "on the district schoolhouse and one other public place within the limits of said district." Where it appeared that notices were posted, "one at the schoolhouse and one at the grist-mill, both in said district," it was held that this was a compliance with the statute. Fletcher *v.* Lincolnville, 20 Me. 439.

Where a school society, in 1822, voted that its meetings should be warned by posting notices upon all the public sign-posts within the society, there being three of them, and, in 1839, a meeting of said society was warned by posting a notice on two of such sign-posts only, it was held that by the act of 1823 (tit. 88, ch. 2, § 2), under which the meeting was warned, the notification given was sufficient, notwithstanding said vote of the society. Bartlett *v.* Kinsley, 15 Conn. 327.

A notice of a school meeting in a quiet rural district, posted on a board six feet in length and ten feet in width, fastened in or against the roadside wall, facing the road, at the south end of the district, is posted "in a safe and public place," within the meaning of Pub. Stats. *Rhode Island*, ch. 52, § 5. Seabury *v.* Howland, 15 R. I. 446.

2. Where a statute requires seven days' notice of the meetings of school districts, a notice dated on the first day of the month for a meeting to be held on the seventh, is insufficient. Hunt *v.* School Dist. No 20, 14 Vt. 300; 39 Am. Dec. 225.

In *Maine* a notice of a school district meeting is sufficient as to time, if posted on the sixteenth of the month, the meeting to be held on the twenty-fourth. Fletcher *v.* Lincolnville, 20 Me. 439.

In *New Hampshire* notice of seven days is all that is required to be given of any annual school district meeting. Harris *v.* School Dist. No. 10, 28 N. H. 58; Chapin *v.* School Dist. No. 2, 30 N. H. 25.

In *Rhode Island* a notice by a trustee for a district meeting six days before the meeting, stating the time, place and purpose, is sufficient. Howland *v.* School Dist. No. 3, 15 R. I. 184.

In *New York* the annual meeting of the inhabitants of a school district was held valid, though the clerk gave no notice, the time and place having been fixed at the next preceding annual meeting, and the clerk acted in good faith. Marchant *v.* Langworthy, 6 Hill (N. Y.) 646.

3. A return by the officer on the warning that "he had warned all the legal voters" in the district "to meet at the time and place and for the purposes within mentioned," was held

these requirements be complied with.[1] If the statute designates the time for the meeting, this is held to obviate the necessity of stating it in the notice.[2] In computing the time for notice, either the day on which the notice is published, or the day on which the meeting is held, will be counted.[3] Where a meeting is for a special purpose, all that is requisite in the form of the notice is that it be so expressed that the inhabitants of the dis-

defective in not specifying how and when notice was given. Perry *v.* Dover, 12 Pick. (Mass.) 206.

Where it was proved that there were no schoolhouses in the district, a return by the person to whom the warrant was directed that he had notified, etc., "by posting four copies of this warrant, one on the sign post at the confluence of the B and F roads, one on the corner of the blacksmith's shop, one on the Methodist meeting house, and one on the post-office, all of which places are in said district," was held sufficient to show that notice was posted, as to place, in the manner required by *Maine* Rev. Stats., ch. 17, § 24; Soper *v.* School Dist. No. 9, 28 Me. 193. So a return by the officer that he had posted notices, "one at the schoolhouse, and one at the grist mill, both in said district," shows sufficiently that they were posted, as to place, as required by *Maine* Stat. 1834, ch. 129, § 11; Fletcher *v.* Lincolnville, 20 Me. 439.

1. Jordan *v.* School Dist. No. 3, 38 Me. 164; People *v.* Peters, 4 Neb. 254. And a vote passed to raise money at a meeting not legally called is void. Rideout *v.* School Dist. No. 5, 1 Allen (Mass.) 232; Haines *v.* School Dist. No. 6, 41 Me. 246. And money paid in consequence of such vote, and under protest, may be recovered in an action against the district. Haines *v.* School Dist. No. 6, 41 Me. 246.

The failure of the notice to recite on its face that the signers are freeholders, is not void, under Gen. Stat. *Minnesota*, ch. 36, § 338, requiring it to be signed by five freeholders. Sturm *v.* School Dist. No. 70, 45 Minn. 88

In *New York* it was held that it was not necessary to insert the boundaries of the district in the notice—that the district would be sufficiently described by its number, if its limits were well defined and generally known—and that such an omission would not render the acts of the meeting void, so that officers chosen thereat might be charged as trespassers for their official acts. Ring *v.* Grout, 7 Wend. (N. Y.) 341.

See Greenbanks *v.* Boutwell, 43 Vt. 207, wherein *Vermont* Gen. Stat. ch. 22, §§ 41–3, is construed as to the requisites of a "lawfully appointed and notified" meeting of a school district.

Under the *Arkansas* statute, providing that notice shall be given by the school directors of the time and place of holding the annual meeting, notice given by two directors is sufficient. Holland *v.* Davies, 36 Ark. 446.

In school district No. 16, in Allen county, there is a stone school building owned by the school district, and used for school purposes. There is also in the district a frame building known as "Germania Hall," which the school board of the district rented for school purposes in April, 1879, for the period of five years. The notice for the annual meeting in 1880 stated that it was to be held in the schoolhouse. On the day for such meeting the clerk of the district decided to hold the meeting at Germania Hall because of the absence of the key to enter the stone schoolhouse, and for the reason that he considered the hall the cooler place, and the seats more convenient for the inhabitants attending the meeting. Under the direction of the clerk a boy was stationed at the stone schoolhouse from two o'clock P.M., on the day of the meeting, until after the close of the proceedings, to inform all persons coming to the stone schoolhouse that the annual meeting of the district was being conducted at the hall; and the attendance at the hall was an average attendance of the annual school meetings in the district. The meeting was held to be a valid one. Wakefield *v.* Patterson, 25 Kan. 709.

Date.—In *Vermont* the warning of a school district meeting need not be dated. If the records show no date, it may be proved by parol, and it may also be shown by parol when the warning was posted up. Braley *v.* Dickinson, 48 Vt. 599.

2. Hodgkin *v.* Fry, 33 Ark. 716.

3. Mason *v.* School Dist. No. 14, 20 Vt. 487.

trict may fairly understand the purpose for which they are convened;[1] and when a notice of an election specifies several purposes in such a way as to leave no doubt as to the meaning, it will be sufficient, although there be an omission of a copulative conjunction in the notice.[2]

If the district clerk, in giving notice of a district meeting regularly called by the trustees, misrepresents the object of the meeting to some of the taxable inhabitants, who in consequence thereof omit to attend, and a district tax is voted at such meeting, the trustees who cause the tax to be collected are not thereby rendered trespassers, unless they are parties to the fraud.[3]

c. POWERS.—Where the statute requires the notice of a school district meeting to set out the object thereof, no matters can be lawfully acted upon that are not distinctly stated in the notice.[4]

1. South School Dist. *v.* Blakeslee, 13 Conn. 227.

2. Merritt *v.* Farriss, 22 Ill. 303.

3. Randall *v.* Smith, 1 Den. (N. Y.) 214.

4. Holbrook *v.* Faulkner, 55 N. H. 311; Lander *v.* School District, 33 Me. 239.

Action Must Conform to Notice.—Where the object of a special meeting was stated to be, "to take action in regard to the collection of the tax already assessed," it was held that the statement was sufficiently explicit to warrant the election of a collector. Seabury *v.* Howland, 15 R. I. 446.

A warning of a town meeting to see if the town would vote to divide school district No. 9, and to make such other alterations in school districts in the town as might be found necessary, was held sufficiently definite to warrant a vote to form a new district out of a portion of the territory of No. 9, which was specified in the vote. Weeks *v.* Batchelder, 41 Vt. 317.

And an article in a warrant for a town meeting, "to see if the town will instruct the selectmen to purchase or take land in South or West Acton for the location of schoolhouses," is sufficient, under *Massachusetts* Gen. Stat., ch. 18, § 22, to authorize the town to designate a lot in West Acton for a schoolhouse. Reed *v.* Acton, 117 Mass. 384.

But a school district meeting, called to see if the district will vote not to defend a suit brought against them for labor and materials in building a schoolhouse, is not a meeting "for raising money, or building or repairing a schoolhouse," within the meaning of Pamp. Laws *New Hampshire*, ch. 222, § 2. Davis *v.* School Dist., 43 N. H. 381.

Prior to the *New Hampshire* law of July 9, 1855, a school district could raise money to build a schoolhouse only by taxation; therefore an article in the warrant for a school district meeting, to be held before that law, "to raise money" to build a schoolhouse, would not authorize a vote to borrow money for that purpose, though passed at an adjourned meeting held after that law took effect. Weare *v.* Sawyer, 44 N. H. 198; Weare *v.* School Dist., 44 N. H. 189.

A meeting called "for the purpose of obtaining information with regard to the recent assessments upon the property in the district" cannot employ counsel and institute legal proceedings. Wright *v.* North School Dist., 53 Conn. 576.

The following cases are in the line of those above cited: Little *v.* Merrill, 10 Pick. (Mass.) 543; Matney *v.* Boydston, 27 Mo. App. 36; Alden *v.* Rounseville, 7 Met. (Mass.) 218; Bramwell *v.* Guheen (Idaho, 1892), 29 Pac. Rep. 110; Ovitt *v.* Chase, 37 Vt. 196; Dix *v.* School Dist. No. 2, 22 Vt. 309; Whitney *v.* Stow, 111 Mass. 368; Kingsbury *v.* Centre School Dist., 12 Met. (Mass.) 99.

Time of Opening Meeting.—The meeting should be opened in a reasonable time after the hour specified in the notice; and what is reasonable time depends, in some measure, upon the circumstances of each particular case; but a delay of one hour and five minutes is not, of itself, an unreasonable delay, there being no law necessarily requiring the meeting to be opened within that time. And where it appears, from

Thus, if the notice states the purpose of the meeting to be the "laying of a tax to meet the expenses of repairs," the meeting will not be warranted in raising, in addition thereto, a premium paid for insurance.[1] But under a notice of a meeting "to take into consideration the expediency of raising money for the use of schooling for the ensuing year," a tax may be laid for the purpose specified;[2] and if the notice recites the purpose to be "to appropriate money to build a schoolhouse," the meeting may regulate the plans for the building.[3] A school district, in its annual meeting, may lawfully recognize and pay equitable claims.[4] In some States the powers of a special meeting of a school district are the same as those of an annual meeting.[5]

A meeting may adjourn to a fixed time, and at such adjourned meeting any matters included in the notice of the former meeting may be reconsidered or acted upon, provided no intervening rights of third parties have become vested.[6]

the record of a school district, that the meeting was held on the appointed day, the presumption of law is that it was held at a suitable time in the day and in pursuance of the warning, and on one claiming it to have been held otherwise rests the burden of proof. South School Dist. *v.* Blakeslee, 13 Conn. 227.

Presiding Officer.—The words "oldest in office of the directors," in a statute prescribing who shall preside at a school meeting, mean the director who has held office for the longest time under an election, and not the one elected for the longest term. State *v.* McKee, 20 Oregon 120; State *v.* Smith (Oregon, 1890), 25 Pac. Rep. 389.

It is not necessary that the moderator chosen at the annual school district meeting should preside at all subsequent meetings of the district during the year; the proceedings will be valid if the district should at a subsequent meeting elect a moderator to preside over that meeting. Stevens *v.* Kent, 26 Vt. 504.

If the clerk of a school district fails or neglects to be present at a meeting of his district, and to act as secretary thereof, the meeting may appoint a secretary *pro tem.*, and the announcement by the chairman that W was appointed, who accepted the position and acted with the assent of the meeting, is to be regarded as the corporate act of the meeting. State *v.* McKee, 20 Oregon 120.

1. Holt's Appeal, 5 R. I. 603.

2. Bartlett *v.* Kinsley, 15 Conn. 32.

3. People *v.* Board of Education (Supreme Ct.), 1 N. Y. Supp. 593. But a notice indicating that the object of the meeting is to *purchase* a schoolhouse, will not warrant a resolution to pay for a house already built. State *v.* Hurff, 38 N. J. L. 310.

4. Stockdale *v.* School Dist. No. 2, 47 Mich. 226.

5. Sanborn *v.* School Dist. No. 10, 12 Minn. 17; Maher *v.* State, 32 Neb. 354.

In *New Jersey* a special meeting of a school district, duly called, may vote to raise money for school purposes, although such appropriation has been refused at the annual meeting. State *v.* Lewis, 35 N. J. L. 377. And a special meeting may vote to raise money to build a schoolhouse, although a similar proposition has been rejected at a previous special meeting of the same year. Stackhouse *v.* Clark, 52 N. J. L. 291.

In *Vermont*, when a school district at the annual meeting has decided that the prudential committee shall consist of one member, and has appointed him, it cannot at a subsequent meeting during the year, warned for that purpose, determine that the committee shall consist of three persons and proceed to appoint two additional members of the committee. It cannot again act upon the subject during the year, unless a vacancy shall have occurred by the death, resignation, removal or disability of the committee thus appointed. Mason *v.* School Dist. No. 14, 20 Vt. 487.

6. Reed *v.* Acton, 117 Mass. 384; Maher *v.* State, 32 Neb. 354.

But in *Nebraska*, the annual school meeting of each school district for the

d. RECORDS.—The records of a school district are proper and legitimate evidence of its proceedings, for such district, in a suit to which it is a party.[1] If the original records have been lost, after proof of that fact their contents may be proved, like any other document, by secondary evidence.[2] While the records may be amended,[3] yet an amendment should not be allowed on

election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day. State *v.* Cones, 15 Neb. 444.

1. South School Dist. *v.* Blakeslee, 13 Conn. 227. Any fact which should be matter of record should be proved by the record. Sherwin *v.* Bugbee, 17 Vt. 337. The district clerk's official certificate imports verity only as to those matters upon which the district may lawfully act. Wilson *v.* Waltersville School Dist., 44 Conn. 157.

If the clerk of a school district fails to attend a meeting of his district and to act as secretary thereof, such meeting has power to appoint any private person as secretary *pro tem.*, for the purpose of making entries of the business of such meeting, and such entries made by authority of the voters then present are evidence of the proceedings of the meeting. State *v.* McKee, 20 Oregon 120. See also Bartlett *v.* Kinsley, 15 Conn. 327.

In a book of records of a school district it did not appear that at a certain meeting there was an election of a prudential committee; and another record was introduced, which the clerk of the district testified contained a true record of the meeting, and in which the election of such committee was entered. He further testified that both these records were made by him soon after the meeting, from loose memoranda put on paper at the time of the meeting. It was held that the election of the committee was duly proved, the records not being contradictory and both being originals, and the one which contained the entry of the election being of equal validity with the other. Williams *v.* School Dist. No. 1, 21 Pick. (Mass.) 75; 32 Am. Dec. 243.

A certain school district had been organized and its boundaries defined. The records of its proceedings were offered in evidence. From such records it appeared that additional territory was embraced in the district. It was held that the records should be admitted as the record of proceedings of the district. Richardson *v.* Sheldon, 1 Pin. (Wis.) 624.

In *Vermont* it is necessary that the warning for a meeting of a school district should be recorded by the district clerk. If it does not appear from the record of the warning that the hour of the day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence that in the original warning the hour for the meeting was named. Sherwin *v.* Bugbee, 17 Vt. 337.

Where the record does not state specifically how or where the notices were posted, but states that the meeting "was duly notified by posting two notices of the time, place and object of said meeting in the district, for five days previous to the day of meeting," this is, under *Rhode Island* Pub. Stats., ch. 58, § 11, *prima facie* evidence that the meeting was notified as the law required. Howland *v.* School Dist. No. 3, 15 R. I. 184.

Where the record of a town meeting under date of December 26, 1851, sets out the assembling and organization of the meeting at the place designated, and then shows a vote to adjourn to another place and an adjournment accordingly, followed by the record of a vote establishing the limits of the several school districts in the town, all under the same date of December 26, 1851, the court will, in the absence of any proof to the contrary, presume that the adjournment was rightfully made, and was to meet at such other place forthwith. Converse *v.* Porter, 45 N. H. 385.

2. Higgins *v.* Reed, 8 Iowa 297; 74 Am. Dec. 305. In this case it was further held that a law making it the duty of the secretary of a school district to record all the proceedings of the meetings in books to be kept for that purpose, is not so far mandatory as to render the proceedings of the district void because they were recorded on loose sheets of paper instead of in a bound book.

3. Harris *v.* School Dist. No. 10. 28 N. H. 158.

the trial of a cause, and with a view to meet a particular decision of the court;[1] nor is it permissible for the clerk of a school district, after he is out of office and another is chosen and sworn in his stead, to amend the records.[2] Under a statutory requirement that, if a given number present at a district meeting vote adversely on a proposition, the clerk shall make a record of the fact, it is not his duty to record the names of those so voting; it is sufficient if he records the state of the vote.[3]

5. Powers and Liabilities.—A school district, though generally a body corporate, can exercise no powers beyond those expressly conferred by statute, or which, by necessary implication, arise therefrom.[4] In the exercise of these powers, the district, like municipal corporations generally, is represented by its lawfully authorized officers and agents, and is liable for such acts of the latter as

1. Hadley *v.* Chamberlin, 11 Vt. 618.

2. School Dist. *v.* Atherton, 12 Met. (Mass.) 105. See also Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

3. Norton *v.* Perry, 65 Me. 183. And see generally RECORD, vol. 20, p. 473.

4. School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140; Third School Dist. *v.* Atherton, 12 Met. (Mass.) 105; School Dist. No. 7 *v.* Thompson, 5 Minn. 280; Denniston *v.* School Dist., 17 N. H. 492; Farnum's Petition, 51 N. H. 376; Gould *v.* Board of Education, 34 Hun (N. Y.) 16; Porter *v.* Robinson, 30 Hun (N. Y.) 209; State *v.* Bacon, 31 S. Car. 120; Buchanan *v.* School Dist., 25 Mo. App. 85; Bank *v.* Brainard School Dist. (Minn. 1892), 51 N. W. Rep. 814. See Beach *v.* Leahy, 11 Kan. 29; Bush *v.* Shipman, 5 Ill. 186.

In Harris *v.* School Dist. No. 10, 28 N. H. 61, Bell, J., in speaking of school districts, said: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected and often experimental enactments. They are *quasi* corporations of the most limited powers known to the law. They have no powers derived from usage, their existence extending back but a few years. They have the powers expressly granted them, and such implied powers as are necessary to enable them to perform their duties, and no more; among these are the power to vote money for specified purposes and the power to appoint committees to carry their votes relative to those purposes into effect. The district may clearly by their votes limit the amount of money to a definite sum, and it seems very clear that no committee can bind the district by exceeding those limits."

Public duties are required of such corporations as school districts as a part of the machinery of the State government, and in order that they may properly perform these duties they are invested with certain corporate powers; but their functions are wholly of a public nature and they are at all times subject to the will of the legislature, unless restrained by the constitution. Board of Education *v.* Board of Education, 30 W. Va. 424; 20 Am. & Eng. Corp. Cas. 11.

In *Iowa* a school district is a political or municipal township within the meaning of the Const., art. 2, § 3, inhibiting such corporations from incurring indebtedness to an amount exceeding five per cent. on the taxable property of the corporation. Winspear *v.* District Tp., 37 Iowa 542; Curry *v.* District Tp., 62 Iowa 102.

If the school districts exceed the powers conferred upon them by statute their acts are void. Thus, if a school district vote to raise money for purposes not within their authority, such vote is a nullity, and whoever presumes to carry it into effect does so at his peril; but the district is not liable, the vote being altogether aside from its corporate powers. School Dist. No. 1 *v.* Bailey, 12 Me. 254.

If school district trustees make a contract altogether outside of the purposes for which it is created, it is void because it has not power over the subject in reference to which it acted; but if it contracts with reference to a subject within its powers, and in so doing exceeds them, the person with whom it deals cannot set up such viola-

are within the scope of the authority vested in them either by statute or by vote of the inhabitants.[1] The most usual and important

tion of its franchises to avoid the contract. Littlewort *v.* Davis, 50 Miss. 403.

In *Maine* a school district has no authority to raise money for fuel, or to make itself liable for it. Estes *v.* School Dist. No. 19, 33 Me. 170.

A school district can act only in its corporate capacity, and can bind itself only by acts authorized by legal votes passed at a district meeting regularly called. Third School Dist. *v.* Atherton, 12 Met. (Mass.) 105.

Power to Borrow Money.—For the purpose of building schoolhouses and purchasing sites, or for repairing and improving the same, school directors by a vote of the people of their district are authorized to borrow money and give bonds therefor executed by them. Folsom *v.* School Directors, 91 Ill. 402; Austin *v.* District Tp., 51 Iowa 102.

Promissory Notes.—A school township by and in the name of its trustee may execute a valid negotiable promissory note for any debt contracted for the benefit of its property, but it is not governed by the law merchant and an assignee takes it subject to all defenses. Sheffield School Tp. *v.* Andress, 56 Ind. 157; Clark *v.* School Dist. No. 7, 3 R. I. 199.

1. School Town *v.* Gebhart, 61 Ind. 187; Conklin *v.* School Dist. No. 37, 22 Kan. 521; Kingsburg *v.* Central School Dist., 12 Met. (Mass.) 99; Edinburg, etc., Co. *v.* Mitchell (S. D. 1891), 48 N. W. Rep. 131.

A school district cannot be held liable for the value of services rendered by one who contracts with a *de facto* school board which is not such *de jure*. White *v.* School Dist. (Pa. 1887), 8 Atl. Rep. 443.

A contract entered into with persons acting as a board of school directors is not binding upon the school district, when there is in existence at the same time another board of school directors who are so *de jure*, and who have notified the persons contracting with the first named board not to carry out their contracts. Genesee Tp. *v.* McDonald, 98 Pa. St. 444.

In dealing with the trustee of a school township, all persons are bound to take notice of his official and fiduciary character and to know that he can only bind his district by contracts which are shown to be authorized by law. Bloomington School Tp. *v.* National School Furnishing Co., 107 Ind. 43.

The inhabitants of a school district, having voted to build a schoolhouse, had appointed and authorized a committee to purchase a certain lot for the site. The only condition upon which they could obtain a conveyance was that they should give the seller their individual note for the purchase money, which they did, and thereupon a deed was made to the committee and the other inhabitants of the district. The districts, however, subsequently rescinded their votes in regard to the building of the schoolhouse, and the note having been paid by the committee, it was held, in an action by the latter against the district, that they were entitled to recover the sum so paid by them, notwithstanding the fact that they had reason to suppose before the purchase was made that the district would hold a meeting for the purpose of rescinding the votes under which they had been authorized to proceed. Kingman *v.* School Dist. No. 13, 2 Cush. (Mass.) 426. *Compare* Haywood *v.* School Dist. No. 13, 2 Cush. (Mass.) 419.

As will be seen from an examination of the decisions, the liability of a school district for the acts of its officers depends, in some cases, upon whether such acts were authorized by the district in a lawful meeting, while in others the officers derive their powers directly from statutes. Thus in *Indiana* a trustee of a school corporation has power to contract a debt in the name of and binding upon such corporation for the purchase of necessary furniture and other supplies for its schools, and to execute in the name of his corporation a valid and binding certificate of indebtedness, or note for the amount of such debt, and such certificate or note will constitute *prima facie* a good cause of action against such corporation. Miller *v.* White River School Tp., 101 Ind. 503; 9 Am. & Eng. Corp. Cas. 144.

In *Illinois* the powers of school directors existing under the statute are extremely limited. They may appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid, and the form of the orders to be drawn by them on the treasurer of the township

is prescribed by statute. Clark *v.* School Directors, 78 Ill. 474.

But they cannot make acceptances of bills of exchange so as to bind the school district and create a right of action thereon against them. Peers *v.* Board of Education, 72 Ill. 508.

In *Minnesota* the trustees of a school district, without express authority from the district, have no power to make a promise that will take a debt due from it out of the statute of limitations, or to execute a valid mortgage on the land of the district, such powers being only in the inhabitants of the districts, acting at a district meeting. Sanborne *v.* School Dist. No. 10, 12 Minn. 17. And so in order for the district to be liable on a promissory note executed by the trustee, it must appear that the indebtedness for which it was given was one that the trustees were authorized to contract. School Dist. No. 7 *v.* Thompson, 5 Minn. 280. In *Kansas* a school district will not be bound by the action of the directors in buying a stereoscope and views, unless the inhabitants have previously voted therefor. School Dist. No. 29 *v.* Perkins, 21 Kan. 536; 30 Am. Rep. 447; Johnson *v.* School Dist., 67 Mo. 319. But it has been held that a well is such a "necessary appendage" to a school that the board, without the vote of the electors, may contract for it. Hemme *v.* School Dist. No. 4, 30 Kan. 377. So also in *Michigan* is a fence around the schoolhouse site. Creager *v.* School Dist. No. 9, 62 Mich. 101. But in *Iowa* the directors of a district cannot, without a vote of the electors, bind the district on a contract for the purchase of lightning rods for the schoolhouse. Monticello Bank *v.* District Tp., 51 Iowa 350. See Wolf *v.* Independent School Dist., 51 Iowa 432. Nor on a contract of insurance on the school property. American Ins. Co. *v.* Willow Dist. Tp., 55 Iowa 606.

In Independent Dist. *v.* Kelly, 55 Iowa 568, it was held that a school district may be liable for expenses incurred by the board of directors in obtaining a location of the highway by the schoolhouse. See also McShane *v.* Board of School Directors, 76 Iowa 333.

In order to bind a school district, a contract by two trustees for the purchase of supplies for the district must be authorized at a meeting of the trustees. If such supplies are received and used for the benefit of the district under such circumstances and for such length of time as to raise the presumption that it was with the common consent of the district, it will be bound to pay for them. Andrews *v.* School Dist. No. 4, 37 Minn. 96. See Currie *v.* School Dist. No. 26, 35 Minn. 163.

So in *Illinois*, school directors have no power under the statute to purchase a schoolhouse site, or borrow money to erect a schoolhouse, except upon a vote of the people of the district had for that purpose. Therefore, the directors cannot give their promissory notes for such consideration so as to bind the district, unless such vote has been taken. School Directors *v.* Miller, 54 Ill. 338.

Where a promissory note was executed by trustees of a school district as individuals, merely annexing their title as trustees to their signatures, it was held that they were individually liable, and that in order to cast the liability upon the school district, it must appear from the note itself that they executed it in their official capacity. Fowler *v.* Atkinson, 5 Minn. 565; Bingham *v.* Stewart, 13 Minn. 106.

Where a trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legitimate claims against it. Union School Tp. *v.* First Nat. Bank, 102 Ind. 464. See Boyd *v.* Black School Tp., 123 Ind. 1; Bicknell *v.* Widner School Tp., 73 Ind. 501; Wallis *v.* Johnson School Tp., 75 Ind. 368; First Nat. Bank *v.* Union School Tp., 75 Ind. 361; Reeve School Tp. *v.* Dodson, 98 Ind. 497.

Where the directors of a school execute a promissory note in their individual names for a purpose connected with the school, but not authorized by a vote of the people, a remedy at law exists against the directors as individuals, although it may be in such case that the district would be liable over to the persons who signed the note on their showing that the avails were appropriated to the legitimate school purposes of the district. School Directors *v.* Miller, 54 Ill. 338.

A school district, like an individual, is liable for money had and received when they obtain and hold the money of another. Trustees of Schools *v.* Trustees of Schools, 81 Ill. 470.

The taxpayers of a school district are not bound by the action of the directors who allow a judgment by default on a debt which was void by reason of its being contracted when the

instances of the powers conferred are those of acquiring and holding lands and other property for school purposes,[1] making con-

district was indebted in excess of the amount allowed by the constitution. Kane *v.* Independent School Dist., 82 Iowa 5.

Where the complaint in an action against a school district showed that the plaintiff made a contract with the directors of the district for a certain number of books, that members of the board agreed to pay for the same, such payment to be made by an order on the township; that a vote was taken at a regular meeting of the board to ratify the purchase, but afterwards, at a meeting of the electors, such ratification was repealed; it was held that such allegations did not purport to be the contract of the district or that the purchase was made for its use or pursuant to its authority, and therefore was not binding on it. Western Pub. House *v.* District Tp. (Iowa 1891), 50 N. W. Rep. 551.

Negligence of Agents.—In *Pennsylvania*, it has been held that a school district is but an agent of the commonwealth, and as such a *quasi* corporation for the sole purpose of administering the system of public education, and therefore not liable for the negligence of the school directors or of their employers. Ford *v.* School Dist., 121 Pa. St. 543; School Dist. *v.* Fuess, 98 Pa. St. 600; 42 Am. Rep. 627.

So in Bank *v.* Brainerd School Dist. (Minn. 1892), 51 N. W. Rep. 814, it was held that a school district was not liable for mere neglect or nonfeasance in failing to make repairs.

Trespass.—A school district, however, is not liable for the trespasses of its officers; the officers are themselves liable in such case. School Dist. No. 11 *v.* Williams, 38 Ark. 454.

Ratification of Officers' Unauthorized Acts.—Where the trustees of a school district act without express authority from the district, such unauthorized act may be ratified by the district at a district meeting. Sanborn *v.* School District No. 10, 12 Minn. 17.

The committee authorized to sell a schoolhouse made a sale for credit instead of for cash and kept the proceeds of the sale in their own hands, making no report to the district of their proceedings, and the district not deriving any benefit from such sale, but at the first corporate meeting thereafter passed votes condemnatory thereof. No ratification could be inferred, although no district meeting was held for some months after the sale was known to individuals of the district, during which time the house was removed from the site upon which it stood by the vendees. School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330.

In Davis *v.* School Dist. No. 2, 24 Me. 349, it was held that a school district cannot be considered as promising to pay for unauthorized repairs upon their schoolhouse, by using it afterwards.

For other cases determining what does and what does not amount to a ratification by a district of its agents' unauthorized acts, see Gibson *v.* School Dist. No. 5, 36 Mich. 404; Norris *v.* School Dist. No. 1, 12 Me. 293; 28 Am. Dec. 182; Milford *v.* Powner, 126 Ind. 528; Kane *v.* School Dist., 52 Wis. 502; Taylor *v.* District Tp., 25 Iowa 447; Andrews *v.* School Dist. No. 4, 37 Minn. 96; Kimball *v.* School Dist. No. 8, 28 Vt. 8; School Dist. No. 17 *v.* Swayze, 29 Kan. 211.

Again, a school district may, through its officers, ratify or adopt any contract of a *de facto* officer, if the officers ratifying had authority to bind the corporation; and contracts made in the name of a corporation before it has a legal existence may be so ratified and adopted after it is incorporated. Dubuque Female College *v.* District Tp., 13 Iowa 555.

1. Baker *v.* Chambles, 4 Greene (Iowa) 428; Le Couteulx *v.* Buffalo, 33 N. Y. 335.

Where a school board made a contract with one of its members for the purchase of a schoolhouse site, and the board was acting in good faith, it was held that such contract was voidable only and not void, and if afterwards ratified by the resolution of a new board with knowledge of all the facts, it became binding. Trainer *v.* Wolf, 140 Pa. St. 279. See Pickett *v.* School Dist. No. 1, 25 Wis. 551; 3 Am. Rep. 105.

The boards of trustees for common schools in the city of New York in the different wards are held to be corporations to the extent of holding property transferred to them for school purposes, and are empowered to take property by bequest for the benefit of their schools. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317.

tracts in relation to school matters,[1] assessing taxes upon the inhabitants in order to maintain schools,[2] and suing and being sued in the corporate name.[3] As a consequence of this statutory

A school district holds its property in trust for beneficiaries whose equitable rights in the trust estate are not created by the incorporation nor lost by the dissolution of the trustee. School Dist. No. 3 *v.* Greenfield, 64 N. H. 84.

Under the constitution and laws of this State, school property is held in trust for school purposes by the persons or corporations authorized for the time being to control the same, and it is within the power of the legislature at any time to change the trustee. Carson *v.* State, 27 Ind. 465.

A school district corporation does not lose its title to land by non-user thereof for a time less than twenty years. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

Division of Fences.—A school district has the same power as any other landowner in respect to agreeing with the adjoining proprietor for the maintenance of division fences between their respective lands. Thus, where a school district authorized its trustee to accept a conveyance of land to be used as a site for a public school, and to agree, as part of the consideration for the conveyance, that the district shall build and keep in repair the whole of the division fence between such land and adjoining land of the grantor, such contract was valid. Albright *v.* Riker, 22 Hun (N. Y.) 367.

Consideration.—Where the purpose of certain land conveyed to a town was that a schoolhouse might be erected thereon and a school maintained for a certain time, the object of such conveyance was sufficient consideration to support it. Castleton *v.* Langdon, 19 Vt. 210.

Abandonment. — Where land had been conveyed to school trustees as a site for a schoolhouse, and a condition in the deed was that if the property should cease to be used for school purposes it should revert to the grantor, and a schoolhouse was erected upon the ground and a school kept therein six months in each year for a number of years, until a family without the permission of the school authorities took possession of the house and occupied it for a period of one year, it was held that the facts did not show such an abandonment of the premises as that they would revert to the grantor and entitle him to re-enter; and if the party occupying the schoolhouse as a resident entered under the grantor without the permission of the school authorities, or as an intruder, in neither case would it operate as an abandonment of the premises for school purposes. Barber *v.* Trustees, 51 Ill. 396.

Sale.—Under *Pennsylvania* act of 1836, § 14, the directors of a school district have power to sell property purchased for school purposes when it is no longer required for those purposes, and the question whether or not it is so required is entirely within the discretion of the directors. McCullough *v.* School Directors, 11 Pa. St. 476. See Samuels *v.* Poplar Plains, 4 Bush (Ky.) 252, where it was held that the trustees, in reinvesting the proceeds of the sale of school property, could not be held responsible as for a misapplication of the fund.

1. Baker *v.* Chambles, 4 Greene (Iowa) 428.

2. As to power of school district to tax its inhabitants, see TAXATION.

It is competent for the legislature to delegate the power of assessing taxes for local school purposes to the inhabitants of the various localities, but the provisions of the law providing for such local taxation must be open to all school corporations of like character, and the statute must be general in its nature and operation. Robinson *v.* Schenck, 102 Ind. 307; 11 Am. & Eng. Corp. Cas. 429.

As a rule, it requires a majority vote of the assembled inhabitants of the school district to order money to be raised by taxation for the erection of schoolhouses. Lee *v.* School Dist. No. 1, 36 N. J. Eq. 581; 3 Am. & Eng. Corp. Cas. 560.

3. McLoud *v.* Selby, 10 Conn. 390; 27 Am. Dec. 689; School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140; School Dist. No. 11 *v.* Williams, 38 Ark. 454; Donnelly *v.* Duras, 11 Neb. 283; Barnet *v.* School Directors, 6 W. & S. (Pa.) 46; Denniston *v.* School Dist., 17 N. H. 492; Gould *v.* Board of Education, 33 Hun (N. Y.) 16; School Dist. No. 3 *v.* Macloon, 4 Wis. 79; Fourth School Dist. *v.* Wood, 13 Mass. 192; South School Dist. *v.* Blakeslee, 13 Conn.

227; School Dist. *v.* Pillsbury, 58 N. H. 424, where it was held that if no name was required to be designated by statute, a school district might acquire a name by reputation under which it may sue and be sued.

The board of trustees of the normal school at Oskaloosa, organized under *Iowa* act of January 15, 1849, was not a body capable of suing or of being sued. Brake *v.* Board of Trustees, 11 Iowa 54.

A school district by its trustees may maintain an action for trespass upon school lands, although they may not themselves be in the actual occupancy of the premises. Barber *v.* Trustees, 51 Ill. 396; Alderman *v.* School Dist., 91 Ill. 179.

So in *Pennsylvania*, under the school law of 1836, the directors may maintain an action of ejectment against an intruder on the property of the district. Klinkener *v.* School Directors, 11 Pa. St. 444.

In *New Hampshire*, under the present law, the school district may, if money has been paid to the prudential committee which he fails to appropriate to its proper use, maintain an action against him to recover such money. School Dist. No. 7 *v.* Sherburne, 48 N. H. 52; School Dist. *v.* Tuttle, 26 N. H. 470; see Barrett *v.* School Dist., 37 N. H. 449; School Dist. *v.* Esty, 16 N. H. 146. But in *Maine* it has been held that school districts are under no legal obligations to support schools and have no power to raise money for that object; that the law imposes this duty on towns, and therefore the school district cannot maintain an action against an agent to recover school money assigned by the town for the support of schools in that district, although such agent has received it of the town. School Dist. No. 3 *v.* Brooks, 23 Me. 543.

Where a school district denies any indebtedness or liability, an ordinary action may be brought to ascertain and determine the amount of the indebtedness or liability, if any; but where the legal liability to pay and the amount claimed are admitted, and the school district officers wilfully refuse to pay or to levy a tax for such purpose, then a mandamus is alike a proper and sufficient remedy. School Dist. No. 49 *v.* School Dist. No. 70, 20 Kan. 76.

In an action by a school district, the petition need not set out the manner of the formation of the district. Fort Dodge City School Dist. *v.* Wahkansa, 15 Iowa 434. See Alderman *v.* School Directors, 91 Ill. 179.

In assumpsit, by the builder against a school district, to recover pay for building a schoolhouse and furnishing materials therefor, the defendants cannot object to the absence of proof of a legal meeting to determine upon the building and raising of the money therefor, unless they have raised such objection by their specifications of defense. Collins *v.* School Dist. No. 7, 52 Me. 522.

Jurisdiction.—In *Kansas* a justice of the peace has no jurisdiction of a suit against a school district where the amount involved exceeds $100. Jones *v.* School Dist. No 47, 8 Kan. 362.

Name in which Suit Is Brought.—A school district must sue or be sued in the name by which it is known at the time of the commencement of the suit. Thus in a suit against a school district for injuries caused by its negligence, etc., it appeared that between the occurring of the action and the bringing of the suit the name of the corporation had been changed by the legislature. The complaint alleged that the limits of both districts were the same, and it was held that the suit was properly instituted against the district by its new name. Gould *v.* Sub-district No. 3, 7 Minn. 203.

An action by a teacher to recover for his services must be brought against the district by its corporate name, and not against the trustees in their individual names with description appended. Sproul *v.* Smith, 40 N. J. L. 314.

In *Indiana*, by §§ 4, 5, act of March 1865 (Rev. Stat. 1881, 4438), every incorporated town is a corporation for school purposes, as well as a civil town, the two corporations being separate and distinct. School Town *v.* Gebhart, 61 Ind. 187; Johnson *v.* Smith, 64 Ind. 275. Under this statute a school township cannot sue or be sued in the corporate name of the civil township. Carmichael *v.* Lawrence, 47 Ind. 554; Wingate *v.* Harrison School Tp., 59 Ind. 520; Utica Tp. *v.* Miller, 62 Ind. 230; Sims *v.* McClure, 52 Ind. 267; Braden *v.* Leibenguth, 126 Ind. 336. See Jarvis *v.* Shelby Tp., 62 Ind. 257. But in Noblesville *v.* McFarland, 57 Ind. 335, it was held that the character in which an incorporated town may sue or be sued as a school

corporation may be designated either in the title of the action as a school corporation, or in the complaint by an allegation of that fact. *Compare* McLaughlin *v.* Shelby Tp., 52 Ind. 114; Jackson Tp. *v.* Barnes, 55 Ind. 136; Huntington *v.* Day, 55 Ind. 7; Wright *v.* Stockman, 59 Ind. 65.

Where a suit is instituted in the individual names of school directors, in reference to a matter in which they are only interested in their corporate capacity, it is proper to amend the title of the cause by striking out the individual names of the directors, and substituting their corporate name. The individual names in such case are regarded as surplusage. Shoudy *v.* School Directors, 32 Ill. 290; Barnet *v.* School Directors, 6 W. & S. (Pa.) 46; Kingsley *v.* School Directors, 2 Pa. St. 28. See Manlove *v.* McHatton, 5 Ill. 95.

Where under ch. 182, *Wisconsin* Laws of 1869, a town which was formerly part of a joint school district adopted the township system of school government, under which all the powers of the school district board were conferred upon the town board as a corporation, it was held that the board of school directors of the town were the legal successors of the joint school district of which the town was formerly a part and might sue in their own name. School Directors *v.* Coe, 40 Wis. 103.

In Donnelly *v.* Duras, 11 Neb. 285, it was held that a school district is a body corporate, authorized to sue and be sued under *Nebraska* Gen. Sts., ch. 68, § 2. The suit must be in the name by which the district is known, and not in that of its treasurer, who may under certain circumstances appear on behalf of the corporation and attend to the prosecution or defense as the case may be, but in such case he must act in the name of the district.

Parties.—The inhabitants of a school district have no estate, in any form, in the property belonging to the district, and the district alone can bring trespass *quare clausum fregit.* Chaplin *v.* Hill, 24 Vt. 528.

Suit to compel a deed for property used as a schoolhouse site can only be maintained in *Illinois* in the name of the trustees of the school, or of some tax-payer or other person having a pecuniary interest in the matter, by showing that the trustees refused to perform their duties. The law invests the school directors with no such interests. Wilson *v.* School Directors, 81 Ill. 180.

Where a school commissioner of a county has defaulted, the trustees of each district in the county have a separate cause of action against him and his sureties. Such an action brought in the name of the trustees of all the districts in the county would be a misjoinder of parties plaintiff. Hammond *v.* Crawford, 9 Bush. (Ky.) 75.

The treasurer of a school district could not, under the act of 1838, sue in his own name for money due to the district. Crawford *v.* Dean, 6 Blackf. (Ind.) 181.

Where a committee duly appointed by a school district employ a person to labor for their principal, they cannot maintain a suit to collect the amount due such person and pay it to him, but the person employed must bring an action in his own name to recover of the district the amount due him, though he is one of the committee employed by it in good faith. Junkins *v.* Union School Dist., 39 Me. 220.

A suit for an injunction to save the equitable and beneficial rights of a school district by preventing rival parties, each claiming to be committeemen, from making contracts in its name, should be brought by the district, or perhaps by a tax-payer of the district, but a suit for an injunction by individuals having no personal interest in the matter in controversy, except as the right to an office is involved, cannot be maintained. Hinckley *v.* Breen, 55 Conn. 119.

Where a district township abandons its organization and the territory is organized into independent districts, a creditor of the district township may join such independent districts as the defendants in an action upon his claim and a joint and several judgment may be rendered against them therein. District Tp. *v.* District Tp., 52 Iowa 72. See Independent School Dist. *v.* District Co. Ct., 48 Iowa 182.

And in such case the district court has jurisdiction to issue a writ of mandamus commanding the directors of the independent districts to apportion the amount of the judgment amongst them. Kennedy *v.* Independent School Dist., 48 Iowa 189.

Suits Concerning Lands.—The trustees of common schools, elected under the act of January 11, 1853, and not the township commissioners, are entitled to sue for such funds as arise from the

power to sue and to be sued it seems that a school district may submit a question in dispute to arbitration,[1] appoint and instruct agents to prosecute and defend a suit, withdraw defenses and

sale of the 16th sections in the several townships, and such other funds as are excepted by the act (Dig., ch. 145, § 12), out of those placed under the control of the board of county commissioners. Cloud *v.* Danley, 16 Ark. 699.

Where the State holds lands of a township in trust for common school purposes, the trustees of the schools of the township may sue in equity in matters affecting such lands. Moore *v.* School Trustees, 19 Ill. 83.

The board of education of the city of San Francisco is authorized by the act creating it to bring suit for lands conveyed to them by the school-fund commissioners. Board of Education *v.* Fowler, 19 Cal. 11.

Although under the *Arkansas* act of January 11, 1853, in relation to common schools, the trustees of common schools are the proper parties to bring suits on notes given for the purchase of the 16th sections, yet the school commissioner, to whom a note has been given for such purchase under a previous law, having the legal title, may well bring suit on such note. Tatum *v.* Tatum, 19 Ark. 194.

In *Mississippi*, county superintendents are, under the constitution and laws of 1870, the legitimate successors of the presidents of boards of trustees of the superseded systems and have the right to sue for and recover moneys due to such trustees for the purchase of lands sold by them. Simmons *v.* Holmes, 49 Miss. 134.

Service of Process.—The treasurer of the school district is an officer thereof and the service of an original notice upon him in an action against the district constitutes service upon the district. Kennedy *v.* Independent School Dist., 48 Iowa 189.

In *Missouri* process is served on the president of the board of school directors in a suit against the district. Carr *v.* Belton School Dist., 42 Mo. App. 154.

Where a township is redistricted so that an old district ceases, if the trustees fail to apportion the indebtedness, and lay it upon the new organizations, the old district will be continued in existence for the purpose of enforcing its liabilities. In such case service upon those who were directors at the time of change will be sufficient, as they will constitute a body corporate for the purpose of enabling creditors to enforce the payment of their debts Rogers *v.* People, 68 Ill. 154.

Evidence.—The plaintiffs, suing as trustees of a school district, offered, as evidence that they were such, their affidavits and bonds. It was held that the evidence was sufficient. Eads *v.* Wooldridge, 27 Mo. 251.

Where the plaintiff, in an action of trespass against the collector and committee of a school society, to show the illegality of a tax imposed by such society, offered evidence to prove that the defendants, and other members of the society, voted for the tax, with the intention of having the proceeds distributed among the several districts in the society; it was held that such evidence was admissible. Bartlett *v.* Kinsley, 15 Conn. 327.

Where two persons are authorized by a board of school directors of a district to make a contract on their behalf, a contract signed and sealed by one only is not admissible in evidence, in an action of covenant brought against the school district. McLain *v.* Snyder Tp. School Dist., 12 Pa. St. 204.

In Wormley *v.* District Tp., 45 Iowa 666, it was held that the books of the secretary of a school district, showing the amount of its indebtedness, are admissible in an action against the district upon its orders wherein it is pleaded they were issued in excess of the legal limit of indebtedness; and the defendant having alleged that the indebtedness which was the cause of the action was incurred by reason of a fraudulent agreement between the plaintiff and its own agents, it was competent for the plaintiff to show that the indebtedness was sustained by a valid consideration.

A certificate of a township trustee acknowledging the purchase of and agreement to pay for certain books is evidence of the liability of the school township for the books. Jackson School Tp. *v.* Hadley, 59 Ind. 534.

1. District Tp. *v.* Rankin, 70 Iowa 65.

confess judgment,[1] and raise money to defray the expenses of litigation.[2]

Where a judgment has been obtained against a school district, the private property of an individual member may be taken in satisfaction thereof;[3] but in such case it seems the district is liable over to the member.[4]

6. Dissolution.—As legislatures have power to organize and alter school districts, so they may make provisions for the dissolution or abolition thereof.[5]

1. Denniston *v.* School Dist., 17 N. H. 492; Gould *v.* Board of Education, 34 Hun (N. Y.) 16. See Templin *v.* Dist. Tp., 36 Iowa 411; Bassett *v.* Fish, 75 N. Y. 303.

But the prudential committee of a district have no authority to employ an attorney in the name of such district to defend a suit against an officer thereof in which it may be interested without a vote to that effect. Harrington *v.* School Dist. No. 6, 30 Vt. 155.

In *Wisconsin*, the statute (Rev. Stat. 1850, ch. 19, § 17) requires the school director to defend suits against the district, unless otherwise specially directed by vote; and he can recover from the district the expenses thereof. Fobes *v.* School Dist., 10 Wis. 117.

In *Michigan*, under Comp. Laws of 1871, § 3613, the management of suits brought by or against the school district is given to the assessor when no other direction has been given by the voters in a district meeting, and where it does not appear that the assessor is interested adversely. School Dist. No. 4 *v.* Wing, 30 Mich. 351.

In *Nebraska* it is the duty of the treasurer of a school district to appear for and on behalf of his district in all suits brought by and against the same, unless other directions were given by the voters at a district meeting, or unless his interests are adverse to the district, in which case the director may appear. When the action is not brought by the treasurer, petition should state the cause. Bowen *v.* School Dist. No. 3, 10 Neb. 265.

Individual members of a school district have no right to appear and be heard in defense of an action against the district. Lane *v.* Fourth School Dist., 10 Met. (Mass.) 462.

In McCaffrey *v.* School Dist. No. 1, 74 Wis. 100, it appeared that the plaintiff had been employed by the director of a school district to defend a suit in a justice's court. Upon the discontinuance of such suit and commencement of another in the circuit court, the electors of the district appointed a committee of three to defend the suit and subsequently a proposition to rescind the action was voted down. It was held that the plaintiff had a valid contract of employment and the district could not resist his right of compensation because the committee stood in the relation of public officers to the district.

A contract made on behalf of a school board for the services of an attorney is binding, although not in writing and not pursuant to an order entered on the minutes of the board. Page *v.* Township Board of Education, 59 Mo. 264.

2. School Dist. No. 1 *v.* Bailey, 12 Me. 254.

3. McLoud *v.* Selby, 10 Conn. 390; 27 Am. Dec. 689; Kenyon *v.* Clarke, 2 R. I. 67; Gaskill *v.* Dudley, 6 Met. (Mass.) 546; 39 Am. Dec. 750, where it was further said that the property of an individual may be so taken, in the first instance, even if there is corporate property of the district which can be taken and applied towards satisfaction of such execution.

4. Gaskill *v.* Dudley, 6 Met. (Mass.) 546; 39 Am. Dec. 750; Miller *v.* East School Dist., 26 Conn. 521.

Under *Minnesota* Gen. St. 1878, ch. 36, § 119, the treasurer of a school district is authorized to pay a judgment against the district only out of money not otherwise appropriated. He has no authority to do so out of moneys of the district applicable only to other specific purposes. School Dist. *v.* Roach, 43 Minn. 495.

5. **Dissolution and Abolition.**—In Rawson *v.* Spencer, 113 Mass. 40, it was held that the statutes abolishing school districts (Gen. Sts., ch. 39, § 3; and Stats. of 1869, ch. 110, 423) were not unconstitutional upon the ground that by them the property of the districts was taken without compensation, or that the

VII. SCHOOL BUILDING—1. Control, Erection, etc.—The power to provide schoolhouses, and to determine the amount necessary to defray the expenses incident thereto, is primarily in the school district or the school trustees.[1] When the district is empowered

taxes to be imposed under them were not proportional and reasonable, or that they impaired the obligation of contracts.

By *Massachusetts* Sts. 1882, ch. 219, all school districts were again abolished in that State.

In Mendell *v.* Marion, 16 Gray (Mass.) 353, it was held that the statutes by which the redistricting of towns into school districts oftener than once in ten years was forbidden, did not prevent towns from abolishing all school districts.

In Whitney *v.* Stow, 111 Mass. 368, it was held that a statute imposing upon towns the debts of their school districts, which have been abolished by a previous statute passed at the same session of the legislature, is constitutional.

As to the abolishment of an independent district consisting of territory adjacent to a city of 10,000 inhabitants, by being annexed to such city for school purposes under Washington sess. laws 1889–90, § 1, see McGovern *v.* Fairchild, 2 Wash. 479.

Where the town superintendent is authorized by statute to alter or abolish incorporated school districts, either alone or acting in conjunction with the trustees of the district, with the assent of a majority of the legal voters of the district, and the certificate required in case of such alteration or abolishment recites that three adjoining districts have been abolished by the consent of the majority of the legal voters in each of the three districts, and is signed by the superintendent and by two of the three trustees of each district, such proceeding is invalid. State *v.* Barrett, 31 N. J. L. 31.

A certificate from the trustees and town superintendents to the county clerk, that a majority of the taxable inhabitants have consented to the abolition of the school district, does not satisfy the statute requiring a certificate of the fact of abolition, and therefore will not be required of the trustees by mandamus, although such consent has been given, etc. State *v.* Jacobus, 26 N. J. L. 135.

In *Vermont*, when a union district is once legally formed, it can only be dissolved by application to the county court under the statutes (Comp. Stat. 150, ch. 20, § 47); neither of the towns out of which it is created can destroy it. Bowen *v.* King, 34 Vt. 156. See also Pierce *v.* Whitman, 23 Vt. 626; Lathrop *v.* Sunderland (Vt. 1892), 23 Atl. Rep. 619.

Where a school district was formed by a special act of the legislature, the board of inspectors were held not to have any authority to dissolve it. School Dist. No. 13 *v.* Dean, 17 Mich. 223. See People *v.* Davidson, 2 Doug. (Mich.) 121.

Where an attempt to dissolve a school district was void by reason of illegal voting at the election held to vote on the question of dissolution, a tax-payer may enjoin a sale, by the school inspectors, of the schoolhouse and other property. Briggs *v.* Borden (Mich. 1888), 38 N. W. Rep. 712.

In *Illinois* it has been held that, in proceedings under the statute for the dissolution of union school districts, the county superintendent cannot act respecting the apportionment of the property to each district except where the trustees refused the prayer of the petitioners, in which case he may order the trustees to make such change or changes; and where on an appeal from the order of the board of trustees the county superintendent reversed their action, it was not error for the circuit court to quash the proceedings had before the superintendent. Badger *v.* Knapp, 7 Ill. App. 222.

1. Colt *v.* Roberts, 28 Conn. 330; Sheldon *v.* Central School District, 25 Conn. 224; School District No. 2 *v.* Stough, 4 Neb. 357.

By the provisions of law, the power to provide schoolhouses or rooms, and to employ and dismiss teachers, is primarily in the school district; if the district neglect or refuse to act, the committee are authorized to provide rooms and employ teachers at the expense of the district. Gilman *v.* Bassett, 33 Conn. 298.

In *Indiana* it has been held that it is for the township trustees to provide the schoolhouse. Crist *v.* Brownsville Tp., 10 Ind. 461; Heal *v.* Jeffer-

son Tp., 15 Ind. 431. See also Fatout *v.* Board of School Com'rs, 102 Ind. 223.

In George *v.* Second School Dist., 6 Met. (Mass.) 497, it was held that a school district did not exceed its power by an agreement with a builder that he should erect for a certain sum a schoolhouse and build a public hall over the same to be his property, he allowing the district to have the use of the hall for meetings, examinations, etc. See also Sheldon *v.* Centre School Dist., 25 Conn. 224; Greenbanks *v.* Boutwell, 43 Vt. 207.

Power is given, in the first instance, to each school district, by vote, to raise money to build or repair schoolhouses for the use of the district, and to locate the same; but on their unreasonable neglect or refusal, the jurisdiction devolves on the selectmen of the town. Blake *v.* Sturtevant, 12 N. H. 567.

In *Arkansas* school directors have no power to build a schoolhouse with funds of the district unless authorized by the annual school meeting held at a time prescribed by statute. Fluty *v.* School Dist., 49 Ark. 94.

In Stevenson *v.* District Tp., 35 Iowa 462, it was held that the board of directors having power to make contracts for the erection of a schoolhouse may ratify an informal contract by their acts.

In *Illinois* it was held that under Rev. Sts., ch. 122, § 8, the board of education had no power to enter into a contract for the erection of a schoolhouse without the petition of a majority of the voters of the district. Board of Education *v.* Roehr, 23 Ill. App. 629; School Directors *v.* Fogleman, 76 Ill. 189.

In *Dakota* it is held that the power to authorize the building of a schoolhouse is vested exclusively in the inhabitants. Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dakota 255; Capital Bank *v.* School Dist. No. 85, 6 Dakota 248.

In *Nebraska* it is the qualified electors of the school district who have the authority to erect the school buildings and determine the expenditure for the same. Gehling *v.* School Dist. No. 56, 10 Neb. 239.

In *New York* it has been held that the school district could not delegate its power. Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

By the *Illinois* Laws 1855, p. 197, § 4, the school inspectors have power to erect, hire or purchase buildings for schoolhouses and keep the same in repair. Under this section it was held that the inspectors of Peoria might accept the use of a building for school purposes which had been built by the inhabitants of a certain district and fitted up at their own cost, notwithstanding the fact that the building was a few feet outside of the city limits. Grove *v.* School Inspectors, 20 Ill. 532.

Debts.—In *Indiana* the trustee of a school township cannot contract a debt for the erection of a schoolhouse which will make the aggregate debts chargeable to the special school fund exceed the amount of that fund on hand. Middleton *v.* Greeson, 106 Ind. 18; Roseboom *v.* Jefferson School Tp., 122 Ind. 377. See also School Dist. No. 2 *v.* Stough, 4 Neb. 357; Appeal of Luburg (Pa. 1889), 17 Atl. Rep. 245.

The school board has power to build a schoolhouse out of funds provided by the district for that purpose, but has no power to build, or cause to be built, a schoolhouse, and then make the cost of the building a charge against the district. Nevil *v.* Clifford, 63 Wis. 435.

In *Minnesota* it has been held that the trustees have power to incur indebtedness in the erection of schoolhouses, and postpone the payment of it to a future day, and to contract for interest, as the consideration of the forbearance. Robbins *v.* School Dist. No. 1, 10 Minn. 340.

Wisconsin Rev. St., § 434, confers on the district school board power to build a schoolhouse out of funds provided by the district for that purpose. It was held that no power exists to build a schoolhouse and then make its cost a charge against the district, this power being vested by *Wisconsin* Rev. St., § 430, in the voters. Nor can *Wisconsin* Laws 1883, ch. 166, be invoked as a ratification. Nevil *v.* Clifford, 63 Wis. 435.

For the purpose of building schoolhouses, purchasing schoolhouse sites, or for repairing or improving the same, school directors, by a vote of the people of their district, are authorized to borrow money, and give bonds therefor executed by any two of them. Folsom *v.* School Directors, 91 Ill. 402.

County Superintendent.—Under *Kentucky* Gen. Stats., § 7, art. 6 and 8, which provides that the county superintendent shall condemn dilapidated school

to erect the building, it is usual to exercise the authority through a committee appointed for that purpose or through the school directors.[1] It is not an unusual provision in statutes regulating school districts that the contract for the erection of a school building shall be given to the lowest responsible bidder.[2] Where through an informality the contract for the erection of a schoolhouse is voidable, an acceptance and use of the building by the

buildings when unfit for the uses designed, and it shall be the duty of the trustees to have a new building erected, or the old one repaired when notified by the superintendent, it was held that the action of the superintendent and trustees in condemning an old building and erecting a new one cannot be questioned by a tax payer. School Dist. No. 1 *v.* Jamison (Ky. 1891), 15 S. W. Rep. 1.

Municipality.—In Danielly *v.* Cabaniss, 52 Ga. 211, it was held to be within the scope of a municipal corporation's authority to apply the corporate funds to the purchase of an interest in a building to be used as a public school.

See generally MUNICIPAL CORPORATIONS, vol. 15, p. 1058.

Bond.—In St. Louis Pub. Schools *v.* Woods, 77 Mo. 197, it was held that a school board of education having power to erect a schoolhouse might take a bond from the builder for the security of those who should labor or furnish material upon the building.

1. Building Committee.—The committee appointed by a school district according to statute to purchase and repair a schoolhouse are public officers and a majority of them have authority to act for the whole. Keyser *v.* District No. 8, 35 N. H. 477.

The powers of the building committee have been held to be limited to the amount voted by the district and they cannot bind the district beyond that amount. Wilson *v.* School Dist. No. 4, 32 N. H. 118; Harrison *v.* School Dist. No. 10, 28 N. H. 58. *Compare* Edinburg American Land, etc., Co. *v.* Mitchell (S. Dak. 1891), 48 N. W. Rep. 131.

But in Junkins *v.* Union School Dist., 39 Me. 220, it was held that it was no defense in an action against a school district that the committee expended a larger sum than that voted by the district, nor that the schoolhouse was worth no more than that sum.

Where one contracted to build a schoolhouse acceptable to the building committee and the committee not unreasonably refused to accept it when completed, it was held that he could not recover of the district the value of the material. Hill *v.* School Dist. No. 2, 17 Me. 316.

At a school meeting, it was voted to build a new schoolhouse or enlarge the old one, and a building committee was chosen with instructions "to proceed forthwith to complete the work which is on their hands." It was held that the committee had power either to build a new schoolhouse or to enlarge the old one. Morse *v.* School Dist. No. 7, 3 Allen (Mass.) 307.

In *New York* it has been held that the inhabitants cannot empower a building committee to advertise or make a contract for building a schoolhouse, without the assent of the trustees. People *v.* Banfield, 6 How. Pr. (N. Y.) 437.

In Junkins *v.* Union School Dist., 39 Me. 220, it was held that the majority of a building committee may employ one of their own number to build the schoolhouse, unless there is fraudulent or corrupt dealings, and that such member may recover in his own name from the district the amount of his claim.

But in Weitz *v.* Independent Dist., 78 Iowa 37, it was held that an agreement by a board of directors to employ one of their number to superintend the construction of a school building was void. See also Moore *v.* Independent Dist., 55 Iowa 654; People *v.* Township Board, 11 Mich. 222.

A committee, appointed by a school district to remove the schoolhouse of the district, has no authority to assess a tax to defray the expenses of such removal, nor can the district confer any such authority upon such committee. The prudential committee of the district is alone authorized by law to assess the tax. Johnson *v.* Sanderson, 34 Vt. 94. See also TAXATION.

2. The acceptance by the school directors of a bid other than the lowest does not constitute a contract. Weitz *v.* Independent Dist., 79 Iowa 423.

district will operate as a ratification and render the district liable to the contractor for the cost of the building.[1]

School directors, in the exercise of their discretion, may cause the school to be taught in a rented building instead of the public schoolhouse.[2]

The care, keeping and repairing of the schoolhouse and other property belonging to the district is in the district school board,[3]

In State *v.* Board of Education, 42 Ohio St. 374, it was held that clause 4 of the Revised Statutes of *Ohio*, § 3988, which provides that a board of education engaged in the erection of a school building "may, in its discretion, reject all bids," did not authorize the acceptance of any but the "lowest responsible bid."

Where the township boards of education are required by statute to advertise a contract for building a schoolhouse and let the same to the lowest responsible bidder, they cannot delegate their authority to the local directors of the sub-districts. Board of Education *v.* Mills, 38 Ohio St. 383.

1. Keyser *v.* District No. 8, 35 N. H. 477; Chapin *v.* School Dist. No. 2, 30 N. H. 25; Fisher *v.* School Dist. No. 17, 4 Cush (Mass.) 494; Sullivan *v.* School Dist. No. 39, 39 Kan. 347; Kimball *v.* School Dist. No. 8, 28 Vt. 8; Bellows *v.* District Tp., 70 Iowa 320.

Where a building committee had erected a schoolhouse, and their action had been ratified by the district with full knowledge of all the facts, it was held that the mere fact that title to the land in fee had not been secured to the district furnished no defense in an action brought by one of the committee to recover money furnished in the erection of the schoolhouse. Davis *v.* School Dist., 44 N. H. 398. See also Norris *v.* School Dist. No. 1, 12 Me. 293; 28 Am. Dec. 182.

Where, however, the vote of a school district authorizing the building of a schoolhouse was absolutely void for lack of corporate power, no subsequent acts of ratification or acceptance, it was held, could give validity to a claim for the cost of the building. Brown *v.* School Dist. No. 6, 64 N. H. 303; Capital Bank *v.* School Dist. No. 85, 6 Dakota 248. See also School Directors *v.* Fogleman, 76 Ill. 189.

2. Millard *v.* Board of Education, 19 Ill. App. 48; 121 Ill. 297; Scripture *v.* Burns, 59 Iowa 70.

In an action against a school district, for rent of a room, hired for the use of the school, it is no defense that the school was continued by private contributions, that the instructors were not legally employed or duly qualified, or that the town had not legally distributed the school fund. Allen *v.* School Dist. No. 2, 15 Pick. (Mass.) 35.

3. Culver *v.* Smart, 1 Ind. 65; Williams *v.* Peinny, 25 Iowa 436; School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

And as an incident of this authority they may bring suit for an injury to the schoolhouse. School Dist. No. 8 *v.* Arnold, 21 Wis. 657; Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175.

A school district is bound by the contract of its board for repairing schoolhouses, and this notwithstanding the fact that at an annual meeting a sum was voted for certain specified repairs and such sum had already been expended. Conklin *v.* School Dist. No. 37, 22 Kan. 521.

It is no defense to a suit to recover for labor and materials furnished in repairing a schoolhouse, under contract with a committee appointed by the municipal officers, by virtue of R. S., ch. 11, § 28, that the building has been unlawfully removed by the selectmen from the lot belonging to the district. Knowles *v.* School Dist. No. 10, 63 Me. 261.

A school district cannot be considered as promising to pay for unauthorized repairs upon their schoolhouse by using it afterwards. Davis *v.* School Dist. No. 2, 24 Me. 349.

By implication, the prudential committee of a school district must have the right to occupy the schoolhouse, when the school is in operation; but the statute or implications growing out of the general powers and duties of the prudential committee, does not give him the exclusive control of the schoolhouse in his district; that power must be in the district. Chaplin *v.* Hill, 24 Vt. 528.

In *New Hampshire*, it was held that a prudential committee could not recover of the district money expended

and the directors may, in general, supply the necessary appendages to the schoolhouse without special authority from the district.[1] When a schoolhouse has become unfit for use, it may be sold by the district.[2] In general the use of a schoolhouse for any other than school purposes cannot be authorized.[3] It has been held that the lease of a public schoolhouse for a definite

for slight occasional repairs; but that such repairs should be made from the school money assigned to the district. Giles *v.* School Dist. No. 14, 31 N. H. 304.

So it was held that the committee of a school district, who have caused repairs to be made upon the schoolhouse, cannot maintain an action on the case in their own names, against the selectmen, for not paying over to them money voted to be raised by the district for the purpose of making such repairs, and assessed by the selectmen in pursuance of such vote. Staples *v.* French, 10 N. H. 72.

Contracts for "repairs" of a schoolhouse have been held in *Iowa* to be entirely under the control of the board of directors of the district township. Williams *v.* Peinny, 25 Iowa 436.

Insurance.—In *Rhode Island* it has been held that the power to insure the schoolhouse and its appendages is vested in the district, and not in the trustee; but a legal vote of the district to raise money to pay the premium would amount to a ratification of the trustee's act in insuring. Holt's Appeal, 5 R. I. 603.

Where a town is incorporated within the limits of a school township, a schoolhouse situated within the limits of the town passes under the control of the school trustees of the town. Carson *v.* State, 27 Ind. 465.

1. Thus in Hemme *v.* School Dist. No. 4, 30 Kan. 377, it was held that a well was a necessary appendage to a schoolhouse, and the school board might bind the district for digging it.

A trustee under the laws of *New York* 1887, ch. 538, may contract for the building of an out-house. Rauscher *v.* Cronk (Supreme Ct.), 3 N. Y. Supp. 470.

A line fence is a "necessary appendage" to a schoolhouse. Creager *v.* School Dist. No. 9, 62 Mich. 101.

In Mayor, etc., of Baltimore *v.* Weatherby, 52 Md. 442, it was held that a board of school commissioners might contract for a heating apparatus for the school, without a previous ordinance prescribing the formalities and the agencies through and by which such contract could be made.

In McLaren *v.* Town Board, 48 Mich. 189, it was held that a township school director had authority to buy new seats for a schoolhouse under a resolution adopted at the annual meeting of the school district, "that the school board fix schoolhouse ready for the winter term."

2. Whitmore *v.* Hogan, 22 Me. 564; School Dist. No. 6 *v.* Ætna Ins. Co., 54 Me. 505; Ackerman *v.* Vail, 4 Den. (N. Y.) 297.

Maine Rev. Stat., ch. 11, § 22, empowers school districts to sell and dispose of any schoolhouse or other property, if necessary, and the school district is the judge of this necessity. School Dist. No. 6 *v.* Ætna Ins. Co., 54 Me. 505.

3. School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

Religious Purposes—(See also *supra* this title, *Bible in Schools*).—In Davis *v.* Boget, 50 Iowa 11, it was held that the electors of a district township when legally assembled might anthorize the use of the schoolhouse of the district for religious purposes; and that under authority thus conferred, a sub-director is empowered to permit the schoolhouse of the sub-district to be so used, and that such use of a schoolhouse is not prohibited by the constitution. See also Townsend *v.* Hagan, 35 Iowa 194.

In Hurd *v.* Walter, 58 Ind. 148, it was held under the *Indiana* statute that, upon the application of a majority of the legal voters of any school district to the proper officers, a schoolhouse might be used for religious purposes.

In Nichols *v.* School Directors, 93 Ill. 61; 34 Am. Rep. 160, it was held that a statute providing that the school directors might grant the temporary use of schoolhouses, when not occupied by schools, for religious meetings and Sunday schools was not unconstitutional.

But in Dorton *v.* Hearn, 67 Mo. 301, it was held that the board of directors of a school district could not authorize a school building, put up and furnished under the school law, to be used

term for use as a private school was unauthorized and might be restrained.[1]

2. Site.—The choice of a site upon which to erect a suitable school building is left, in some States, to the determination of inhabitants of the district themselves, as ascertained by their votes at a meeting held for the purpose,[2] while in other States, the

for the purpose of teaching a Sunday school.

And in Scofield *v.* Eighth School Dist., 27 Conn. 499, it was held that the inhabitants of a school district have no right to use the schoolhouse of the district for religious meetings and Sunday schools against the objection of any taxpayer of the district, even though the district may have voted to allow such use.

So in Spencer *v.* Joint School Dist. No. 6, 15 Kan. 259; 22 Am. Rep. 268, it was held that the use of a public schoolhouse for any private purpose, such as the holding of religious or political meetings, social gatherings, and the like, is unauthorized by law and may be restrained at the instance of any party injured thereby, and this though a majority of the electors and tax-payers of the district consent to such use. See also State *v.* District Board, 76 Wis. 177; 20 Am. St. Rep. 41; School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

Township Purposes.—In Harmony Tp. *v.* Osborne, 9 Ind. 458, it was held that the township trustees might use the schoolhouse for township purposes.

1. Weir *v.* Day, 35 Ohio St. 143. In that case it was said that by virtue of the statute regulating school districts, all public schoolhouses were vested in boards of education in trust for use of the public or common schools, and the appropriation of them to any other use was unauthorized and unlawful.

In Chaplin *v.* Hill, 24 Vt. 528, it was held where a district voted to have a private school in the schoolhouse, and it did not appear that such school would not answer all the purposes of a public school and be open to all the children in the district, that there was nothing inconsistent with the rights of the district in allowing the school to continue there for the time being merely, the court said: "The district clearly could not confer any exclusive right to the possession of the schoolhouse for any definite time upon anyone. But while they could not use it for a school themselves, we do not perceive any perversion of the general rights and duties of districts to allow them to license others to give similar instruction therein upon terms which they approve." See also Russell *v.* Dodds, 37 Vt. 497

In Appeal of Barnes, 6 R. I. 591, it was held that the trustees of a school district, subject to the control of the district meeting, might permit the schoolhouse to be used out of school hours for the purpose of private instruction in vocal music.

2. Bean *v.* Prudential Committee, 38 Vt. 177; Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

In *Missouri*, the directors of a school district cannot of their own will and discretion select the schoolhouse site; that must be done at an annual meeting of the electors of the district. Seibert *v.* Botts, 57 Mo. 430; Black *v.* Cornell, 30 Mo. App. 641.

In *New York*, it is held that the site of a district school must be designated by the inhabitants at a district meeting. They are not empowered to delegate the authority to the trustees, and if they do so and vote a tax to be levied for the building of a schoolhouse on a site to be designated by the trustees, such proceeding is illegal and the trustees are trespassers for the taking of property under a warrant issued for the collection of such tax. Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

By *Dakota* Laws of 1879, ch. 14, § 29, it is provided that the inhabitants qualified to vote at a school district meeting lawfully assembled shall have power to designate by vote the site for a district schoolhouse. Under this statute it is very clear that the intent of the legislature was that the inhabitants and legal voters of the school district, as contradistinguished from the district board, should alone have the power and right to select the site for a schoolhouse, and that until they had exercised that right the district board were powerless to act. Farmers, etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255.

Vermont Comp. Stats., ch. 20, § 38, provides that each district may determine in what place the schoolhouse

trustees or other officers specified by statute are empowered to make the selection.[1] If the voters of the district are unable to settle upon a site, as where several are voted on and the requisite majority is not given to any, or if the minority are aggrieved by the selection, application sometimes may be made to certain

shall be located. This is meant to be done by a vote of the majority. The statute then proceeds as follows: "If the voters in the district cannot agree upon the location of the schoolhouse, the selectmen upon application of the prudential committee may fix upon the place." It was held that this was not intended to mean that all the voters must agree, and that if any one dissents the question must be left to the selectmen, but is only a provision for those cases where several locations may sometimes be advocated by different parties so that no one can command a majority of the votes. Bean *v.* Prudential Committee, 38 Vt. 175.

In Tozier *v.* School Dist. No. 2, 39 Me. 556, it was held that where the selectmen in the location of a schoolhouse do not appear to have acted under authority conferred upon them by the statute, in case of a disagreement on the part of the district, but in harmony with the whole district by its invitation and under a vote thereof passed without dissent, their acts under such circumstances are merely recommendatory and not compulsory.

Where it appears that a site for a schoolhouse has been chosen by the voters of the district, it will not be invalidated because the clerk had made irregularities or omissions in describing the site selected. Merritt *v.* Farriss, 22 Ill. 303.

1. Crist *v.* Brownsville Tp., 10 Ind. 461; Braden *v.* McNutt, 114 Ind. 214; Howland *v.* School Dist. No. 3, 15 R. I. 184.

Under *New Jersey* act of March 11, 1880, as now altered by act of February 1888, the power is given to the voters of a school district at an annual or special meeting to vote and appropriate money for the purchase or acquirement of lands and the construction of a schoolhouse at such place in the school district as the school trustees may designate. It was held that the trustees must designate at such meeting the place where the lands proposed to be purchased or acquired lie, and the voters must vote on the purchase or acquisition of the land so designated. State *v.* School Dist. No. 10, 52 N. J. L. 104.

Under *Rhode Island* Pub. Stats., ch. 56, § 5, providing that in case the school committee shall fix upon a location for a schoolhouse in any district, . . . and the district shall have passed a vote to erect a schoolhouse, then, if the owner of the land selected shall refuse to convey it, the committee shall appoint appraisers who shall determine the price to be paid, and upon tender of payment the title to the land shall vest in the district, it was held that the selection of the site was not a condition precedent to a vote by the inhabitants of the district to build the schoolhouse. Howland *v.* School Dist. No. 3, 15 R. I. 184.

In *Ohio*, under act of March 1853, the township boards have the power to designate the particular place where schoolhouses shall be built and where schools shall be kept in the sub-districts, and whatever powers are conferred upon the local authorities of sub-districts in respect to the selection of sites and the location of sub-district schools, they are to be exercised in subordination to the paramount authority of the township board. State *v.* Lynch, 8 Ohio St. 347; Hughes *v.* Board of Education, 13 Ohio St. 336.

In Witherop *v.* Titusville School Board, 7 Pa. Co. Ct. Rep. 45, it was held, that although the action of school controllers in selecting a site for the school building appeared unwise they will not be enjoined in the exercise of the discretion allowed them.

In Koontz *v.* State, 44 Ind. 323, it was held that a township trustee cannot by mandamus be required to locate and build a schoolhouse on land that does not belong to the township, notwithstanding the fact that the county examiner on an appeal from his decision has rendered a judgment requiring him to erect the schoolhouse on such land.

When the doings of the selectmen in locating a schoolhouse are reduced to writing, and returned to the town clerk for record, their duty is fully discharged, and no subsequent neglect of the town

specified officers of the district to designate another location,[1] or to appoint a committee for that purpose.[2] Where the site for a schoolhouse has been illegally or injudiciously selected, the remedy generally is by appeal to the county superintendent or county commissioner.[3]

clerk to make a due record will affect the validity of such location. Converse *v.* Porter, 45 N. H. 385.

1. Bean *v.* Prudential Committee, 38 Vt. 175; Tozier *v.* School Dist. No. 2, 39 Me. 556.

Where, under a statute providing that in case more than one-third of those present and voting at a meeting oppose the location made by the majority, the municipal officers may upon application decide where a schoolhouse shall be placed, the location made by such officers is defective by reason of the vague description of the premises to be taken, such defect will not render valid the preceding and different location objected to, and in such case the district must proceed anew to make a valid location. Norton *v.* Perry, 65 Me. 183.

2. True *v.* Melvin, 43 N. H. 503, where it was also held that in appointing such committee it is not necessary for the selectmen to give notice to the other parties interested. It was further held in this case that a selectman cannot properly act in the appointment of a committee where his brother is a party; and that the proper notice to be given to individuals and to the district of a hearing before such committee is that limited for the service of process on persons and corporations.

A location made by a committee appointed by the selectmen under *New Hampshire* Rev. Stat., ch. 75, §§ 1 and 2, has no greater effect than one made by the district. It is not conclusive, and if, after a decision by the committee, the district establishes a different location, their decision supersedes the award of the committee, which can no longer be regarded as binding on anybody. True *v.* Melvin, 43 N. H. 503.

3. Independent School Dist. *v.* Gookin, 72 Iowa 387; Adams *v.* Slate, 65 N. H. 188; State *v.* Custer, 11 Ind. 210; Braden *v.* McNutt, 114 Ind. 241; Knight *v.* Woods, 129 Ind. 101. See Gardiner's Appeal, 4 R. I. 602.

Where such selection has been made, an injunction and not a writ of mandate is the proper remedy to prevent township trustees from erecting a schoolhouse upon it, but a mandamus is the proper remedy to compel trustees to obey a decision of the superintendent of public instruction on an appeal from them establishing a schoolhouse for the district. State *v.* Custer, 11 Ind. 210. See Newby *v.* Free, 72 Iowa 379.

Under *New Hampshire* Gen. Laws, ch. 43, § 6, by which the location of a schoolhouse by the school district committee is conclusive for five years unless appealed from, a decision by the appellate tribunal of county commissioners, provided for by Gen. Laws, ch. 88, §§ 6 & 7, is conclusive for the same period of time. Stickney *v.* Orford, 64 N. H. 299. See Farnum's Petition, 51 N. H. 376.

The same statute provides that if ten voters of a school district are aggrieved by the location of a schoolhouse by the district or school committee they may apply by petition to the county commissioners, who shall hear and determine the location thereof. Under this statute the jurisdiction of such commissioners extends to towns in which the district system has been abolished, as such towns had power to abolish the same at the time such statute was enacted. Adams *v.* Slate, 65 N. H. 188.

In *Rhode Island* an appeal lies to the commissioner of public schools from the action of the school committee in locating a schoolhouse, and he may confirm or reverse the same, or make a new location. Until his decision is confirmed by the supreme court judge such commissioner may rehear the case, but after such confirmation it is final and another location can only be made on entirely new proceedings. Cottrell's Appeal, 10 R. I. 615.

Under *Indiana* Rev. St., § 4517, which provides that an appeal shall lie from a trustee's decision in regard to the location of a schoolhouse, such decision cannot be attacked in a proceeding for the condemnation of lands for such location. Braden *v.* McNutt, 114 Ind. 214.

A private person cannot, by virtue

The same general provisions are usually made in relation to a change of site.[1]

By the right of eminent domain a schoolhouse site may be taken from the land of a private person without his consent if damages therefor are paid or tendered him.[2] Before such taking

of being a citizen and tax-payer, maintain an action against a school district or its officers to restrain them from erecting or attempting to erect a schoolhouse upon a certain site, where such action on the part of the district would merely affect the interest of the public in general and not those of such private person in particular. Nixon *v.* School Dist. No. 92, 32 Kan. 510.

So in Parody *v.* School Dist., 15 Neb. 514, it was held that a petition which seeks to enjoin a school district from removing the schoolhouse of the district from its former site to another, must show that the petitioner will suffer some special damage not common to the public or it will not state facts sufficient to entitle him to the relief sought.

But a resident and tax-payer of a school district living only a half-mile from the legally located schoolhouse, and who has children of a school age, and whose taxes will be materially increased by a removal of the schoolhouse two and a half miles further from his residence, has such an individual interest as gives him the right to invoke a court of equity to restrain the illegal acts of the board in such removal. Graves *v.* Jasper School Tp. (S. Dak. 1892), 50 N. W. Rep. 904.

1. Change of Site.—Thus, in Buchanan *v.* School Dist., 25 Mo. App. 85, it was held that the directors of a school district incorporated under the general law would be enjoined from changing the site of a schoolhouse, or from building a new schoolhouse upon a new site, without first having obtained the sanction of the voters at an election held therefor under the law. See Graves *v.* Jasper School Tp. (S. Dak. 1892), 50 N. W. Rep. 904.

By statute in *Connecticut* a school district can change the location of its schoolhouse only by a two-thirds vote, § 17 of the act of 1856, authorizing committees of school districts to provide suitable rooms, not being intended to qualify this law. Colt *v.* Roberts, 28 Conn. 330.

In Holbrook *v.* Faulkner, 55 N. H. 311, it was held, where a school district, being in possession of a schoolhouse, voted to repair it, and to buy land enough to straighten the line west of the schoolhouse, that this was a sufficient location to give the county commissioners jurisdiction of a petition to change the location.

The remedy for inexpedient action of a district school board, in changing the site of a schoolhouse, is by appeal to the county superintendent; a court of equity will not interfere unless the board exceeds its jurisdiction. Vance *v.* District Tp., 23 Iowa 408.

In *Indiana* a township trustee has power to change the location of a schoolhouse after it has been established by the school examiner on an appeal to the latter from the decision of the trustee. Koontz *v.* State, 44 Ind. 323.

In *New York*, where the previous consent of the commissioners of common schools has not been obtained to a change of the site of a schoolhouse, the trustees of a district are liable in trespass for making an assessment and issuing a warrant for the collection of a tax to raise money to purchase a site of a schoolhouse and building a new schoolhouse on a site different from that on which the old house stood. Baker *v.* Freeman, 9 Wend. (N. Y.) 36; 24 Am. Dec. 117.

The selectmen of a town are not liable to indictment for neglecting on petition to remove a schoolhouse to a new site, designated by report of a committee, where it is not shown that the new site was the property of the school district, by purchase or otherwise, and no allegation is made that proper steps have been taken to have it laid out as a school lot. State *v.* Bailey, 21 N. H. 185.

2. Storer *v.* Hobbs, 52 Me. 144; Williams *v.* School Dist. No. 6, 33 Vt. 271; Long *v.* Fuller, 68 Pa. St. 170; Cousens *v.* School Dist. No. 4, 67 Me. 280. See also Hooper *v.* Bridgewater, 102 Mass. 512.

Payment or tender of the damages after the schoolhouse is built, and after the owner of the land sues in an action of trespass *quare clausum fregit*, affords

may be valid it seems that there must be an unqualified refusal on the part of the owner to sell the land at a reasonable price,[1] and he must be given proper notice of the intention of the parties taking.[2]

VIII. Officers—1. Superintendents—*a.* STATE SUPERINTENDENT.—In most States a state superintendent or superintendent of public instruction has general supervision and control of

no justification. Storer *v.* Hobbs, 52 Me. 144.

In Gibbons *v.* Southwest School Dist., 4 Allen (Mass.) 508, it was held that the tender of the appraised value of land which had been selected and laid out as a schoolhouse might be made to the owner's agent, who is in possession of the land, if the former is out of the commonwealth.

Before any proceedings can be had under *Massachusetts* Stats. 1848, ch. 237, and the subsequent statutes in addition thereto, in regard to the taking of land for schoolhouse sites, it is necessary that a suitable place shall have been designated by the town or school district for the erection of the schoolhouse agreeably to the provision of Rev. Stat., ch. 23. Therefore, where the building committee of a town had selected a lot and, upon refusal of the owner to sell it, applied to the selectmen to have a meeting called, and such meeting was called, "to see if the town will authorize the selectmen to select at their discretion a lot," and it was voted at such meeting that the selectmen should be authorized to select and lay out a schoolhouse lot, it was held that this was not a sufficient designation of land by the town to authorize the selectmen in condemning the lot chosen. Harris *v.* Marblehead, 10 Gray (Mass.) 40.

The selectmen may appraise the damages of a lot taken for a schoolhouse site at the time of laying out the same. Cousens *v.* School Dist. No. 4, 67 Me. 280.

In *Rhode Island*, under Gen. Stats., ch. 53, § 5; Pub. Stats., ch. 56, § 5, the school committee cannot appoint appraisers of the land fixed upon by the committee for a schoolhouse site before the district has voted for the erection of the schoolhouse. But the statute does not imperatively require that the location of a district schoolhouse shall be fixed before the district votes to build a schoolhouse, and, therefore, proceedings to condemn the land cannot be quashed because the district's vote preceded the school committee's location. Howland *v.* School Dist. No. 3, 15 R. I. 184.

Waiver.—The receipt by the owner of land taken for a schoolhouse lot, of the damages awarded him by the selectmen pursuant to *Massachusetts* Stats. 1848, ch. 237, § 1, estops him to object to the irregularity of their proceedings in such taking. Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

Where land had been taken for the location of a schoolhouse and the owner, after damages had been awarded him, petitioned the county commissioners for a change of location and an increase of damages, it was held that he thereby waived any mere irregularities in the location. Jordan *v.* Haskell, 63 Me. 193.

Right of Owner.—The owner of land taken for schoolhouse purposes has not the same right over the trees and fences as he has in case of land taken for a town way under *Massachusetts* Act 1848, ch. 98. Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

1. Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

An unqualified refusal on the part of the owner to sell lands selected by committee without calling for the authority of the party building, is a sufficient refusal to justify the selectmen in setting off the land. True *v.* Melvin, 43 N. H. 503.

2. Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

The fact that the vote of a district to which the municipal officers refer in the laying out of the lot speaks of an enlargement of their present schoolhouse lot, while the notice given by said selectmen to the land owner speaks of laying out the lot for schoolhouse and playground, will not invalidate the taking of such land if the other requirements of the statute have been complied with. Cousens *v.* School Dist. No. 4, 67 Me. 280.

See generally EMINENT DOMAIN, vol. 6, p. 509.

schools, school officials, and school funds,[1] and the power to hear and determine appeals from school directors, trustees, or other officers.[2]

1. In *Pennsylvania*, the state superintendent has "the power of removing any county superintendent for neglect of duty, incompetency, or immorality, and of appointing another in his stead until the next triennial convention." In Field *v.* Com., 32 Pa. St. 478, the court held that a removal could only be made by the state superintendent upon cause shown, and that there must have been a specific charge, notice, and opportunity for hearing and defense. But see People *v.* Mays, 17 Ill. App. 361. The superintendent of common schools cannot decide a question of contested election. Mershon *v.* Baldridge, 7 Watts. (Pa.) 500.

In *New York*, the state superintendent may remove any school commissioner or other officer who shall to the satisfaction of the superintendent be proven guilty of a violation or neglect of duty under any act of the legislature, or who shall willfully disobey any decision, order or regulation of the superintendent. People *v.* Draper, 63 Hun (N. Y.) 389.

The superintendent of public instruction has power to approve so much of the compensation allowed to a school fund commissioner as he deems reasonable, and to disprove the balance. Jones *v.* Benton, 4 Greene (Iowa) 40.

In State *v.* Sims, 76 Ind. 328, it was held that the state superintendent of public instruction and the state auditor were authorized by law to employ an attorney to collect a desperate claim due the common school fund of the State and that their contract in this behalf was the contract of the State.

The court, by a writ of mandamus, will compel the state superintendent to approve a claim of the school commissioner where such approval is a part of his official duties. Pickett *v.* Harrod, 86 Ky. 485.

2. State *v.* Whitford, 54 Wis. 150; Easton *v.* Calendar, 11 Wend. (N. Y.) 90; State *v.* Albertson, 54 N. J. L. 72; State *v.* Board of Education, 45 N. J. L. 100. But the power to determine appeals cannot be delegated to an assistant. Joint School Dist. No. 7 *v.* Wolfe, 12 Wis. 765.

In *Indiana*, an appeal will lie from the decision of township trustees to the state superintendent, and obedience to his order upon such appeal may be enforced by mandamus. State *v.* Custer, 11 Ind. 210.

In Desmond *v.* Independent School Dist., 71 Iowa 23, it was held that the superintendent of public instruction has the power to correct mistakes in rendering judgments in the case before him, possessed by all courts and judicial officers; if through mistake he should announce a decision differing from the decision actually rendered, he possesses the power to recall such announcement and publish the decision correctly, or if, mistakenly, he should render a decision, he could, before rights had been acquired under it and within a proper time, upon discovering his mistake, recall it and decide rightly. In Newby *v.* Free, 72 Iowa 379, it was held that the decision of the state superintendent upon an appeal was final, and that the court would enforce obedience to it by *mandamus*.

The decisions of the state superintendent, so far as they are *quasi* judicial, may be reviewed upon a writ of *certiorari*, but only to determine whether he had jurisdiction, and has acted according to law; and the writ will not warrant a review of mere questions of fact where there is any contention as to the proof, or the reversal of the judgment of the officer upon the *merits* of the case. State *v.* Whitford, 54 Wis. 150; State *v.* Graham, 60 Wis. 395. Although the *Wisconsin* statute declares that the decision of the state superintendent upon an appeal from a school board shall be final (Rev. Stat., § 166, subdiv. 4), yet it has been held that his action will be reviewed by the court upon writ of *certiorari*. State *v.* Thayer, 74 Wis. 48.

In *New York*, where the statute declares that the "decision of such superintendent shall be final and conclusive, and not subject to question or review in any place or court whatever" (act of 1864, § 1, tit. 12), it was decided that the court could not review his decision in an action in the nature of a *quo warranto* brought to try the title of a person holding the office of school trustee. Hill *v.* Collins, 34 How. Pr. (N. Y.) 336.

In Wood *v.* Farmer, 69 Iowa 533, it

b. COUNTY SUPERINTENDENT.—A county superintendent has the general supervision of the schools in the county. His powers and duties are derived wholly from statute.[1] These are, in general, to visit and examine the schools, condemn school buildings, require new buildings or school apparatus to be furnished, to grant and revoke teachers' certificates,[2] and hear

was held that the decision of the state superintendent upon all questions of fact involved in an appeal would be final. In Atkinson *v.* Hutchinson, 68 Iowa 161, a controversy arose in regard to the location of the schoolhouse. An appeal was taken from the decision of the county superintendent to the state superintendent, and afterwards the court by a writ of *mandamus* compelled the trustees to move the school in accordance with the determination of the state superintendent. It was contended that changes in the condition of affairs arose after the taking of the appeal from the county superintendent and prior to the decision of the state superintendent. The court held that the judgment of the latter official would be held conclusive and that it would be presumed that, in rendering his decision, all facts which had transpired up to that time were taken into consideration by him.

1. The powers and duties of a county superintendent of public instruction are derived entirely from statute. He can only exercise such powers as are specially granted, or are incidentally necessary to carry the same into effect. It must appear from the record of his proceedings that he has jurisdiction, or his acts will be void. Ratcliff *v.* Faris, 6 Neb. 539. See also Murray *v.* Clay Co., 81 Ill. 597.

2. Trustees of School Dist. No. 1 *v.* Jammison (Ky. 1891), 15 S. W. Rep. 1; Smith *v.* Jefferson Co., 10 Colo. 17; Donnelly *v.* Duras, 11 Neb. 283. In regard to power of a county superintendent to determine the location of a schoolhouse, see State *v.* Mewhinney, 67 Ind. 397.

In State *v.* Albertson, 54 N. J. L. 72, it was held that a county superintendent could be called upon to express an opinion as to the validity of an election of a school trustee, but had not the power to render a final judgment, avoiding the election and declaring the office vacant.

Where power is given to the county superintendent to alter a school district, this can only be done upon a written petition duly signed, and after notice given of the time and place of a hearing upon such petition. State *v.* Compton, 28 Neb. 485.

In *Colorado*, by Gen. Sts., § 3067, the county superintendent shall estimate the proportion of the school fund to be distributed to each district in the county; but the making of such estimate does not of itself vest in the several districts the ownership of their respective shares. Cooke *v.* School Dist. No. 12, 12 Colo. 453.

In School Dist. No. 50 *v.* Roach, 41 Kan. 531, it was held that the decision of the county superintendent, in changing the boundary lines of a school district, would not be invalidated by the fact that the superintendent's office was not situated within the county seat.

In *Nevada* the superintendent of the board of education was *ex officio* county superintendent, and upon the abolition of that board his powers and duties as superintendent ceased. State *v.* Tilford, 1 Nev. 240. By act of February 23, 1887, the district attorney is *ex officio* county superintendent, and is not entitled to extra compensation as such. State *v.* Elko Co. (Nev. 1890), 23 Pac. Rep. 935.

In Perkins *v.* Wolf, 17 Iowa 228, it was held that the county superintendent was not the proper person to apply for an injunction to restrain a person from teaching, on the ground that such teacher was acting without a certificate of qualification. Such an action, it seems, should be brought by a citizen or resident of the district.

Election, Term of Office, and Removal.—It has been held that an act providing for the election of county superintendent throughout a portion of the State is not in violation of the constitutional provision (*Mississippi* Const., art. 8, § 1) requiring "a uniform system of free public schools." Wynn *v.* State, 67 Miss. 312.

In *Minnesota*, under *Minnesota* Const., art. 7, § 8, a woman may hold the office of county superintendent. State *v.* Gorton, 33 Minn. 345.

In *Indiana* a county school super-

intendent must file a bond. See Knox Co. *v.* Johnson, 124 Ind. 145.

In State *v.* Kilroy, 86 Ind. 118, the court defined the word "inhabitants," used in *Indiana* Const., art. 6, § 4, to mean "one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor," and held that the office of county superintendent might legally be filled by a person born abroad of foreign parentage who had not been a naturalized citizen of the county for the time specified in the constitution, but who had resided therein for that length of time.

In Hornung *v.* State, 116 Ind. 458, the court held that, in a meeting of a board of trustees for the election of a county superintendent, a trustee could not legally vote for himself for that office. In regard to the legality of the action, see State *v.* Edwards, 114 Ind. 581.

In Wood *v.* Cutter, 138 Mass. 149, it was held that the school committee of a town, having been required by vote of the town to appoint a superintendent of schools, could, after having elected such superintendent by ballot reconsider the vote at the same meeting and before it had been communicated to the person appointed, and, at an adjourned meeting elect another person by a yea and nay vote.

Where an ineligible person is elected to fill the office of county superintendent, the office is not thereby made vacant, but the present incumbent holds over until a successor is legally chosen. Howard *v.* Cornett (Ky. 1886), 1 S. W. Rep. 1.

In Pendleton *v.* Miller, 82 Va. 390, where the *Virginia* constitution fixed the term of office of the county superintendent at four years, the court held that the general assembly could not by a resolution declare the office vacant before the expiration of that time.

In State *v.* Harrison, 67 Ind. 71, it was decided that an election of a person to fill the office of county superintendent, not being made upon the day provided by law, was invalid, and that the present incumbent would hold over until his successor was legally appointed and qualified. See also Sackett *v.* State, 74 Ind. 486.

In Robinson *v.* Thompson, 38 Mo. 192, it was held that by art. 5, § 8, of the *Missouri* Const., a county superintendent held his office until his successor was legally appointed and qualified, and that he would be entitled to receive his salary until his term of office expired. In *Mississippi* the Const., art. 8, § 5, limits the term of office of county superintendent to two years, and therefore, an act of the legislature extending their terms beyond this time was *ultra vires.* Burnham *v.* Sumner, 50 Miss. 517.

A county superintendent who has neglected his duties through intoxication, may be removed by the board of supervisors, and where the statute has prescribed no method of procedure, their action will be valid though no opportunity for a hearing or defense be given. People *v.* Mays, 117 Ill. 257; People *v.* Mays, 17 Ill. App. 361.

In regard to the employment of a school superintendent by school boards under the laws of some States, see Davis *v.* School Dist. No. 1, 81 Mich. 214; Adams *v.* Thomas (Ky. 1890), 12 S. W. Rep. 940; Gates *v.* School Dist., 53 Ark. 468. In this case it was decided that the directors could make a contract with the superintendent for a term to commence after some of the members of the board go out of office. To the same effect is the decision in Reubelt *v.* Noblesville, 106 Ind. 478.

In *Rhode Island* any town may elect a superintendent of public schools, and if it fails to elect, the school committee shall elect one. Verry *v.* School Committee, 12 R. I. 578. In *Michigan* the school board has authority to appoint a superintendent, and this power is incident to the full control of the schools of the district, which is vested by law in the board. Stuart *v.* School Dist., 30 Mich. 69.

Compensation.—A municipal corporation may become liable upon an implied assumpsit; and where the principal of a school performed duties belonging to the office of superintendent, under a verbal arrangement with one of the trustees, the court held that if the services were performed with the knowledge and consent of the school district, the latter would be liable therefor. Davis *v.* School Dist., 81 Mich. 214.

In Jimison *v.* Adams, 130 Ill. 558, it was held that in art. 9, § 11, *Illinois* Const., providing that the compensation of no municipal officer elected or appointed for a definite term, should be increased or diminished during such term, the word "compensation" meant

and determine appeals from the action of school boards or inferior officers.[1]

the entire amount to be received and not the *per diem* compensation; and that a county superintendent was a municipal officer within the meaning of that section, and, therefore, could receive no other or different compensation than that previously fixed by the county board.

In estimating the amount of salary to which the county superintendent is entitled, the number of inhabitants, according to the last census, will form the criterion. Geraghty *v.* Ashland Co., 81 Wis. 36.

In Smith *v.* Jefferson Co., 10 Colo. 17, it was held that as a large discretion was vested by law in the county superintendent, items in his charge for services would not be rejected unless they were incorrect or illegal. See also Farrell *v.* Webster Co., 49 Iowa 245. But the superintendent will not be allowed to be the judge of the correctness of his own claim. And his sworn statement of the number of days on which he was necessarily engaged in the performance of official duties is not conclusive and the court will not compel the board to allow the amount so shown to be due. Bean *v.* Carroll Co., 51 Iowa 53.

In Clark *v.* Milwaukee Co., 53 Wis. 65, it was held that a county superintendent would be entitled to receive the amount fixed by law, and that the receipt, without protest, of a smaller sum would not prevent him from claiming the remainder. See also O'Herrin *v.* Milwaukee Co., 67 Wis. 142.

In *Tennessee* (Act 1873, ch. 25, § 8) the pay of the county superintendent is determined by the county court, and its decision is final. Haile *v.* Young, 6 Lea (Tenn.) 501.

The *California* statute (Political Code, § 1552) contemplates the allowance of a salary to the county superintendent by the board of supervisors, and if no action has been taken by them, the county auditor cannot fix the salary at the minimum provided by the code and issue his warrant for such amount. Peachy *v.* Redmond, 59 Cal. 326. And in Peachy *v.* Calaveras Co., 59 Cal. 548, the court by mandamus compelled the board to fix the salary of the county superintendent.

Under *Indiana* Rev. Stats. 1871, § 5720, it is the duty of a county superintendent to make reports to the bureau of statistics, and he will not be entitled to special compensation from the county for such services. Yeager *v.* Gibson Co., 95 Ind. 427.

1. State *v.* Board of Education, 45 N. J. L. 100; Barnett *v.* Board of Directors, 73 Iowa 134. In this latter case an application for a writ of mandamus was made to compel the restoration of certain territory by a district board of directors. The court refused the writ upon the ground that the proper remedy was by appeal from the action of the board to the county superintendent. (*Iowa* Code, § 1829.) See also Independent School Dist. *v.* Gookin, 72 Iowa 387; Fogle *v.* Gregg, 26 Ind. 345.

But it has been held that in all cases wherein the jurisdiction and powers of directors are brought in question, a party is not confined to his remedy by appeal to the county superintendent, but may have his rights determined by the courts: hence, when the rights of a citizen are involved in the exercise of authority of a school officer, the courts may determine whether such authority was lawfully exercised. Perkins *v.* Directors, 56 Iowa 476.

In *Iowa*, an appeal may be taken from a school board to the county superintendent, and from that officer to the state superintendent. In Vance *v.* Wilton, 23 Iowa 408, it was held that the remedy for an unwise or inexpedient action by the school board in locating a schoolhouse, was by appeal to the county superintendent. In Independent School Dist. *v.* Independent School Dist., 45 Iowa 391, the court said that in all cases of law and fact an appeal could be taken from the directors to the county superintendent, and his decision, though not in the nature of a judgment, would be binding upon the parties. In School Dist. Tp. *v.* Pratt, 17 Iowa 16, it was held that the acts of the school board of directors are ministerial, and the power of the county superintendent to hear and determine an appeal from their action is ministerial and not judicial: so when the statute says his decision shall be final it means simply as a ministerial act.

In regard to an appeal from the decision of a county superintendent, see Board of Education *v.* Campbell, 17 Kan. 537.

c. POWERS AND LIABILITIES.—The courts will compel by mandamus the performance of the duties of superintendents of schools.[1] But, where the statute vests a discretionary power in the superintendent, the court, by mandamus, will compel him to act, but will not control his action.[2] Where discretionary power is given to a superintendent he will not become liable to anyone for the exercise, in good faith, of such discretion.[3]

2. Commissioners—*a.* IN GENERAL.—In the school systems of some of the States provision is made for state, city and county commissioners of schools; the manner of whose election or appointment, their qualifications, term of office, compensation, powers and duties are fixed by statute.[4] In the main, state and

1. State *v.* Custer, 11 Ind. 210; Newby *v.* Free, 72 Iowa 379. The court by a writ of mandamus will compel the state superintendent to approve a claim of the school commissioner, when such approval is a part of his official duties. Pickett *v.* Harrod, 86 Ky. 485.

In Williams *v.* Clayton (Utah, 1889), 21 Pac. Rep. 398, a proceeding by mandamus was brought by the relator to compel the auditor to issue a warrant in payment of relator's salary as superintendent of schools, it was held that mandamus would be the proper remedy, although the question of title to the office was incidentally involved in the case, and that mandamus could properly be brought unless there was a plain, adequate and speedy remedy by ordinary action, and that this remedy must be one against the defendant. The court said: "It is no doubt true that, as a general proposition, the proceeding by *quo warranto* is the proper one in which to try the title of an office, and that it cannot be litigated in mandamus. But such trial of the title, when the rule requires resort to *quo warranto*, means the right to the possession of the office when such possession is held by another, and the purpose of the action is to oust the occupant. It is not to be resorted to when there is no occupant. . . . Nuttall is not in possession of the office, and was not when the action was brought. He could not, therefore, be ousted, as he was already out of office, and the object of *quo warranto* proceeding had been accomplished, the judgment in such proceeding being one of ouster."

In State *v.* Thompson, 38 Mo. 192, the question of title was incidentally involved. This was a case of mandamus, and it was held that the superintendent of public instruction continued in office until his successor was appointed and qualified.

2. Brinsmore v. Cottingham, 11 Ky. L. Rep. 486; Bailey *v.* Ewart, 52 Iowa 111. In this case an application for a mandamus was made to compel the county superintendent to issue a teacher's certificate, but this was refused by the court upon the ground stated in the text.

3. In Cowles *v.* School Dist. No. 6, 23 Neb. 655, it was held that where the power to change the boundaries of a school district was vested in the county superintendent, no cause of action accrued to the district for the manner in which he had changed the boundary of such district. See also School Dist. *v.* Wheeler, 25 Neb. 199. But while a county school superintendent is not liable for an error of judgment in refusing a license to teach when he should have granted it, if he withholds it maliciously from one entitled to it he is liable. Elmore *v.* Overton, 104 Ind. 548; 54 Am. Rep. 343.

4. One elected school commissioner, on the establishment of a new county, and commissioned by the governor to hold the office "until the next general election," is entitled to hold it only until the qualification of his successor elected at the next general election, and not for the full term of two years after his own election. Pettigrew *v.* Bell, 34 S. Car. 104.

In New York city it was held in People *v.* Board of Education, 1 Den. (N. Y.) 647, that no one could be chosen to the office of school commissioner who was not at the time a resident of the ward for which he was chosen, and that a removal by such commissioner from the ward for

county commissioners correspond to what in other States are known as state and county superintendents, respectively.[1]

b. POWERS, DUTIES AND LIABILITIES.—By statute in several of the States, the state commissioner has power to hear and determine appeals from the decisions of school committees, district meetings, trustees, etc., taken to him by persons aggrieved; and in one case, it was held that this power extended to matters which lay within the discretion of the school committee.[2] The county commissioners are intrusted with the care and general management of the school funds,[3] and clothed with power to invest the same,[4]

which he was chosen vacated his office.

The three dollars compensation for each school district, allowed the school commissioner by the *Kentucky* Common School Law, art. 1, § 12, is for reporting the districts, and not for visiting them, and, when allowed and paid for the latter service, should be deducted from the compensation for reporting. Pickett *v.* Adams (Ky. 1891), 15 S. W. Rep. 865. See also Pickett *v.* Harrod, 86 Ky. 485.

1. See *supra*, this title, *Superintendents*.

2. Cottrell's Appeal, 10 R. I. 615. *Compare*, however, Gardiner's Appeal, 4 R. I. 602.

But it is held that an appeal will not lie from a vote of the district directing the payment of certain moneys by the tax collector which he claims have been paid already; the rights of the parties upon the question of money due will be determined by the ordinary tribunals of the law, and of these questions the commissioner has no jurisdiction upon appeal. James Appeal, 5 R. I. 602. The decision of a judge of the supreme court upon an appeal from the commissioner is final. Smith's Appeal, 4 R. I. 590.

See *supra*, this title, *Site*.

3. Where by statute school commissioners are given full and exclusive power over the school fund, and all money due that fund is made payable to their order, they are constituted a *quasi* corporation, with capacity to sue for money due the fund; and the fact that the money due was levied by the county commissioners does not take away that capacity. O'Neal *v.* Washington Co., 27 Md. 227.

Where the common school commissioner, in the absence of any election or appointment of trustees for the several townships in his county, has, as such, received the common school fund belonging to them, especially where it so appears by entries on a book kept by himself, he cannot, avoid responsibility to his successor on the ground that the funds in question did not belong to the commissioner. State *v.* May, 22 Ark. 445.

Where a school commissioner has drawn school funds from the bank, which he fails to pay over as directed by law, any legal voters of the township may maintain an action against him for the recovery of the money, by motion under the statute. Burns *v.* Minter, 12 Ala. 316.

One school commissioner, as such, cannot recover from another commissioner, money belonging to the school fund in his hands. Burns *v.* Minter, 12 Ala. 316.

A school commissioner is not authorized to pay over interest collected by him on money of a congressional township, except on a draft of township trustees. But though he may have paid money to a person not authorized to receive it, if he be ready to pay trustee's draft when presented, his duty on that subject will be discharged. State *v.* Wright, 8 Blackf. (Ind.) 65.

4. If the school commissioner, in loaning school money for a longer period than one year on real estate security, takes the security on real estate to which the mortgagor has no title, and the commissioner, by using due caution, could have ascertained this fact from the public records or any other accessible source of information, he has violated the law and is at once liable on his bond. And in a suit on his bond in such a case, the measure of damages is not merely the interest in arrear on the loan, but the full amount of the loan, with the interest in arrear. People *v.* Haines, 10 Ill. 528.

But if the commissioner acts *bona fide*, and uses due care and circumspection in making investment of school

and, in the exercise of a sound discretion, to sell school lands.[1] A county commissioner is held to be not a mere agent, but an officer whose powers and duties are prescribed by law, and any act of his in conflict therewith is a nullity.[2] Where one, as school commissioner, contracts by a writing, showing on its face that he acts in his official character, the fact that he does not add his official designation to his signature will not render him personally liable.[3] Where a commissioner may be indicted for a breach of duty, the indictment, to be valid, must show the condition of his bond to be broken.[4]

funds, he will incur no liability. Greene Co. *v.* Bledsoe, 12 Ill. 267.

Insufficient Declaration.—In an action of debt by the State, on relation of the inhabitants of a congressional township in Washington county, against the school commissioner of that county and his sureties, on their bond, the declaration showed that the boundary between the counties of Washington and Orange ran through said township; that commissioner had loaned out "school money," to secure which he had taken a mortgage for use of the township; and that, by commissioner's neglect, etc., the money was lost. It was held that the declaration was bad, first, because it was not stated with sufficient certainty that the money belonged to relators; and, secondly, because there was no averment that the trustees of the township had decided that the commissioner of Washington county should have jurisdiction over the school land of the township. State *v.* Newby, 7 Blackf. (Ind.) 330.

See also Greene Co. *v.* Smith, 4 Ill. 227.

1. In Trustees of Schools *v.* Allen, 21 Ill. 120, it was held that the eleventh section of the *Illinois* act of 1847, requiring school commissioners to keep certain books for purposes connected with the sale of school lands, is merely directory, and the title to the land he might sell, if legally and fairly sold, would not depend on his obeying these directions. Further, whether a township contains the number of inhabitants necessary to authorize the sale of a school section is a question of fact for the school commissioner to determine before he makes the sale of the land; and it will be presumed, after the lapse of ten years, that notice of the sale of school land was given by the commissioner, as required by the statute.

And a school commissioner who is authorized to sell school lands upon a credit, under the provisions of the *Illinois* act of January 12, 1833, may contract with the purchaser for the payment of interest; and while the inhabitants of his township may determine whether the lands shall be sold on a credit, yet the terms of that credit are left to the discretion of the commissioner. Kidder *v.* Trustees of Schools, 10 Ill. 191.

2. State *v.* State Bank, 5 Ind. 353.

As to the powers of school commissioners in cities of 30,000 inhabitants, in *Indiana*, see Fatont *v.* Board of School Com'rs, 102 Ind. 223.

3. Lyon *v.* Adamson, 7 Iowa 509.

4. The breach in such case ought to be so particularly assigned that the assignment would, were it in a declaration in a suit on the bond, be beyond the reach of a special demurrer. Lathrop *v.* State, 6 Blackf. (Ind.) 502.

Suit on Bond of Commissioner.—A suit on the bond of a school commissioner, who had gone out of office, should be brought by State on relation of his successor. State *v.* Wright, 8 Blackf. (Ind.) 65.

A school commissioner may be a relator in an action founded on the bond of his predecessor, for non-payment by the latter to his successor of school funds in his hands at expiration of his office. Wright *v.* State, 7 Blackf. (Ind.) 63; State *v.* Grant, 7 Blackf. (Ind.) 71.

Sureties of Commissioner.—The sureties of a defaulting school commissioner have no standing in court in an action by them to recover the revenues. Pryse *v.* Hewitt (Ky. 1886), 1 S. W. Rep. 469.

Under the *Indiana* act of 1831, a school commissioner could have held indefinitely his office, until the election of a successor, and in such case his sureties would have been liable for his acts during his continuance in office. The act of the second of February, 1833, repealed the act of 1831, and lim-

3. Boards of Education.—In many States the chief supervisory power over school affairs is vested in the State board of education, the members of which, as a rule, are appointed by the governor, or hold their position by virtue of occupying some other office under the State government. Their powers and duties, being regulated entirely by statute, vary greatly in extent and character, and correspond generally to those imposed upon the state superintendent of public instruction in those States which have no board of education.[1] In addition to the State boards, the statutes generally contain provisions for the appointment and organization of county, city and township boards, which, where they exist, have direct control of the more important affairs of the schools within their respective counties, cities or townships.[2]

ited the terms of school commissioners to the precise time for which they were elected; and the sureties were not liable under that law for the acts of the commissioners, after the expiration of his term. Tuley *v.* State, 1 Ind. 500.

1. The powers, duties and liabilities of State boards of education, their appointment, term of office, etc., vary to such an extent that it would be useless here to do more than refer to the school laws of the various States.

In *Illinois* the State board of education is a corporation that may act by an agent; and the property of the Normal University of that State is not the property of the State, but of the "Board of Education of the State of Illinois," as a corporation whose charter cannot be repealed by the legislature. The corporation may sue and be sued, and, unlike a municipal corporation, the only remedy a creditor has against it is by a judgment and execution. Board of Education *v.* Greenebaum, 39 Ill. 609.

The State board of education of *Nevada* has power to adopt certain text books for the schools, and they may reconsider and rescind a resolution adopting a certain series at any time before such resolution has been acted upon in the different districts. State *v.* State Board of Education, 18 Nev. 173.

2. As a rule the city, county and township boards of education are bodies corporate. People *v.* Board of Education, 39 Mich. 635; Stewart *v.* Thornton, 75 Va. 215.

In *Florida*, members of the board of public instruction are county agents, whose duties pertain to and are limited by the territory of a county. The laws provide that they shall be paid from the county treasury for their services and expenses, on the same basis as the county commissioners are paid for their services and expenses, and such laws are not in conflict with the constitution of *Florida*. Gadsden Co. *v.* Green, 22 Fla. 102.

When a board of education has acted on its responsibility in a way which seems to be regular, its servants cannot be permitted to refuse obedience and to call on the board to prove what may be presumed to be valid without further inquiry. Port Huron Board of Education *v.* Runnels, 57 Mich. 46.

The *New Jersey* act (Supp. Rev., p. 507), providing that no member of any municipal board shall be eligible to any office to be filled by such board, applies to boards of education of a city. State *v.* Board of Education (N. J. 1892), 23 Atl. Rep. 670.

Election.—By *South Dakota* act of March, 1891, ch. 9, § 7, it is made the duty of every town having a civil or municipal organization adopting the provisions of the act to hold an election at which a new board shall be chosen; the particular day upon which such election shall be called is to be determined by the municipality subject to two conditions, viz., that it shall be within a reasonable time and that it shall not in any case be upon the same day as the municipal election. The manner of calling, holding and conducting such election, so far as unprovided for by the act, is the same as in other municipal elections. *In re* Construction of School Law (S. Dak. 1891), 48 N. W. Rep. 812.

The Act of Congress, March 22, 1882, declaring vacant all registration and election offices in *Utah*, is not applicable to a board of education of a city

Again, in some States the managing officers of a school district are known as district boards, though they are usually trustees or directors.[1]

which has been organized under a Territorial act passed in 1890 by a legislature elected under the Act of Congress, which board was authorized to call elections concerning bonds of the school district. People *v.* Godfrey (Utah, 1891), 26 Pac. Rep. 577.

The board of education of Grand Rapids is not vested with any power, judicial or *quasi* judicial, to go behind the statements of election of any of their members. They are bound to receive those whose election has been ascertained by the statements made out by the canvassers. Local Acts, 1877, p. 440. People *v.* Board of Education, 38 Mich. 95.

Term of Office.—Under *South Dakota* Comp. Laws, § 1814, the term of each member of an old city or town board of education continues until his successor is elected and qualified; and as the act of 1891, ch. 9, § 7, provides for the election of an entirely new board, such old board holds over and continues in office until succeeded by the new board elected under the provisions of the new law. *In re* Construction of School Law (S. Dak. 1891), 48 N. W. Rep. 812.

The provision of *New Hampshire* Gen. Laws, ch. 87, § 18, as to how the term of office of the members of a town board of education is to be determined is directory merely. Pickering *v.* DeRochemont (N. H. 1891), 23 Atl. Rep. 88.

Powers.—In the *Illinois* act of February 1859, establishing the system of schools in the city of Galesburg, there is nothing which gives the board of education power to examine and determine the qualifications of teachers, nor is this power given by implication from the power of exclusive management and control, and the power to appoint teachers. The power to employ teachers is to be limited to qualified teachers. Board of Education *v.* Arnold, 112 Ill. 11. It was further held in this case that § 80 of the Gen. School Law of *Illinois*, providing that in all school districts having a population of not less than 2,000 inhabitants the board of education may examine and employ teachers, has no application to a school district created by special act of the legislature.

By virtue of the annexation, under *Illinois* act of 1889, of a town to a city having a population of 100,000 or more the board of education of the city becomes vested with the exclusive jurisdiction over the public schools within the town, as there is nothing in the school law to prevent the legislature from taking the control of schools and school property from the educational board of one township and vesting it in a different board. Cravener *v.* Board of Education, 133 Ill. 145. See McGurn *v.* Board of Education, 133 Ill. 122.

In *Michigan*, unless authorized by the legislature, the school board of a city has no power to furnish pupils free text-books. Board of Education *v.* Detroit, 80 Mich. 548.

Under *West Virginia* Code of 1868, ch. 45, whereby each board of education of the different townships is created a corporation, and its duties prescribed, the members of such board, acting individually and separately, and not as a board, cannot make a contract that will bind them as a corporation. Pennsylvania Lightning Rod Co. *v.* Board of Education, 20 W. Va. 360.

Liability.—The officers of a board of education who failed to take the bond required by *Michigan* Pub. Acts 1883, No. 94, to be given by a contractor for building a schoolhouse, for the payment by such contractor for labor and materials, are personally liable for such labor and materials. Wells *v.* Board of Education, 78 Mich. 260.

The duties and powers of the board of education of Paris, Kentucky, are prescribed, not by the general law relating to the common school, but by special statute applicable to the city of Paris, where upon the appointment of a superintendent such board reserved the power to remove him at any time, and likewise conceded to him the right to resign at any time, it was held that if he was removed without malice or any intent to injure him, the board acting in good faith, he cannot bring an action for damages against the individual members of the board. Adams *v.* Thomas (Ky. 1890), 11 Ky. L. Rep. 701; 12 S. W. Rep. 940.

1. The powers, duties, liabilities, etc., of district boards are practically the

4. Treasurer.—Provision is usually made for a treasurer,[1] who is the proper depositary of all moneys belonging to the school fund,[2] and who receives a stated compensation.[3] He must give bond with sufficient security[4] for the faithful performance of his duties, on which bond he and his sureties will be liable for any loss resulting to the fund through his default or neglect.[5] Thus, if he lends money belonging to the school fund on less security

same as those of trustees and directors. See *infra*, this title, *Trustees, Directors*, etc. See also *supra*, this title, *School Districts—Powers and Liabilities*.

The board of education is not vested with the powers previously exercised by the school directors, the powers of both bodies being precisely defined and limited by the statute. Board of Education *v.* Roehr, 23 Ill. App. 629.

Under the decisions in *New Hampshire* district school boards are not agents thereof, but trustees for it. Wheeler *v.* Alton School Dist. (N. H. 1891), 23 Atl. Rep. 89. See Barrett *v.* School Dist. No. 2, 37 N. H. 445; Giles *v.* School Dist. No. 14, 31 N. H. 304; Stebbins *v.* School Dist., 16 N. H. 510.

1. The act of the *Georgia* legislature of October 30, 1870, establishing a system of common schools and reorganizing the boards of county education, taken in connection with the constitution of 1868 abolishing the inferior court and casting its duties upon the ordinary, is a repeal by implication of § 378 of the code making the ordinaries the treasurers of the boards of education of their respective towns. The treasurer of the county and not the ordinary is now by law the treasurer of the board of education. Clarke *v.* Levy, 45 Ga. 498.

Removal.—In *Illinois*, the statute gives to the trustees power to remove the treasurer at pleasure, and the appointment of another person is of itself a removal. Holbrook *v.* Trustees of Schools, 22 Ill. 539.

Under *Nebraska* Comp. Stat., ch. 79, § 8, the office of a district school treasurer cannot be declared vacant except by the official act of the two disinterested members of the board—the moderator and the director—in session as a board. State *v.* School Dist. No. 49, 22 Neb. 48.

2. People *v.* Yeazel, 84 Ill. 539; Adams *v.* State, 82 Ill. 132.

It is his duty to demand, receive and safely keep all moneys, books and papers of every description belonging to his township. Lovingston *v.* Board of Trustees, 99 Ill. 564.

In *Michigan* the treasurer of the board of school inspectors, and not the town treasurer, is the proper custodian of the township library money. McPharlin *v.* Mahoney, 30 Mich. 100. Even if the school fund of a township is not entitled to receive from the city a portion of its revenues derived from the license of dram shops, yet if the treasurer collects and receives the same he will be liable to the board of trustees for it. To enable the trustees to refund it, they must have the money to do so if the collection is illegal. Lovingston *v.* Board of Trustees, 99 Ill. 564.

The treasurer of a school district is an officer thereof in such sense that service of notice upon him is binding on the district. Kennedy *v.* Independent School Dist., 48 Iowa 189; but he has no authority to bind the township by his contract or admissions. Carpenter *v.* District Tp., 58 Iowa 335.

3. The treasurer is entitled to no allowance over and above the compensation fixed by the board of trustees before his appointment. Lovingston *v.* Board of Trustees, 99 Ill. 564.

4. A formal approval is not necessary to render the bond valid and binding on the sureties; being filed, not rejected, and treated by all parties as approved, is equivalent to approval. Bartlett *v.* Board of Education, 59 Ill. 364.

Where a school district treasurer, who had qualified by giving the requisite bond at the time of his first election, was elected to succeed himself, he was held not to have vacated the office by failing to give bond within twenty days after the second election. Horneman *v.* Harlan, 47 Kan. 413. If there is sufficient cause for failure he may afterwards qualify. Carpenter *v.* Titus, 33 Kan. 7. See State *v.* Matheny, 7 Kan. 327.

5. Lindsey *v.* Marshall, 12 Smed. & M. (Miss.) 587; School Trustees *v.* Stokes, 3 Ill. App. 267.

Where one was appointed treasurer of a school district to fill a vacancy, and upon such appointment gave a bond with sureties as provided by law, and at the annual election thereafter was elected as his own successor and continued in office without giving a new bond, it was held that the sureties on the bond given upon his appointment were not liable for any default occurring after the commencement of the term to which he was elected. Riddel *v.* School Dist. No. 72, 15 Kan. 168.

Where the treasurer had neither claimed compensation for his services, nor the board of directors had awarded it, it was held, in an action on his official bond, that the amount of recovery should not be diminished by an allowance for his services. Independent School District *v.* McDonald, 39 Iowa 564.

Where the treasurer of the school fund, who was also a school director, voted as director for misapplication of the public funds, he cannot shield himself from liability under the warrant of the board of directors. The maxim *respondeat superior* furnishes no protection to one who is both subordinate and superior. Dickinson Tp. *v.* Linn, 36 Pa. St. 431.

It has been held in *Iowa* that the treasurer of a school district is absolutely liable on his bond for money coming into his hands by virtue of his office, regardless of the cause or circumstances of the loss, and will not be excused for loss by showing the exercise of due diligence and care. District Tp. *v.* Morton, 37 Iowa 550; District Tp. *v.* Hardinbrook, 40 Iowa 130. Nor will he be excused by showing that the money was destroyed by inevitable accident, as where it was consumed by fire without any want of care and diligence on the part of the treasurer. District Tp. *v.* Smith, 39 Iowa 9; 18 Am. Rep. 39.

It must be shown that the treasurer was in some way delinquent, and proof that a township treasurer received moneys of the district is not sufficient to maintain an action to call it out of his hands without proof of delinquency on his part, or even of demand before the commencement of the action. School Dist. No. 2 *v.* Tebbetts, 67 Me. 239.

Although the treasurer of the school board may have kept his books in an irregular manner, yet if the funds in his hands are accounted for he cannot be held liable because his books are apparently different from the settlement with the school board. Parish School Board *v.* Packwood, 42 La. Ann. 468.

Where the principal debtor to the school fund of a township dies, it is the duty of the township treasurer to present the claim against his estate for allowance, if due, without an order from the trustees of schools, and for a neglect to discharge such duty he is liable to the trustees on his official bond. McHaney *v.* School Trustees, 68 Ill. 140.

He is also liable for interest received by him for use of the fund while in his hands. Hadley *v.* State, 66 Ind. 271.

If the treasurer of a school district has money belonging to the district, and devoted to the payment of teachers' wages, and refuses to pay it over on a proper order and demand, he becomes personally liable to the teacher. Edson *v.* Hayden, 18 Wis. 627. But an order on the treasurer to pay a particular bill, without specifying out of what fund, need not be obeyed by him if he has no money belonging to the fund to which the bill is chargeable, though he has money belonging to other funds. State *v.* Slavan, 11 Wis. 158.

In an action on the bond of the treasurer for failure to pay over money in his hands to his successor, it is no defense that the board was indebted to a third party on a contract for building a schoolhouse, and that he had, without the knowledge or authority of the board, loaned money to such contractor and tendered an unaccepted order from the contractor on the board for the amount of the loan. Snyder *v.* Board of Education, 16 Kan. 542.

Action on Bond.—The action on the treasurer's bond should be in the name of the school district and not in the name of the treasurer. Coffman *v.* Parker, 11 Kan. 9; Armstrong *v.* Durland, 11 Kan. 15.

It has been held in *Illinois* that in an action on the bond of a school township treasurer, the final report made by him and the entries made in the books kept by him in such capacity, are conclusive against him and his sureties as to the amount due. Longan *v.* Taylor, 31 Ill. App. 263; *Aff'd* 22 N. W. Rep. 745. But in *Kansas* they are not conclusive. Saville *v.* School Dist. No. 27, 22 Kan. 529.

When the statute requires the treasurer to make a report in writing at the end of each year, and there is no evi-

than is required by law, he must make good any loss which ensues,[1] and he cannot, on his own authority, release any security given for a debt due the fund.[2] He has no right to receive for school moneys anything which the law has not authorized him to receive,[3] and cannot be released from liability for money lost or misapplied by him.[4] The fact that money belonging to the school fund has been stolen from him without any default on his part constitutes no defense,[5] and where he deposits money of a

dence that the report has not been made, it is no error to refuse evidence of his private accounts. Hinton *v.* School Dist., 12 Kan. 573.

Where a school treasurer was reappointed about five months before his death, but gave no new bond, and after his death it was found that he was a defaulter in a given sum, in the absence of proof that he had in his hands all the moneys and securities intrusted to him during his first term of office, it was held that it could not be presumed he paid over all the moneys and notes to himself as his own successor, so as to exonerate his sureties. A defalcation being established, and no time shown when it occurred, it may as well be presumed that he misapplied the funds during his first term as during the time after his reappointment. An entry upon the minutes of the board of trustees, at the time of such reappointment, that he made a report as treasurer, and the same was "carefully examined," is not evidence that his defalcation had not then occurred. Trustees of Schools *v.* Smith, 88 Ill. 181.

A school treasurer, after reappointment, died before giving a new bond, and after his death was found to be in default, for part of which the sureties on his bond were not liable. Judgment was recovered against his estate for the whole of the shortage but payment was made of only a part. It was insisted that this payment should be first applied to the part of the debt not secured, but it was held that this was not a case for the appropriation of payments, there being but a single indebtedness evidenced by the judgment. School Trustees *v.* Smith, 88 Ill. 181.

1. Even though he acted on the advice of members of the board of directors and against his own judgment. Board of Trustees *v.* Baker, 34 Ill. App. 620; 24 Ill. App. 231.

2. If a school treasurer releases a mortgage given to secure a debt due the school fund of his township without an order of the board of trustees or a majority of them, entered upon their journal and subscribed by their official clerk, he will be liable upon his official bond if any loss is sustained in consequence thereof. Board of Trustees *v.* Misenheimer, 78 Ill. 22. See Humiston *v.* School Trustees, 7 Ill. App. 122.

3. If he chooses to receive various local orders from the tax-payers instead of money, and to receipt for the taxes, he must make good the amount. Jones *v.* Wright, 34 Mich. 371. And where a city is liable to the school fund for moneys received for license fees, it is his duty to receive the same, and he has no authority to receive city warrants in lieu of money, or to procure the issue of city bonds for the same and to sell them at a discount. If he receive city orders on the city treasurer, it is his duty to demand the money and take steps for its collection. Lovingston *v.* Board of Trustees, 99 Ill. 564.

The township treasurer, by consent and direction of the school directors, may receive the coupons of bonds of the district in place of the money due the district, and turn them over to his successor, and the school directors are by their acts estopped from tendering back the coupons and demanding payment of the money. Humiston *v.* School Trustees, 7 Ill. App. 122. But the retiring treasurer of a school board cannot compel his successor to receive notes for the loan of school funds as money. The successor is a proper relator in an action on the official bond of his predecessor for a default in failing to pay over money on demand, and no order of the board of commissioners is necessary to authorize the suit. Hiatt *v.* State, 110 Ind. 472.

4. Ward *v.* School Dist. No. 15, 10 Neb. 293; 35 Am. Rep. 477; Board of Education *v.* Jewell, 44 Minn. 427; 20 Am. St. Rep. 586; Jones *v.* Wright, 34 Mich. 371.

5. Board of Education *v.* Jewell, 44 Minn. 427; 20 Am. St. Rep. 586.

district in a bank to his individual credit or on his own responsibility in the absence of legal authority, he will be liable for any loss resulting from a failure of the bank.[1]

5. Township Trustees.—Courts take notice as a matter of law that a township trustee is a trustee of a school township, and that in making contracts for schools the township trustee acts as trustee of the school township. The officer may be designated by either title.[2] Statutes limiting the authority of township trustees to contract debts are construed to embrace trustees of schools as well as of civil townships.[3] The school trustees of the township are vested with the power to determine to what district money collected for school purposes shall belong.[4] When they employ teachers in good faith and pay them in part out of their own pockets, the public fund being insufficient, they may maintain an action against the school township for the amount so paid.[5]

1. Thus, it was held in *Kansas* that there is no law in that State authorizing a school district treasurer to deposit the funds of the district with any bank or banker, and especially with a bank or banker outside of his district and outside of his county, nor is there any law that authorizes a school board to instruct a school district treasurer to do so; and where the treasurer with such instructions does deposit the funds of the district with a bank or banker, and the bank or banker afterwards becomes insolvent, the treasurer and not the district must lose the money so deposited. School Dist. *v.* Carson, 10 Kan. 238.

The defendant, while treasurer of the plaintiff district, deposited money with his banker to his own individual credit. The money was intended to meet certain bonds of the district then about to fall due and which were payable at that bank, and the defendant so informed the banker and verbally directed him to so apply it when the bonds were presented. Before the bonds were presented the bank failed and the money was lost, and it was held that the banker was agent of the treasurer and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond. Ward *v.* School Dist. No. 15, 10 Neb. 293; 35 Am. Rep. 477.

The liability of the treasurer of a school district is absolute for all funds which come into his hands in his official capacity, and in case of loss cannot be varied or diminished by the cause or manner of the loss. District Tp. *v.* Hardinbrook, 40 Iowa 130. In this case the treasurer testified that he made a deposit of the money held by him as treasurer in the Albia Deposit Bank and told the cashier at the time that he intended to make it a *special* deposit; that an ordinary certificate of deposit drawing interest was given him in his own right and he did not notice the mistake until after the bank had failed, and that it was his intention to make a special deposit as treasurer, and he supposed the certificate so showed. He then defined the deposit he intended to make, and which he called and supposed would be a special deposit. The jury found the verdict for the defendant which the court set aside because the deposit as intended was not a special deposit. The court on appeal said it would not stop to consider whether the statement of the deposit intended would constitute a special deposit or not because they had twice held recently that the treasurer was absolutely liable for the money coming into his hands as treasurer, regardless of the cause of, or circumstances attending, its loss. See District Tp. *v.* Morton, 37 Iowa 550; District Tp. *v.* Smith, 39 Iowa 9; 18 Am. Rep. 39.

Where the treasurer is required by law to deposit the school funds in a certain bank, the board of education is entitled to a *mandamus* to compel him to do so. Board of Education *v.* Runnels, 57 Mich. 46.

2. State *v.* McDonald, 106 Ind. 233.

3. Middleton *v.* Greeson, 106 Ind. 18.

4. School Directors *v.* School Directors, 36 Ill. 140.

5. Kiefer *v.* Troy School Tp., 102 Ind. 279.

6. Directors, Trustees, etc., of School Districts—*a.* ELECTION.—School directors, trustees, or committees are elected generally in each district at the time and place designated by the law in each particular State.[1] When duly elected they hold their offices until others are legally elected to supersede them.[2] Those who vote for school district officers must have the qualifications required,[3] and the vote is usually by ballot;[4] a majority of all the votes cast is necessary to elect.[5] Where vacancies occur they must be filled in the manner prescribed.[6] A vacancy must occur from one of the causes named in the statute before an officer can be elected or appointed to fill the place of another.[7] The office of a school trustee or committee becomes vacant by removal from the district.[8] But such office does not become vacant merely by the failure of the district to maintain a school as required by the statute. Such neglect merely affords a reason for vacating the offices and they do not become vacant until the selectmen have duly made new appointments.[9]

If a new district is created and the director or trustee is included within its limits, this vacates his office.[10] It does not become vacant merely by the failure of the district to maintain a school.[11] A director appointed to fill a vacancy in the board will hold the office, during the whole of the unexpired term.[12]

Willfully depositing more than one vote during the same bal-

1. State *v.* Perkins, 13 Wis. 411.

In *Nebraska*, the annual school meeting of each school district for the election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day. State *v.* Cones, 15 Neb. 444. But in *Massachusetts* it was held, in Kingsbury *v.* Quincy School Dist., 12 Met. (Mass.) 99, that a school district, after having chosen one person as prudential committee at its annual meeting, and adjourned to another day, might choose additional members of such committee at the adjourned meeting.

2. Chandler *v.* Bradish, 23 Vt. 416; Walker *v.* Miner, 32 Vt. 769; Stewart *v.* State, 4 Ind. 396; Attorney Gen'l *v.* Burnham, 61 N. H. 594; Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408.

Failure to elect a committee at an annual meeting creates no vacancy, but leaves the committee of the previous year in office. Rowell *v.* School Dist. No. 19, 59 Vt. 658.

In Myer *v.* Crispell, 28 Barb. (N. Y.) 54, it was held that it was no objection to the election of a school director that he was elected at a meeting held outside the boundaries of the district, the election being unobjectionable in other respects.

3. State *v.* Deshler, 25 N. J. L. 177.

The act allowing women possessing the qualifications therein prescribed to vote at school meetings is not in conflict with the constitution, and is valid. State *v.* Cones, 15 Neb. 444.

In *Michigan*, women are entitled to vote at a meeting to elect trustees. Belles *v.* Burr, 76 Mich. 1.

4. People *v.* Gartland (Mich. 1889), 42 N. W. Rep. 687.

5. Cleveland *v.* Amy, 88 Mich. 374.

6. Pierce *v.* Edington, 38 Ark. 150.

7. Richardson's Appeal, 5 R. I. 606; Chandler *v.* Bradish, 23 Vt. 416.

Appointment of school directors by the *Arkansas* county court will be presumed to be upon the vacancy in the office contemplated by statute, though the record of appointment does not show a vacancy. Pierce *v.* Edington, 38 Ark. 150.

8. Giles *v.* School Dist. No. 14, 31 N. H. 304; Gildersleeve *v.* Board of Education, 17 Abb. Pr. (N. Y.) 201.

9. Woodcock *v.* Bolster, 35 Vt. 632.

10. Stevens *v.* Kent, 26 Vt. 503.

11. Woodcock *v.* Bolster, 35 Vt. 632.

12. School Dist. No. 25 *v.* Cowee, 9 Neb. 53.

loting for a school district officer at a school district meeting has been held to be an indictable offense.[1]

b. QUALIFICATIONS.—A school director generally must qualify by taking and subscribing the official oath and filing it with the county clerk within the time prescribed by statute.[2] Where he fails to qualify within the time and manner prescribed by the statute, the term of his predecessor will continue.[3] In *Missouri* none but tax payers are eligible to the office of director.[4] In some of the other States women are by statute made eligible to the office of director or trustee.[5]

c. POWERS AND DUTIES.—The powers and duties of these officers are derived exclusively from statute.[6] It is the duty of the directors to provide the necessary schools to accommodate all children of the district of proper age.[7] They have the management and control of the schools,[8] the school buildings and of other property belonging to the district.[9] They have power to employ teachers[10] and to purchase ordinary supplies.[11] But the

1. State *v.* Philbrick, 84 Me. 562.

2. School Dist. *v.* Bennett, 52 Ark. 511; Childrey *v.* Rady, 77 Va. 518.

By provisions of a statute in *Iowa* a sub-director may qualify on or before the day fixed, by appearing before some officer authorized to administer oaths and taking the oath of office. Failure to appear at the meeting of the board next ensuing does not prevent such qualification being valid. Bennett *v.* District Tp., 53 Iowa 687.

3. School Dist. *v.* Bennett, 52 Ark. 511.

4. State *v.* Macklin, 41 Mo. App. 335.

5. Huff *v.* Cook, 44 Iowa 639; State *v.* Cones, 15 Neb. 444. In *Massachusetts*, under the constitution, a woman may be a member of a school committee. Opinion of the Justices, 115 Mass. 602.

6. Adams *v.* State, 82 Ill. 32; Wells *v.* People, 71 Ill. 532; School Directors *v.* Fogleman, 76 Ill. 189; Peers *v.* Board of Education, 72 Ill. 508.

7. Rulison *v.* Post, 79 Ill. 567.

School directors may in the exercise of their discretion cause the school to be taught in a rented building instead of the public schoolhouse. Scripture *v.* Burns, 59 Iowa 70.

8. Chase *v.* Stephenson, 71 Ill. 383.

9. Culver *v.* Smart, 1 Ind. 65; Williams *v.* Peinny, 25 Iowa 436; Alderman *v.* School Directors, 91 Ill. 179; School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

School trustees may maintain suits at law for the purpose of taking care of the district property. Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175.

10. See *supra*, this title, *Teachers*.

A town school committee may reconsider its vote electing a superintendent of schools at the same meeting, and before it has been communicated to the person so elected. Wood *v.* Cutter, 138 Mass. 149.

11. School Dist. No. 17 *v.* Swayze, 29 Kan. 211; School Dist. No. 29 *v.* Perkins, 21 Kan. 536; 30 Am. Rep. 447; Monticello Bank *v.* District Tp., 51 Iowa 350; Knabe *v.* Board of Education, 67 Mich. 262; Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

In *Iowa* an independent school district may provide for teaching music, and the board of directors have authority to contract for the purchase of a musical instrument to be paid for out of any unappropriated funds of the district. Bellmeyer *v.* Independent School Dist., 44 Iowa 564.

In *Michigan* the trustees of a graded school may contract for a piano for high school purposes. Knabe *v.* Board of Education, 67 Mich. 262.

The board of directors has no authority to bind the district township for insurance of building, furniture, etc. American Ins. Co. *v.* District Tp., 55 Iowa 606.

Lightning rods are not such an expense as may be paid for out of the contingent fund, and an order for that purpose drawn upon such fund is *prima facie* invalid. Wolf *v.* Independent School Dist., 51 Iowa 432;

purchase must be authorized by statute or at some meeting of the board [1] or by vote of the electors.[2] The statutes generally require the purchase to be made out of surplus funds.[3] Such a limitation is an implied restriction against purchase generally on credit.[4]

Contracts made by the directors and trustees are binding upon the district when made within their authority.[5] In dealing with a school trustee, all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by contracts authorized by law.[6] The statutes usually require the concurrence of the entire board of directors at a regular meeting in order to make a contract binding on the district.[7] A statutory prohibition against the transaction of any

Monticello Bank *v.* District Tp., 51 Iowa 350.

1. Andrews *v.* School Dist., No. 4, 37 Minn. 96.

Where the district board of a township, without authority from the electors, purchased maps and other school apparatus, it was held, that the subsequent use of the articles in the schools, with the knowledge of the directors and electors, and the fact that at a meeting of the electors subsequent to the purchase no steps were taken to repudiate the contract, would not amount to a ratification of it. Taylor *v.* District Tp., 25 Iowa 447.

2. Taylor *v.* District Tp., 26 Iowa 281; Manning *v.* District Tp., 28 Iowa 332.

Repairs proper may be contracted and paid for out of the contingent fund, without being previously authorized by a vote of the electors; but where they amount to remodeling or rebuilding, they should not be undertaken unless authorized by such vote. Williams *v.* Peinny, 25 Iowa 436.

A township school director has authority in the exercise of a sound discretion, to buy new seats for a schoolhouse, under a resolution adopted at the annual meeting of the school district that the school board fix the schoolhouse ready for the winter term. McLaren *v.* Akron, 48 Mich. 189.

3. Yaggy *v.* Monroe Dist. Tp., 80 Iowa 121.

4. Clark *v.* School Directors, 78 Ill. 474.

A purchase of supplies by the school directors on credit, where it does not appear that there were any surplus funds, after all necessary school expenses were paid, applicable to such purpose, is void, and there is no contract implied by law to pay for the articles thus purchased arising from their receipt and use. Clark *v.* School Directors, 78 Ill. 474.

Although by statute the board cannot contract indebtedness for apparatus, etc., but are limited to the use of unappropriated contingent funds on hand for such purposes, yet a contract for the purchase of such apparatus to be paid for in the future does not necessarily imply that there is no such fund and such credit is not necessarily void. Bellmeyer *v.* Independent Dist., 44 Iowa 564.

5. Gibson *v.* School Dist. No. 5, 36 Mich. 404; Knabe *v.* Board of Education, 67 Mich. 262.

A contract signed by the directors in their official capacity and attested by their secretary, held binding upon the district and not upon the directors individually. Independent Dist. *v.* Reichard, 50 Iowa 98.

A district township is bound by the contracts of its sub-directors. Athearn *v.* Independent Dist., 33 Iowa 105.

Under *Minnesota* Comp. Stat., ch. 23, the trustees of a school district have no authority to make a promise or acknowledgment, which will take a debt out of the statute of limitations. Sanborn *v.* School Dist. No. 10, 12 Minn. 17.

6. Bloomington School Tp. *v.* National School Furn. Co., 107 Ind. 43.

7. School Dist. *v.* Bennett, 52 Ark. 511; People *v.* Peters, 4 Neb. 254; State *v.* School Dist. No. 49, 22 Neb. 48; School Dist. *v.* Padden, 89 Pa. St. 395; Doyle *v.* Gill, 59 Wis. 518.

Compare Crane *v.* School Dist. No. 6, 61 Mich. 299; Schofield *v.* Watkins, 22 Ill. 66; Trustees of Schools *v.* Allen, 21 Ill. 120.

business, except at a regular or special meeting of the school board, does not refer to the particular manner in which special meetings may be called, but prohibits the doing of business by the members unless in meeting assembled.[1] A contract which the board of directors is authorized to make will not, however, be void because no record thereof is made.[2] If the contract is not made in conformity with the law, it may be ratified by the district.[3] The fact that the district has the benefit of an illegal or unauthorized contract made by the school board will not amount to a ratification by the district of such contract.[4] The long continued enjoyment of the benefits of a contract may, however, amount to a ratification.[5]

A board of directors of a district may bind the corporation by contract entered into after their successors have been elected but before they have qualified.[6] They have power to change a

Two trustees of a school district cannot act in the performance of their duties, except when all three are present, whether the third one refuses to act or not. Whitford *v.* Scott, 14 How. Pr. (N. Y.) 302; Lee *v.* Parry, 4 Den. (N. Y.) 125; Keeler *v.* Frost, 22 Barb. (N. Y.) 400.

But in *Nebraska*, in the employment of teachers, it is not necessary that there should be a meeting of the board or that all the members be consulted concerning the employment. Russell *v.* State, 13 Neb. 68.

In *Iowa* the assent of a majority of the members of the board of directors of the district township individually to a proposition will not bind the district. An action to be binding must be that of the board as a body. Herrington *v.* District Tp., 47 Iowa 11. *Compare* Athearn *v.* Independent Dist., 33 Iowa 105.

Where individual members of the board were procured to sign their names individually to a contract for school supplies, conditioned that it should be binding when signed by a majority of the members of the board, it was held, that such contract was in contravention of the policy of the law and void, where it was procured by misrepresentation as to the fact that the president of the board had agreed to sign such contract. Mills *v.* Collins, 67 Iowa 164.

In *Minnesota* contracts must be made or ratified by a majority of the board, after notice to all. Currie *v.* School Dist. No. 26, 35 Minn. 163.

In *Massachusetts* a majority of a prudential committee of a school district may lawfully do official acts, especially after a refusal of the minority to meet with them. Kingsbury *v.* Quincy School Dist., 12 Met. (Mass.) 99.

1. Lawrence *v.* Trainer (Ill. 1891), 27 N. E. Rep. 197.

2. Bellmeyer *v.* Independent Dist., 44 Iowa 564; Athearn *v.* Independent Dist., 33 Iowa 105.

The unrecorded acts of school directors are so far valid that those who contract with them cannot, for that reason, repudiate their action. School Directors *v.* McBride, 22 Pa. St. 215.

3. Trainer *v.* Wolfe, 140 Pa. St. 279; School Dist. No. 17 *v.* Swayze, 29 Kan. 211; Dubuque Female College *v.* Dubuque, 13 Iowa 355.

Where a district committee make a contract not binding on the district, and the district vote to accept and to pay a certain sum, this vote binds them to pay a *quantum meruit*, not limited to the sum voted. Kimball *v.* School Dist. No. 8, 28 Vt. 8.

4. Wells *v.* People, 71 Ill. 532; School Directors *v.* Fogelman, 76 Ill. 189; Gibson *v.* School Dist. No. 5, 36 Mich. 404; Gehling *v.* School Dist. No. 56, 10 Neb. 239; Johnson *v.* School Dist., 67 Mo. 319; Board of Education *v.* Thompson, 33 Ohio St. 321.

5. Andrews *v.* School Dist., No. 4, 37 Minn. 96.

6. Dubuque Female College *v.* Dubuque, 13 Iowa 555. See Reubelt *v.* Noblesville, 106 Ind. 478.

A contract made by *de facto* school trustees, and not to be performed until after the commencement of the term of a new board of trustees, is binding upon

contract already made, even though such change operates to release the securities on the contract.[1] But they cannot by contract divest themselves of powers which have been conferred upon them for a public purpose;[2] nor can they enter into contracts with their own members.[3]

School directors may execute or become indorsers of a promissory note for a purpose connected with the school.[4] They may borrow money for certain enumerated purposes on terms prescribed by the statute.[5] Unless the statute is complied with they cannot give their promissory notes for such consideration so as to bind the district.[6] Their powers and duties being derived exclusively from the statute, they can exercise no other powers than those expressly granted, or such as result by fair implication from the powers granted.[7] If they exercise powers and functions not conferred upon them, the statute makes them responsible for

the latter. Milford *v.* Zeigler, 1 Ind. App. 138.

1. Independent Dist. *v.* Reichard, 50 Iowa 98.

2. Conley *v.* School Directors, 32 Pa. St. 194.

3. Hewitt *v.* Board of Education, 94 Ill. 528; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; Pickett *v.* School Dist. No. 1, 25 Wis. 551; 3 Am. Rep. 105. Such contracts are voidable. Weitz *v.* Independent Dist., 78 Iowa 37; Trainer *v.* Wolfe, 140 Pa. St. 279.

A director or trustee should not be a party to any contract with the other trustees. Currie *v.* School Dist. No. 26, 35 Minn. 163.

Both the letter and spirit of the law forbid that the directors of schools shall in anywise, whether directly or indirectly, openly or covertly, become interested in demands or claims originating while they are directors to be satisfied by payment from the funds of their district. School Directors *v.* Parks, 85 Ill. 338.

Where orders were drawn by two school directors in favor of the third, one for labor in repairing a schoolhouse, and the other for wood furnished the school, of which payment was made by the township treasurer, it was held, that if the services were performed and the wood furnished while the person receiving the orders was director, the school district was entitled to recover the money so paid, in an action against him, but if before he was elected, it was not. School Directors *v.* Parks, 85 Ill. 338.

A school committee may contract with one of their number to board a teacher. Brown *v.* School Dist., 55 Vt. 43.

4. School Directors *v.* Miller, 54 Ill. 338. See Folsom *v.* School Directors, 91 Ill. 402; Brewster *v.* Colwell, 13 Wend. (N. Y.) 28.

Compare Union School Tp. *v.* First Nat. Bank, 102 Ind. 464.

Promissory notes made by trustees of school districts as evidences of indebtedness are valid between the parties, as a contract for forbearance and a promise to pay the amount specified, which will bind the successors of the original trustees, and upon which suit may be brought against the district. Robbins *v.* School Dist. No. 1, 10 Minn. 340.

5. Adams *v.* State, 82 Ill. 132.

The power given to school directors, by the *Illinois* statute of 1865, upon a vote of the people, to borrow money for certain purposes and issue bonds therefor, cannot be enlarged by construction or implication so as to authorize them to execute promissory notes, which, in themselves, would be binding on the district. School Directors *v.* Sippy, 54 Ill. 287.

6. School Directors *v.* Miller, 54 Ill. 338.

7. School Directors *v.* Fogelman, 76 Ill. 189; Wells *v.* People, 71 Ill. 532; Peers *v.* Board of Education, 72 Ill. 508; Spring *v.* Wright, 63 Ill. 90; Union School Tp. *v.* First Nat. Bank (Ind. 1885), 1 West Rep. 107. *Compare* Seeger *v.* Mueller, 133 Ill. 86.

Power to Make Class Distinctions.—While the directors very properly have large and discretionary powers in regard to the management and control of

all losses that may ensue.[1] They cannot use the forms of law, and exercise a power conferred by law, for unauthorized purposes and in fraud of the law, and parties oppressed by such acts have a right to relief from them.[2]

A positive official duty imposed upon a board of directors, which is not discretionary, may be enforced by mandamus.[3] But mandamus will not lie to compel action where the aggrieved party has a right to appeal to the county superintendent.[4]

d. COMPENSATION.—Directors in some States are not allowed compensation for their services.[5] But in other States members of the school committee, in the absence of any fixed or agreed sum, are held entitled to a reasonable compensation and to be reimbursed for money properly expended by them.[6]

e. PERSONAL LIABILITY.—Directors of a school district may be liable individually upon a contract made by them in their own names, although described as school directors;[7] but not on a con-

schools, in order to increase their usefulness, they have no power to make class distinctions, nor can they discriminate between scholars on account of their color, race or social position. Chase *v.* Stephenson, 71 Ill. 383.

1. Adams *v.* State, 82 Ill. 132.

Authority Presumed.—A party acting as prudential committee in a school district will be presumed to have been completely authorized, until the contrary is proved. State *v.* Williams, 27 Vt. 755.

2. Schofield *v.* Watkins, 22 Ill. 66.

3. Benjamin *v.* District Tp., 50 Iowa 648.

Where supervisors have jurisdiction of a claim of district school officers for costs and expenses, their determination as to its nature and amount, and whether it is of the character provided for by law, is conclusive; and if they direct a sum to be levied by the trustees of the district, the trustees may be compelled to comply by *mandamus*. People *v.* Van Leuven, 8 How. Pr. (N. Y.) 358; People *v.* Green, 10 How. Pr. (N. Y.) 468; People *v.* Trustees of School Dist. No. 13, 8 How. Pr. (N. Y.) 125; 6 How. Pr. (N. Y.) 332. But see People *v.* Snyder, 10 How. Pr. (N. Y.) 143.

4. Marshall *v.* Sloan, 35 Iowa 445.

Cases wherein the jurisdiction and power of directors are brought in question, and wherein questions arise involving the construction of statutes conferring power upon school officers, may properly be brought into the courts, as by *mandamus*, for instance, without prosecuting the appeal here provided. So held as to power of directors to make certain rules, under which plaintiff was excluded from school. Perkins *v.* Board of Directors, 56 Iowa 476.

5. Hinman *v.* School Dist. No. 1, 4 Mich. 168; Moore *v.* Independent Dist., 55 Iowa 654.

In *Iowa* the salaries of the treasurer and secretary of the board of directors of a common school district are a part of the necessary expenses of keeping the schools in operation, and to which the contingent fund should first be applied, under *Iowa* Code, §§ 1729, 1748, authorizing the use of the contingent fund for the purposes specified therein. Yaggy *v.* Monroe Dist. Tp., 80 Iowa 121.

6. Manchester *v.* Potter, 30 N. H. 409.

A school committee of a city caused to be printed an address by them to the people of the city regarding an occurrence in the public schools, and referred to such address in their subsequently printed annual report as a part thereof. It was held that they were authorized to charge the expense of printing the address upon the city, under *Massachusetts* Gen. Sts., ch. 40, § 6, directing them to make annually a report of the condition of the schools and cause it to be printed for the use of the inhabitants. Wilson *v.* Cambridge, 101 Mass. 142.

7. Sharp *v.* Smith, 32 Ill. App. 336.

Where the president of a board of school trustees promises, in their behalf, by a note, to pay a debt contracted in the erection of a schoolhouse, he acts as a public agent, and therefore is

tract in which they are described as the board of directors of a school district, though signed only by the individual members.[1] They are not liable to a personal action for damages at the suit of a teacher whom they have employed for wrongfully, unjustly and illegally refusing to allow him to enter upon his duties;[2] nor to a taxpayer in damages for errors on their part in the performance of the duties of their office, where it is not shown that they have acted in bad faith;[3] nor on a warrant signed by them for the wages of a teacher, merely because there is no money in the fund against which it is drawn;[4] nor to the school directors of another district for money paid over to them by the school trustees.[5] Where school trustees fail to raise and collect the school funds as required by law, they may be personally liable to the teacher for a failure to pay him as agreed.[6]

f. REMOVAL.—School directors may be removed on a rule to show cause, where they neglect and refuse to establish the number of schools required by law;[7] but not because a schoolhouse constructed for them was cheap, unsightly, difficult to keep in repair and unfit for permanent use.[8] Proceedings by a township board to remove a school director are not invalidated by the fact that the board did not meet to agree on the notice under which the proceedings were taken.[9]

IX. SCHOOL FUNDS—1. In General.—In most States school funds for the support of a system of free public schools are provided for by the constitution.[10] These school funds consist of grants of land made by the general government for school purposes, and the income arising from the investment of the proceeds of the sale of such lands and of other funds,[11] together with such funds as

personally liable on the note. Hodges *v.* Runyan, 30 Mo. 491.

1. Lyon *v.* Adamson, 7 Iowa 509. See Independent Dist. *v.* Reichard, 50 Iowa 98; Harvey *v.* Irvine, 11 Iowa 82; Baker *v.* Chambles, 4 Greene (Iowa) 428.

Where the language of a note was, "We the undersigned, directors of school district No. 4, . . . promise to pay," etc., and it was signed by the directors in their individual names, without official designation, it was held that the note was binding on the district, and the directors were not individually liable. Baker *v.* Chambles, 4 Greene (Iowa) 428.

So held also where the note read, "We, the board of school district No. 1, . . . promise to pay," and was signed by the directors with their individual names. Lyon *v.* Adamson, 7 Iowa 509.

2. Chamberlain *v.* Clayton, 56 Iowa 331; 41 Am. Rep. 101.

3. Wood *v.* Farmer, 69 Iowa 533; see Fertich *v.* Michener, 111 Ind. 472; 60 Am. Rep. 709.

School trustees are not liable for the improper disbursement of money by one of their number acting as treasurer, in which act they had no part. State *v.* Julian, 93 Ind. 292.

4. Jacquemin *v.* Andrews, 40 Mo. App. 507.

5. School Directors *v.* School Directors, 36 Ill. 140.

6. Ferguson *v.* True, 3 Bush (Ky.) 255.

7. *In re* Connopuenessing School Directors, 9 Pa. Co. Ct. Rep. 425.

8. *In re* Ohio Tp. School Directors, 9 Pa. Co. Ct. Rep. 392.

9. Wenzel *v.* Township Board, 49 Mich. 25.

10. As, for example, *California* Const., art. 9, § 4; *Illinois* Const., art. 8, § 2; *New York* Const., art. 9, § 1.

11. Houston, etc., R. Co. *v.* Randolph, 24 Tex. 317; People *v.* Davenport, 30 Hun (N. Y.) 177; State *v.* Hendershott, 21 Iowa 437; *In re* School

Fund, 15 Neb. 684; Hamilton Co. *v.* State, 122 Ind. 333; Davis *v.* State, 44 Ind. 38; Murray *v.* Smith, 28 Miss. 31; Board of School Directors *v.* Hernandez, 31 La. Ann. 158.

The legislature has the power to direct in what manner the school funds shall be loaned, upon what security, at what rate of interest, and in what currency they shall be received. Bush *v.* Shipman, 5 Ill. 186; and provision is made for securing the principal and interest of the loan. See Gaines *v.* Faris, 39 Miss. 403; Lindsey *v.* Marshall, 12 Smed. & M. (Miss.) 587; Montgomery Co. *v.* Auchley, 92 Mo. 126; Grant *v.* Huston, 105 Mo. 97; Knox Co. *v.* Goggin, 105 Mo. 182; Montgomery Co. *v.* Auchley, 103 Mo. 492; Kubli *v.* Martin, 5 Oregon 436; Board of Trustees *v.* Davison, 65 Ill. 124; Trustees *v.* Southard, 31 Ill. App. 359.

Where a statute directs that the board of police shall take deeds of trust on real estate from the borrowers of the common school fund, it gives them the right to make that right available by purchasing the land sold for the payment of a debt due the school fund, and to resell the same for the collection of the debt. Gaines *v.* Faris, 39 Miss. 403.

The collector must proceed strictly in accordance with the requirements of the statute, and a sale made for the payment of a greater sum than is actually due is void. Key *v.* Ostrander, 29 Ind. 1.

In *Missouri*, where money is borrowed from the school fund and secured by a mortgage, the county court may, on default of interest, without notice, order the land sold according to the provisions of the mortgage. Hurt *v.* Kelly, 43 Mo. 238.

Where the officer empowered to make a loan of the school fund fails to take proper security as required by statute, or to use due caution in ascertaining the borrower's title to property taken as security, a loss results, he will be liable upon his official bond. People *v.* Haines, 10 Ill. 528; Littlewort *v.* Davis, 50 Miss. 403.

The riparian commissioners of *New Jersey* have no power, by a covenant contained in a grant to a railroad company, to discharge a mortgage investment of the school fund. American Dock, etc., Co. *v.* Trustees, 35 N. J. Eq. 181.

In *Nebraska* the board of educational lands and funds has authority to invest the permanent school fund in United States three per cent. bonds, and the payment of premiums in purchasing them should be made from the permanent school fund. But after the investment the board cannot sell or convert the bonds into other securities, though when paid they may be reinvested as the board may deem best. *In re* School Fund, 15 Neb. 684.

An act providing that the purchase money arising from a sale of stock belonging to the State school fund might be paid in bonds and coupons of the State, does not necessarily make it an investment within the meaning of the constitutional provision prohibiting the investment of any part of the school fund in the stock, bonds, or other obligations of any State, county, city or corporation. State *v.* State Bank, 45 Mo. 528.

A *Kansas* statute directing the commissioners of the school fund to invest a portion of the same in bonds issued to pay members of the legislature, was held void. State *v.* Board of Com'rs, 4 Kan. 261.

The *Indiana* act of February 24, 1871, distributing the sinking fund among the several counties of the State, to be invested by them for school purposes, and providing that all loans thereafter made by the auditors and treasurers of the county should be at eight per cent. interest, was held valid. Shoemaker *v.* Smith, 37 Ind. 122. And see Fulwiler *v.* Zern, 38 Ind. 208. But it was held in *Kentucky* that the legislature had no power to abdicate its control over the school fund and abandon to the county courts the duty and power which the constitution imposed upon and vested in them alone. Auditor *v.* Holland, 14 Bush (Ky.) 147.

By *Indiana* Rev. Sts. 1881, § 4326, the several counties are made liable for so much of the public school fund as is entrusted to them, and the annual payment of interest thereon. By §§ 4390, 5904, it is made the duty of the county auditor to bring suit on the notes when property mortgaged to secure a loan of such funds fails to sell for enough to pay the principal and interest, but the county may pay a deficiency before the auditor brings suit. Lopp *v.* Woodward, 1 Ind. App. 105. Where a county loaned the congressional school fund and on default paid the interest, on foreclosure realizing enough to pay all due upon the mortgages, the county is entitled to be reimbursed for the interest paid. Hamilton Co. *v.* State, 122 Ind.

accrue from State and individual endowments, or from taxation,[1]

333. Where mortgaged lands are sold and the county auditor bids in the land on account of the fund, no deed to the State is required, but the land must be appraised and sold before a suit will lie on the mortgage notes for the deficiency. Clark *v.* State, 109 Ind. 388. A surety who signs a note given for a loan of the common school fund, made by the county auditor, is not released by reason of the loan not being secured by mortgage on real estate, as required by statute. Scotten *v.* State, 51 Ind. 52. The note is not thereby rendered void. Edwards *v.* Trustees, 30 Ill. App. 528; Littlewort *v.* Davis, 50 Miss. 403. And see Mann *v.* Best, 62 Mo. 491; Montgomery Co. *v.* Auchley, 103 Mo. 492; Bremer Co. *v.* Barrick, 18 Iowa 390.

A mortgage given by the auditor of a county to secure the loan of school funds to himself is not void, though the loan is unlawful as against public policy. State *v.* Levi, 99 Ind. 77; limiting Ware *v.* State, 74 Ind. 181; Stockwell *v.* State, 101 Ind. 1.

The constitution of *Indiana* declares that the principal of a school fund may be increased but shall never be diminished, and that the several counties shall be held liable for so much of the same as may be intrusted to them. And an act of 1865 providing that the county auditor's report of amount of school funds held in trust, when approved by superintendent of public instruction, should be conclusive, was held unconstitutional, as it might preclude the securing of all the money belonging to such funds. Howard Co. *v.* State (Ind. 1889), 22 N. E. Rep. 255.

By *Indiana* Laws 1833, § 96, $300 was the greatest amount that could be lent any one party, and a loan for a greater amount, and the mortgage given to secure the same, were void. State *v.* State Bank, 5 Ind. 353. And see further, concerning the investment of school funds in *Indiana*, Deming *v.* State, 23 Ind. 416; Webb *v.* Moore, 25 Ind. 4; Jones *v.* Hopkins, 26 Ind. 450; Ferris *v.* Cravens, 65 Ind. 262.

The interest of the public moneys in the United States, which by the act of 1836 is appropriated to the use of the common schools, is not a part of the proceeds of the school fund, within the proviso to § 9 of the act of 1827, entitled "An act to provide for the support of common schools." State *v.* Jericho, 12 Vt. 127.

A county court, having loaned township funds at ten per cent., has no right upon the application of inhabitants of the township to reduce the rate of interest. In relation to these funds, the county courts are trustees; they have no authority to dispose of the principal or interest otherwise than prescribed by law. Veal *v.* Chariton Co. Ct., 15 Mo. 412.

It has been held in *Louisiana*, that the sale of bonds constituting a part of the assets of the "free school fund," made by virtue of an act of the legislature, was utterly void and conferred no title on the purchaser, and that no future assignee of the purchaser, who took the bonds in good faith, for value, and before their maturity, could acquire a title to them. Sun Mut. Ins. Co. *v.* Board of Liquidation, 31 La. Ann. 175.

Pending litigation between the board of education of a township and a special school district therein, as to the custody and control of a fund in the township treasury, the board permitted the treasurer, by a verbal agreement, to use the fund in his business, on his agreeing to pay interest thereon, the object being to earn sufficient by such use to meet the interest with which the board would be charged in the event the pending action should be decided against it. When the treasurer's term expired, and for the same reason, the loan was renewed and a note of surety taken for the amount then due, payable to the board with interest in ten months. It was held that such loan was in contravention of public policy and prohibited by statute, and that in an action on the note by the board the sureties thereon were not estopped from setting up the illegality of the transaction as a defense. Board of Education *v.* Thompson, 33 Ohio St. 321.

In order to recover the extra interest allowed by the *Illinois* school law of 1845, in case of default in the payment of school money borrowed, there must be an especial averment in the declaration claiming the penalty. Sexton *v.* Gallatin Co., 19 Ill. 51.

1. School Dist. No. 1 *v.* Ormsby Co., 1 Nev. 334; Hackett *v.* Emporium Borough School Dist., 150 Pa. St. 220; 3 W. N. C. 411; Alter *v.* McBride, 7 Pa. St. 147; Collins *v.* Henderson, 11 Bush (Ky.) 74; Belle Point *v.* Pence (Ky.

fines and forfeitures,[1] sometimes from the proceeds of liquor licen-

1891), 17 S. W. Rep. 197; Trustees *v.* Broadhurst, 109 N. Car. 228.

The justices of a county court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasurer for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury. Wallendorf *v.* County Justices, 45 Mo. 228.

And where the school commissioners are by statute given exclusive power over the school fund and all money due the fund is made payable to their order, they may sue for and recover from the tax collector school taxes collected by him which he has failed to pay over. O'Neal *v.* Board of School Com'rs, 27 Ind. 227.

The *Kentucky* act of April 19, 1886, "to establish a public school in Morganville" and setting apart certain territory as a school district, the object being, by additional taxation in the district thus created, to have better school accommodations than its annual share of the common school fund would afford, was held to be constitutional. Board of Trustees *v.* Thomas (Ky. 1891), 15 S. W. Rep. 670.

The legislature may delegate the power of taxation to the taxable inhabitants, for raising money for the support of schools; Burgess *v.* Pue, 2 Gill (Md.) 11; Stewart *v.* Jefferson, 3 Harr. (Del.) 335; Union Co. Ct. *v.* Robinson, 27 Ark. 116; and under an act of the legislature authorizing voters of the different wards of the city of Trenton, New Jersey, to determine the amount to be raised each year for the support of the public schools, it was held that the amount thus determined on could not be reduced by the common council and that the collectors of the different wards failing to pay over to the superintendent the whole money when collected, though acting under the direction and authority of the common council, might be proceeded against by mandamus. State *v.* Hammell, 31 N. J. L. 446. The power of a township in *New Jersey* to raise money for schools is restricted by the fourth section of the school act of 1846 to an amount not exceeding double the sum received from the State. State *v.* Kingsland, 23 N. J. L. 85.

In *Arkansas*, where the electors of a district only have authority to fix the amount of the school tax and the meeting is not attended by a sufficient number to hold an election, it is the duty of the trustee to lay his estimate before the county court for their action, and, upon which the law requires the court to make the levy. Union Co. Ct. *v.* Robinson, 27 Ark. 116.

A school tax assessed on only a portion of a school district is void. Auditor Gen'l *v.* McArthur, 87 Mich. 457.

It has been held in *Nebraska* that although a school district may have voted a tax for the purpose of erecting a schoolhouse, the fund is beyond the control of its officers until its expenditure be authorized by a vote of the district. School Dist. *v.* Stough, 4 Neb. 357.

In *Illinois*, the township collector must pay the school tax collected by him to the township treasurer, and for failure to do so is liable upon his official bond. People *v.* Yeazel, 84 Ill. 539.

A system of education adopted in a particular district, under an act of the legislature authorizing a tax, that the school may be taught the entire year and the higher branches of education brought within the reach of all the children, is not a violation of the State or federal constitutions. Newman *v.* Thompson (Ky.), 4 S. W. Rep. 341. And see Board of Trustees *v.* Thomas (Ky. 1891), 15 S. W. Rep. 670.

It was held in McGahey *v.* Virginia, 135 U. S. 662, that the *Virginia* act authorizing the payment of moneys due the literary fund to be made in coupons was illegal, and that the act requiring the school tax to be paid in lawful money of the United States was valid.

1. Under *Iowa* Code, § 3370, the county in which a forfeited appearance bond is collectible is entitled to the proceeds thereof for the use of the school fund. Lucas Co. *v.* Wilson, 61 Iowa 141. And see Woodward *v.* Gregg, 3 Iowa 287; Board of Trustees *v.* Harrodsburg (Ky. 1887), 7 S. W. Rep. 312; Yankton Co. *v.* Faulk, 1 Dakota 348; State *v.* Heins, 14 Neb. 477; State *v.* Stone (Miss. 1892), 11 So. Rep. 4.

The taxable costs of the prosecution not paid by the defendant are in some States allowed to be deducted. Yankton Co. *v.* Faulk, 1 Dakota 348.

ses,[1] and money from other sources.[2] It has been the system of the general government to provide funds for the public schools

But in *Iowa* the prosecuting attorney is not allowed to retain his fees. Woodward *v.* Gregg, 3 Iowa 287.

Under the constitution of *Wisconsin*, art. 10, § 2, the "clear proceeds" of all fines collected for breaches of the penal laws belong to and constitute a part of the school fund. State *v.* Casey, 5 Wis. 318. And a law providing that two thirds of certain fines shall go to the informer is not unconstitutional, the words "clear proceeds" meaning the amount left of such fines after making authorized deductions. State *v.* DeLano, 80 Wis. 259.

The penalty for failure to forward freight imposed by *North Carolina* Laws of 1874–1875, ch. 240, is not given to the county school fund by article 9, § 5 of the *North Carolina* Const., providing that "the clear proceeds of all penalties and forfeitures," etc., shall be "faithfully appropriated for establishing and maintaining free public schools." Katzenstein *v.* Railroad Co., 84 N. Car. 688. But under the same section, it was held that the penalty for non-compliance with section 1960 of the *North Carolina* Code requiring railroad corporations to make an annual report to the governor, should be paid to the school fund. State *v.* Marietta, etc., R. Co., 108 N. Car. 24.

An act providing that penalties recovered for obstructing highways should go to the town for the benefit of highways, does not violate an article in the constitution providing that all fines assessed for breaches of the criminal laws should go to the common school fund. Toledo, etc., R. Co. *v.* Stevenson (Ind. 1892), 30 N. E. Rep. 1082.

1. Thus, under the *Nebraska* Const. of 1875, art. 8, § 5, all money arising from liquor licenses granted by cities belong to the common school fund of such cities. State *v.* McConnel, 8 Neb. 28; Hastings *v.* Thorne, 8 Neb. 160; State *v.* Wilcox, 17 Neb. 219. Though formerly it went to the school fund of the county. Tecumseh *v.* Phillips, 5 Neb. 305; White *v.* Lincoln, 5 Neb. 505. When a portion of more than one school district is within the limits of an incorporated village, the fund should be equally divided between them. State *v.* White, 29 Neb. 288; State *v.* Brodboll, 28 Neb. 254.

Money received for liquor license issued by a county does not belong to the school district where the business is carried on, but to the use of all the schools within the county granting the license. State *v.* Fenton, 29 Neb. 348.

Under acts *New Mexico*, 1891, ch. 9, and ch. 25, it was held that the money received from liquor licenses should be placed to the credit of the school districts and not to that of the general school fund of the county. Board of Education *v.* Laforga (N. Mex. 1891), 27 Pac. Rep. 616.

2. In *Indiana*, the proceeds of effects found by the coroner on dead bodies, and unclaimed, go to the support of the common schools of the county; State *v.* Marion Co., 85 Ind. 489; and all moneys arising from the sale of estrays and property taken up adrift, so soon as the same shall have vested absolutely in any county, become a part of the common school fund of the State, the act of 1844 not being repealed by the act of 1881. Tippecanoe Co. *v.* State, 92 Ind. 353. Escheats, Murray *v.* Smith, 28 Miss. 31; Thomas *v.* Frederick Co. School, 7 Gill & J. (Md.) 369.

Under a certain contingency in *Wisconsin*, the drainage money in a town treasury may be applied to the support of common schools. School Dist. *v.* Edwards, 46 Wis. 150.

And see School Dist. *v.* Edwards, 46 Wis. 150; South Bend School *v.* Jaquith, 90 Ind. 495 (revenue from dog tax).

The *Michigan* constitution provides that certain revenues shall be applied to paying the interest upon educational funds and the interest and principal of the State debt "until the *extinguishment* of the" said debt, when they shall constitute a part of the primary school interest fund. It was held that for the purpose of this requirement the debt is to be considered "extinguished" when there is money enough in the State treasury, not subject to other claims, to pay it, even though it has not matured and has not been actually paid. Auditor-Gen'l *v.* State Treasurer, 45 Mich. 161.

An act of the *Nevada* legislature providing for the transfer of money then in the railroad and sinking fund, and all moneys thereafter due or deposited in the said fund to the school fund, was held constitutional, and was not repealed by an act authorizing the county commissioners to loan or

by setting off a section of land in each township for school purposes.[1] In *Massachusetts*, in the early colonial days, it was the custom, in assigning lands to settlers, to reserve in the township one lot for school purposes.[2] The title to lands thus received from the United States is in the States in trust for the respective townships in which the lands lie;[3] and it is for the State legislatures to provide for the sale of such lands.[4] The school fund cannot be distributed for the benefit of pupils in private schools,[5]

transfer surplus money from one fund to another. State *v.* Storey Co., 17 Nev. 96.

1. 2 Kent's Com. *196, note (e); State *v.* Springfield Tp., 6 Ind. 83.

2. 2 Kent's Com. *196; 2 Winthrop's Hist. N. E. 215.

3. Long *v.* Brown, 4 Ala. 622; Widner *v.* State, 49 Ark. 172; School Dist. *v.* Driver, 50 Ark. 346; State *v.* Springfield Tp., 6 Ind. 83; Greene Tp. *v.* Campbell, 16 Ohio St. 11. And in *North Carolina* and *Tennessee*, by compact with the United States, such lands are inalienable. Lowry *v.* Francis, 2 Yerg. (Tenn.) 534; Goodman *v.* Tennessee Min. Co., 1 Head (Tenn.) 172.

4. Bradley *v.* Case, 4 Ill. 585; Maupin *v.* Parker, 3 Mo. 310. But the proceeds must be for the exclusive use of the township in which the lands lie. Springfield Tp. *v.* Quick, 22 How. (U. S.) 56; and the legislature cannot divert them from that purpose. Morton *v.* Grenada Male, etc., Academies, 8 Smed. & M. (Miss.) 773; State *v.* Springfield Tp., 6 Ind. 83. In *California* such proceeds may constitute a State fund, instead of a township fund. Wyman *v.* Banvard, 22 Cal. 524. A school district is entitled to its proportion of the school fund, though no school is kept. School Dist. *v.* Morrill, 59 N. H. 367. And it is immaterial whether the school is in the township or not if the fund is appropriated for the benefit of the children who reside in the township. Bishop *v.* McDonald, 27 Miss. 371.

5. Otken *v.* Lamkin, 56 Miss. 758; St. Patrick's Orphan Asylum *v.* Board of Education, 34 How. Pr. (N. Y.) 227; State *v.* Graham, 25 La. Ann. 440.

Schools maintained by an "Orphan Asylum Society" are not "common schools" within the meaning of the constitution of *New York*. People *v.* Board of Education, 13 Barb. (N. Y.) 401; St. Patrick's Orphan Asylum *v.* Board of Education, 34 How. Pr. (N. Y.) 227; *In re* Malone's Estate, 21 S. Car. 435. And a statute allowing a part of the State school fund of *Kentucky* to be taken from one of the school districts and to be appropriated to the payment of the tuition of such children living in the district as may be taught under a special contract at a private academy, is unconstitutional, and an injunction will be granted at the instance of a teacher entitled to part of such common school fund to prevent the superintendent of common schools from paying a portion of the fund to a party not entitled thereto, but claiming it under an unconstitutional statute. Underwood *v.* Wood (Ky. 1892), 15 L. R. A. 825.

The legislature cannot authorize a town to raise money for private schools. Curtis *v.* Whipple, 24 Wis. 350; 1 Am. Rep. 187. But it has been held in *New York* that the legislature might provide that moneys raised in city and school districts, for school purposes, should be used in part for orphan asylums in proportion to the number of children therein educated. St. Patrick's Orphan Asylum *v.* Board of Education, 34 How. Pr. (N. Y.) 227; People *v.* Board of Education, 13 Barb. (N. Y.) 401. And see People *v.* Glowacki, 2 Thomp. & C. (N. Y.) 436.

In *Illinois*, under the constitution of 1848, the legislature cannot constitute a private schoolhouse erected under the provisions of a will of a testator as a schoolhouse and place of worship, a district, and provide for the election of trustees therein and vest them with the taxing power for the support of a school to be maintained there. People *v.* McAdams, 82 Ill. 356. And an act is unconstitutional which allows children to receive the same share of the public school fund for attendance at a private school, making no exception as to schools controlled by religious societies, as for attendance on public schools. Otken *v.* Lamkin, 56 Miss. 758.

The fact that private contributions

or to aid any sectarian school.[1] The restrictions and regulations under which these funds are provided must be strictly observed.[2]

were made in aid of a district school to lengthen the term does not change the character of the school or the liability of the district on a contract for rent of the building used for the school. Allen *v.* School District No. 2, 15 Pick. (Mass.) 35.

In 1799 *South Carolina* granted to the city council of Charleston, for the benefit of its Orphan House, all escheated property within certain limits, to the amount of $50,000; and in 1868 the constitution directed the proceeds of all escheated property to be preserved as "a State school fund" for the use of "free public schools." In 1864 a person died intestate leaving lands within such limits which were claimed to be escheated property, and it was held that the right so granted by the act of 1799 could not be divested by the constitution of 1868, but that the city council were entitled to so much of this property (if escheated) as would, with its previous receipts from like sources, make up the amount of $50,000. *In re* Malone's Estate, 21 S. Car. 435.

1. Atchison, etc., R. Co. *v.* Atchison, 47 Kan. 712; Cooley's Const. Lim. 576.

The constitutional provision prohibiting the appropriation of any money or other property to aid any sectarian school, applies to all appropriations to such schools, whether made as a donation or in payment for services rendered the State by such school. Synod of Dakota *v.* State (S. Dak. 1891), 50 N. W. Rep. 632; Cook Co. *v.* Chicago Industrial School, 125 Ill. 540; 8 Am. Rep. 386; 1 L. R. A. 437; State *v.* Hallock, 16 Nev. 373. In this last case a school connected with and controlled by the officers of an orphan asylum who were sisters of charity of the Roman Catholic church, in which religious instruction was given the Roman Catholic children, was held to be a sectarian institution within the meaning of the constitution. In Cook Co. *v.* Chicago Industrial School, 125 Ill. 540; 8 Am. Rep. 386; 1 L. R. A. 437, the Chicago Industrial School for Girls, a corporation having no building of its own, placed all girls committed to it by the county court in the House of the Good Shepherd and St. Joseph's Asylum, institutions under two orders of the Roman Catholic church, which furnished them with clothing and tuition and received all the pay allowed therefor by the county. It also appeared that the officers of the industrial school were also officers of the two institutions named and that the doctrine of the Roman Catholic church was taught therein to some of the pupils. It was held, in a suit by the industrial school against the county to recover for the price of tuition and clothing of dependent girls committed to its charge and custody, that the money sought to be recovered would be a payment in support of schools controlled by a church and in aid of a sectarian purpose, and that the action would not lie.

But the basement of a church may be temporarily leased for a public school where it remains under the control of the school board and is taught by their teachers. Millard *v.* Board of Education, 121 Ill. 297.

In *Texas*, all appeals from the decisions of the subordinate school officers are to the superintendent of public instruction, and from him to the State board of education; taxpayers, therefore, unless they have exhausted these remedies, cannot maintain a suit to enjoin the payment of a school fund to a teacher on the ground that he maintains a sectarian school and that the trustees, therefore, had no authority to make the contract. Nance *v.* Johnson (Tex. 1892), 19 S. W. Rep. 559.

The territorial law of *South Dakota* authorized the board of education to designate a private institution where instruction should be given and the tuition paid by the territory. Accordingly a contract was made with the Pierre University which required three months' notice on either side to cancel, and it was held that the constitution of the State subsequently adopted prohibiting appropriation to any sectarian institution, terminated the contract, and that such provision did not contravene the provision in the constitution of the United States prohibiting the impairing of the obligations of contracts. Synod of Dakota *v.* State (S. Dak. 1891), 50 N. W. Rep. 632.

See *supra*, this title, *Bible in Schools*.

2. Halbert *v.* Sparks, 9 Bush (Ky.) 259; Collins *v.* Henderson, 11 Bush (Ky.) 74; State *v.* Graham, 25 La. Ann. 440; State *v.* Board of Liquidators, 29 La. Ann. 77; Sun Mut. Ins. Co. *v.* Board of Liquidation, 31 La. Ann. 175; Littlewort *v.* Davis, 50

An illegal use of the school fund may be restrained by injunction.[1] A statute which in effect makes a donation of a portion of the fund for other than common schools is void.[2]

Miss. 403; Otken *v.* Lamkin, 56 Miss. 758; People *v.* Board of Education, 13 Barb. (N. Y.) 400; People *v.* Allen, 42 N. Y. 404; Weir *v.* Day, 35 Ohio St. 143.

But where a county treasurer's books show that he has money belonging to a district that he has not disbursed, an apportionment to the district as provided by law does not have to be proven to maintain an action on his bond for the conversion. High Lake Dist. Tp. *v.* Espeset, 75 Iowa 500.

The public school law of *Missouri* (1874), properly understood, does not create a separate fund for the support of public schools upon which warrants for the payment of teachers of such schools must be drawn. But warrants for the payment of teachers of both white and colored schools of the same district are properly drawn upon the teachers' fund of said district. State *v.* Thompson, 64 Mo. 26.

Under the general statutes of *Minnesota* (1878), authorizing the treasurer of a school district to pay a judgment against the trustees of the district only out of money not otherwise appropriated, he has no authority to do so out of moneys of the district applicable only to other specific purposes as shown by his own report. School Dist. No. 31 *v.* Roach, 23 Minn. 495.

1. In *Missouri*, the county treasurer is a proper party. Black *v.* Cornell, 30 Mo. App. 641.

Where a special tax is levied to pay for the building of a schoolhouse and the directors of schools employ a person to build such schoolhouse and issue orders to him on the treasurer for his pay, and he sells such orders at par to raise money to construct the building, the purchasers of the orders have an equitable lien on the tax thus levied for payment, and an attempt to divert it to a foreign purpose is a fraud and misapplication. Pennington *v.* Coe, 57 Ill. 118.

2. People *v.* Allen, 42 N. Y. 404; Collins *v.* Henderson, 11 Bush (Ky.) 74; Knox Co. *v.* Hunolt (Mo. 1892), 19 S. W. Rep. 628.

Nor can the building tax of a school district be diverted to ordinary purposes. German Tp. School Dist. *v.* Sangston, 74 Pa. St. 454.

In *Massachusetts*, it has been held that a town has no authority independent of statute, nor, under the constitution, can it take authority by statute, to raise by taxation and appropriate money to support a school, as a public school, which is founded by a charitable bequest that vests the order and superintendence of it in trustees who, though a majority of them are to be chosen by the inhabitants of the town, yet are limited to be members of certain religious societies. Jenkins *v.* Andover, 103 Mass. 94. And in *Virginia*, where the constitution provides that the public free school system shall be uniform and under the control of the school officers, it was held that an incorporated free school, established by a charitable bequest and under control of the trustees of the corporation, could not be given any part of the school money. Hall's Free School *v.* Horne, 80 Va. 470. Nor can the legislature appropriate any part of the fund set apart by the constitution of the State for free public schools, to a State normal school, although it may provide for such school out of other public money. State Female Normal School *v.* Auditors, 79 Va. 233; Gordon *v.* Cornes, 47 N. Y. 608; nor to establish an observatory, even though the appropriation is in the form of a loan to be secured by a mortgage on the observatory, where the security is inadequate. People *v.* Allen, 42 N. Y. 404. Nor can it be appropriated to a state university which is to be under the exclusive control and management of a board of trustees and not subject to the supervision of the State superintendent of education, who is, by the constitution of the State, vested with the general supervision of the public schools, as it cannot be regarded as one of these public schools. Elsberry *v.* Seay, 83 Ala. 614; State *v.* Graham, 25 La. Ann. 440.

The *Missouri* constitution of 1875, art. 10, § 19, abrogated the continuing appropriation for the State Normal School made by the act of 1875. State *v.* Holladay, 66 Mo. 385.

The Straight University is not a public institution of learning in contemplation of art. 140 of the *Louisiana* constitution, and therefore a constitutional

2. Apportionment—*a.* IN GENERAL.—The fund should be apportioned equitably among the several school districts, usually according to the number of children of the school age residing in each. Provisions for apportionment are made by statute as a rule.[1] If it

objection to any appropriation made by the legislature in its favor must prevail. A public institution of learning would be one controlled by the State through its agents, and in which the State would have a paramount interest, and right of property, and which would depend upon the State for its existence. State *v.* Graham, 25 La. Ann. 440.

A female high school for the purpose of teaching book-keeping, algebra, geometry, history, rhetoric, mental, moral and natural philosophy, botany, the Latin and French languages, and other higher branches of knowledge than were taught in the grammar schools of the town, was held to be a town school within the meaning of the Revised Statutes of *Massachusetts;* and it was held that the town might raise money for its support by tax. Cushing *v.* Newburyport, 10 Met. (Mass.) 508. And see Newman *v.* Thompson (Ky. 1887), 4 S. W. Rep. 341.

But an agreement by certain school districts to turn over the school money assigned them by the town to an academy in consideration of free instruction in the common school branches to the scholars of the districts, was held valid under *New Hampshire* Gen. Laws, ch. 90, § 15; Page *v.* Haverhill Academy, 63 N. H. 216. And see Holt *v.* Antrim, 64 N. H. 284. And in *Missouri* an academy whose trustees the legislature authorized to receive all the public school moneys, and on which it conferred all the rights of the inhabitants in educating their children at the public schools and the benefits of which were open to all the inhabitants, was held to be one of the common schools of the State, although it taught Latin and the higher mathematics and was allowed to charge a small amount of tuition if necessary, from those only who were able to pay it. State *v.* Vaughan, 99 Mo. 332.

1. Apportionment.—Board of Education *v.* Cheney, 5 Ohio St. 67; State *v.* Barnes, 22 Fla. 8; School Dist. No. 7 *v.* Patterson, 10 Mont. 17; Cooke *v.* School Dist. No. 12, 12 Colo. 453.

An act discriminating between white and black children in the distribution of the school fund, is unconstitutional. Claybrook *v.* Owensboro, 23 Fed. Rep. 634; *aff'g* 16 Fed. Rep. 297.

In *New Hampshire*, under the town system, the annual meeting is authorized to direct how the money shall be assigned. School Dist. No. 1 *v.* Prentiss (N. H. 1890), 19 Atl. Rep. 1090.

Where it is provided that the fund is to be apportioned among the several counties of the State in proportion to the children of a school age, the inmates of an orphan asylum having no right to attend a public school, and for whom education is provided in the home, are not to be counted as part of the children of the county in which it is situated. State *v.* Dovey, 19 Nev. 396.

Where there has been an erroneous apportionment, the State superintendent of instruction may consider a payment made to a parish under it when he makes a proper apportionment. State *v.* Fay, 36 La. Ann. 241.

Where a statute provides that "the income of the school fund" and other moneys "shall annually be divided and distributed by the comptroller among the several towns," it amounts to an appropriation, and a mandamus will lie to compel the comptroller to so distribute it. State *v.* Staub (Conn. 1892), 23 Atl. Rep. 924. And where an apportionment has been made by the superintendent of public instruction under *Michigan* St., § 5029, the treasurer cannot refuse to pay to a school district the amount to which it is entitled under such apportionment because no apportionment has been made by the township clerk. Moiles *v.* Watson, 60 Mich. 415. In Board of Education *v.* Sheridan, 42 N. J. L. 64, a mandamus was allowed for the payment of the county superintendent's order for the State appropriation for public schools, although the moneys had been applied for school purposes in the preceding year.

In *New Hampshire* a school district is entitled to its proportion of school money although no school is kept. School Dist. *v.* Morrill, 59 N. H. 367. Where a sub-district lies in two counties the taxes belong to the dis-

should happen that the apportionment is an unfair one, a court of equity will interfere frequently by granting an injunction.[1]

b. ON PARTITION OF SCHOOL DISTRICT.—Where an existing county or school district is partitioned and a new one formed from a portion of its territory, provision is made usually for an apportionment of all school funds and property.[2] But, in the

trict township to which the territory is attached. Honey Creek Tp. *v.* Floete, 59 Iowa 109.

The superintendent of common schools in *New York* has no general power over school money in the hands of the commissioners of common schools; and therefore, where there is no appeal or other proceeding pending before him, he is not authorized to make an order directing the commissioners of a town to retain in their hands, to abide such order as may be thereafter made, the money about to be apportioned pursuant to law to a school district for teachers' wages. Bennett *v.* Burch, 1 Den. (N. Y.) 141.

1. Maloy *v.* Madget, 47 Ind. 241, where an injunction was granted to prevent the use of the dog tax fund to employ a teacher in a single school district, or the use of the fund in advance of the general apportionment.

In *Iowa* a law directing the county judge to apportion one-half the county school fund, in equal amounts, to the several school districts of the county, was held unconstitutional as inconsistent with a section of the constitution requiring a distribution in proportion to the number of youths between the ages of five and twenty-five. Dubuque Tp. *v.* Dubuque Co. Judge, 13 Iowa 250.

In *Vermont* it has been held that where the distribution of the fund is left to the selectmen of the town, a district cannot sue the town for moneys paid to other districts by order of the selectmen, which should have been paid to the complaining district. School Dist. No. 1 *v.* Bridport, 63 Vt. 383.

Where the school trustees having power to apportion the fund between the districts, have directed a certain amount to be paid the directors of a school district, an action will not lie against the directors by another district claiming the amount as having been levied in their territory, but the action should be against the trustees. School Directors *v.* School Directors, 36 Ill. 140.

Where it was provided that the board of town auditors should apportion so much of a certain fund as they deemed necessary among the several school districts, as the public school moneys of the State were apportioned, and the apportionment certified to the treasurer by them, it was held that when such board of auditors had apportioned the moneys of certain years in accordance with the statute, their powers respecting the same were ended, and a mandamus would not lie to compel them to modify their apportionment to conform to corrections subsequently made by the superintendent of public instruction in the apportionment of State school funds for those years. People *v.* Board of Town Auditors, 126 N. Y. 528.

2. Lower Allen Tp. School Dist. *v.* Shiremanstown School Dist., 91 Pa. St. 182; Williams Tp. *v.* Williamstown, 9 Pa. Co. Ct. Rep. 65; Manchester *v.* Reserve Tp., 4 Pa. St. 35; State *v.* Eaton, 11 Wis. 28; Cassville *v.* Morris, 14 Wis. 440; School Dist. *v.* Twitchell, 63 N. H. 11; Board of Education *v.* Board of Education, 30 W. Va. 424.

The legislature may unite and divide townships and their school funds at discretion. Greenleaf *v.* Trustees of Tp. No. 41, 22 Ill. 236.

In *New Hampshire* the power of selectmen to apportion school money among the several school districts in a town is a continuing power to be exercised from time to time whenever it may be necessary from change made in the districts in order to give each district the benefit of the taxes paid by its members. School Dist. No. 1 *v.* Sanborn, 25 N. H. 34.

In *Texas* it is made the duty of the county judge, upon the subdivision of a school district, to apportion its school funds among the new districts formed. Porter *v.* State, 78 Tex. 591.

But where it is made the duty of certain officers to ascertain at the time the amount justly due such new district from the district out of which it may have been in whole or in part created, no action can be maintained by the

new district against the old one to recover its share of such property until such apportionment has been made. School Dist. Nos. 17 and 24 *v.* School Dist. Nos. 2 and 18, 17 Neb. 177. And see Donnelly *v.* Duras, 11 Neb. 283. And where an apportionment has been made, acquiescence will prevent the reopening thereof and recovery on an old claim. School Dist. No. 3 *v.* Riverside Tp., 67 Mich. 404.

Where one school district was created and organized out of territory belonging to another, and the latter obtained all the property previously belonging to the old district, in consideration of which the county superintendent adjudged and ordered the new district to pay to the old a certain amount, it was held, in an action to recover this sum, that a petition setting forth the facts fully and alleging that such sum was due, and that the defendant refused to pay it, although requested to do so by the treasurer, stated a good cause of action. School Dist. No. 49 *v.* School Dist. No. 70, 20 Kan. 76.

If a district has voted to levy a tax to raise money for the erection of a building and before the tax is levied the district boundaries are changed, the tax is only to be levied on lands remaining within the district after the boundaries were changed. Hughes *v.* Ewing, 93 Cal. 414.

Where a statute requires a town clerk to give notice of every meeting of the board of school inspectors of his township an apportionment made by such inspectors of the valuation of school property on the formation of a new district, at a meeting held without such notice, was void, and the satisfaction of the amount apportioned by assessment and collection of a tax will be enjoined. School Dist. No. 3 *v.* School Dist. No. 1, 63 Mich. 51.

In *Pennsylvania* it has been held, where an action was brought by an old district against a new one created therefrom to determine how much the new district should pay the old for its proportionate share of the real estate and schoolhouses, another school district subsequently formed from the old district could not intervene in said suit and claim its proportionate share but must wait the settlement between the old and first new district and then make its claim. While the law provides that the new district shall compensate the old for any undue proportion of real estate within the boundary of the former, it is otherwise as to the net assets of a personal nature, such as cash, etc., on hand at the time of separation. Appeal of School Dist., 96 Pa. St. 76.

When a portion of an old township is taken to make a new one, and through its trustees brings a mandamus against the county auditor to compel him to issue a warrant for its share of the taxes assessed by the original township, the trustee of the old township is not entitled to be admitted a party defendant. Towle *v.* State, 110 Ind. 120.

A school district may maintain a bill in equity against another which retains a tax claimed by it. School Dist. No. 13 *v.* Dean, 17 Mich. 223. And see Hendricks *v.* Bobo, 12 La. Ann. 620. And one district may recover its apportionment illegally obtained by another; and when invested, the property may be recovered. East Carroll School Board *v.* Union School Board, 36 La. Ann. 806. The action on a demand belonging to a school district should always be in the name of the district. Donnelly *v.* Duras, 11 Neb. 283.

It has been held in *Michigan* that a mandamus for the payment of the school fund can only issue at the instance of one school district against another when there are statutory or legal relations between them to authorize it, and the obligation to pay has been legally liquidated, and that an action for money had and received is the only proceeding by which to liquidate the demand. School Dist. No. 9 *v.* School Dist. No. 5, 40 Mich. 551.

Where school trustees of one township are ordered to pay over money in their hands belonging to another township, the trustees of such township may recover it in an action for money had and received. Trustees of Schools *v.* Trustees of Schools, 81 Ill. 470. But it has been held in *Ohio* that where there is no privity between the boards of two districts, one cannot recover from the other taxes erroneously received by it belonging to the former. Board of Education *v.* Board of Education, 44 Ohio St. 278.

Where a general statute provided that when any territory is detached from one school district and annexed to another, such latter district should be liable for "its just share of the liabili-

absence of statutory authority for an apportionment, none can be made.[1]

3. Warrants.—See MUNICIPAL SECURITIES, vol. 15, p. 1204.

X. SCHOOL TAXES.—See TAXATION.

SCIENCE.—Science in a broad sense is knowledge; "the knowledge of many, methodically digested and arranged, so as to be attainable by one."[2]

ties and indebtedness" of, and receive its "just share of, the credits" from the district from which such territory was detached, the word "credits" in the body of the act, construed in connection with the word "assets" in the title thereof, was held to include the value of all school property, the school tax levied, county school tax, and cash in the treasury, less the debts and liabilities of the school district. Board of School Directors *v.* Board of School Directors, 81 Wis. 543.

In *Michigan* a township board has jurisdiction of appeals from decisions of the board of school inspectors fixing the amount to be paid by an old school district to a new one formed from a portion of its territory, the old district retaining the school property. Cannon *v.* Wilcox, 48 Mich. 404.

1. Cooke *v.* School Dist. No. 12, 12 Colo. 453 (division of a county); State *v.* School Dist. No. 15, 90 Mo. 395 (division of a school district); District No. 6 *v.* District No. 5, 10 Mo. App. 266 (same); Rice *v.* McClelland, 58 Mo. 116; Morrow Co. *v.* Hendryx, 14 Oregon 397.

And where the act creating a new county out of a portion of an old one, created a board to determine the amount of indebtedness of the old county, over and above the value of public property of the county, and to determine the proportion of such net indebtedness as should be assumed by the new county, created out of the old one by that act, it gave no authority to such board to determine the respective rights of the two counties to the school taxes collected by the old county. Morrow Co. *v.* Hendryx, 14 Oregon 397.

Where the proceedings by which the boundaries of the school districts were changed are illegal, the proper officers should apportion the school fund precisely as if no change had been attempted, and mandamus will issue to compel them to do so. State *v.* Grimshaw (Mo. 1886), 1 S. W. Rep. 363.

But see Merritt *v.* School Dist., 54 Ark. 468. In this case a school district was detached from Arkansas county and added to Jefferson county. Mansf. Dig. *Arkansas*, § 6176, provides that upon receipt of notice of the share of school revenues apportioned to a county, the county court shall apportion the same to the several school districts of the county, and it was held that the children of the detached district having been included in the enumeration on which the apportionment was made to Arkansas county, such district must be included in the apportionment made by the county court of that county.

Where a school district has been abolished, unexpended school money apportioned to such district before it was abolished may be held by trustees appointed by the court for the benefit of the district, and the maintenance or revival of the district organization is unnecessary. School Dist. No. 16 *v.* Concord, 64 N. H. 235.

In Willimantic School Soc. *v.* First School Soc., 14 Conn. 456, it appeared that the school society of A was divided by legislature and a new society formed. At this time the society of A held certain funds for the use of the school therein, but in the act making the division there was no provision for these funds. Several years later the legislature, on the petition of the society of B against the society of A, passed a resolution directing a division of such fund between the two societies in proportion to the number of school children within their respective limits. It was held that this resolution providing for such a division was not invalid as infringing the vested rights of the defendants, the appropriation having been made originally for the benefit of the schools and not for the benefit of the corporations then embracing them.

2. Vredenburg *v.* Behan, 33 La. Ann. 637. See also Jackson *v.* Waldron, 13 Wend. (N. Y.) 205. In the first case it was held that a rifle club was not properly incorporated under an act authorizing the creation of corporations for "literary, scientific and charitable purposes." After stating that rifle

SCIENTER—(See also ANIMALS, vol. 1, pp. 581–585; INDICTMENT, vol. 10, p. 596).—An allegation in a pleading (or the clause which contains it) that the defendant or accused person has knowledge of certain facts, knowledge of those facts being essential to the wrong or crime charged. Inserting such an allegation is called "laying the action or indictment with a *scienter*." *Scienter* also signifies the guilty knowledge itself. Thus, in a prosecution for uttering counterfeit money the word *scienter* signifies both the knowledge of the defendant of the character of the money, and the averment of such knowledge in the indictment.[1]

shooting is an art, but is not a science, the court by Todd, J., thus distinguishes science and art: "The distinction between the two, science and art, has been the subject of much erudite discussion, and given rise to some confusion of ideas; but it is a distinction that is now generally accepted, is well defined, and has received authoritative recognition. It may be summed up thus: 'Science in its broadest sense is knowledge'; or, as stated by an eminent lexicographer, 'the knowledge of many, methodically digested and arranged, so as to be attainable by one;' a 'body of principles and deductions to explain the nature of some matter'—as mental science, moral science, physical science, etc. 'It depends on abstract or speculative principles.' 'Art relates to practice or performance.' It is 'practical skill as directed by theory or science;' 'the mere application of knowledge.'"

"The very notion of science springs from the recognition of the existence of general truths or laws, to which the relation of things and their operation upon each other conform. These laws or truths ascertained by the investigation of men devoted to particular departments of inquiry, constitute science." Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7.

Scientific Institution.—"A 'scientific institution,' under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of 'science.'" Detroit Home, etc., School *v.* Detroit, 76 Mich. 523.

Scientific Works. — See BOOKS AS EVIDENCE, vol. 2, p. 467*m*; EXPERT AND OPINION EVIDENCE, vol. 7, p. 513.

1. The owner of a watch-dog kept chained by day and loosed at night is liable, without further proof of *scienter*, to one who is bitten by the dog while passing the premises on the highway at night. Montgomery *v.* Kester, 35 La. Ann. 1091; 48 Am. Rep. 253.

The omission of the positive averment in an indictment that the prisoner did the act charged is not supplied by the concluding averment of the *scienter* and is fatal. State *v.* Halder, 2 McCord (S. Car.) 377; 13 Am. Dec. 738.

An indictment alleging in words of the statute that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely made, forged, counterfeited, and altered obligation of the United States; but not further alleging that the defendant knew it to be false, forged, counterfeited, and altered, is insufficient, even after verdict. U.S. *v.* Carll, 105 U.S. 611.

Evidence of the *scienter* being given by the State, it is competent for the defendant to rebut it. This he could do by facts and circumstances tending to show that he supposed the bill was genuine, that it was so in fact, or that he resorted to the ordinary and approved sources of information to ascertain its character, as that he examined the "Counterfeit Detector" to ascertain whether it was good or bad. State *v.* Morton, 8 Wis. 167.

To prove that prisoner knew bill to be counterfeit at the time he passed it; evidence that before and after he passed it, he was in company with another person shortly before and after the latter passed counterfeit bills of the same bank, is admissible for the purpose of showing that the two had formed a conspiracy to put off counterfeit bills. And if such conspiracy is established, the latter's acts in passing the counterfeit bills go as far to show the former's knowledge that the bill passed by him was spurious, as if he had passed the other bills with his own hand. State *v.* Spalding, 19 Conn. 233; 48 Am. Dec. 158. See Martin's Case, 2 Leigh (Va.) 745.

SCILICET, in legal papers, has the same meaning and effect as *videlicet*, *q. v.*

SCINTILLA JURIS.—See REAL PROPERTY, vol. 19, p. 1067; USES.

SCINTILLA OF EVIDENCE—(See also INSTRUCTIONS, vol. 11, p. 244; NEGLIGENCE, vol. 16, p. 466; NONSUIT, vol. 16, p. 720; QUESTIONS OF LAW AND FACT). The doctrine that where there is any evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence.[1] In the *United States* courts it has been decided that the most reasonable rule is "that before the evidence is left to the jury there is, or may be, in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed.[2]

1. Mercier *v.* Mercier, 43 Ga. 323; Johnston *v.* Crawley, 22 Ga. 348; Stamper *v.* Hayes, 25 Ga. 546; Phillips *v.* Brigham, 26 Ga. 617; Thornton *v.* Gibson, 43 Ga. 395; Way *v.* Illinois, etc., R. Co., 35 Iowa 585; Muldowney *v.* Illinois, etc., R. Co., 32 Iowa 178; Cumberland Coal, etc., Co. *v.* Scally, 27 Md. 589; Denny *v.* Williams, 5 Allen (Mass.) 1; Brooks *v.* Somerville, 106 Mass. 275; Hays *v.* Bell, 16 Mo. 496; Houghtaling *v.* Ball, 19 Mo. 84; Chambers *v.* McGiveron, 33 Mo. 202; Deere *v.* Plant, 42 Mo. 60; McKown *v.* Craig, 39 Mo. 156; Matthews *v.* St. Louis Grain Elevator Co., 50 Mo. 149; Chamberlin *v.* Smith, 1 Mo. 482; Speed *v.* Herrin, 4 Mo. 356; Obouchon *v.* Boon, 10 Mo. 442; Robbins *v.* Alton Marine, etc., Ins. Co., 12 Mo. 380; Dooly *v.* Jinnings, 6 Mo. 61; Todd *v.* Boone Co., 8 Mo. 437; Winston *v.* Wales, 13 Mo. 569; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Lee *v.* David, 11 Mo. 116; Meyer *v.* Pacific R. Co., 40 Mo. 151; Glasgow *v.* Copeland, 8 Mo. 268; Hughes *v.* Ellison, 5 Mo. 110; Morton *v.* Reeds, 6 Mo. 64; Emerson *v.* Sturgeon, 18 Mo. 170; Rippey *v.* Friede, 26 Mo. 523; Flori *v.* St. Louis, 3 Mo. App. 231; Charles *v.* Patch, 87 Mo. 462; Lewis *v.* Pratt, 48 Vt. 358.

2. Comrs. *v.* Clark, 94 U. S. 284. And so a similar doctrine to that maintained by the *United States* courts has prevailed in *England*. Jewell *v.* Parr, 13 C. B. 909; Toomey *v.* London, etc., R. Co., 3 C. B. N. S. 146; Cornman *v.* Eastern Counties R. Co., 4 H. & N. 781; Giblin *v.* McMullen, L. R., 2 P. C. 317; Wheelton *v.* Hardisty, 8 E. & B. 231; Metropolitan R. Co. *v.* Jackson, L. R., 3 App. Cas. 193. The old rule has been exploded likewise in several of the States. Mason *v.* Lewis, 1 G. Greene (Iowa) 494; Fort Scott Coal, etc., Co. *v.* Sweeney, 15 Kan. 244; Brown *v.* European, etc., R. Co., 58 Me. 384; Morton *v.* Frankfort, 55 Me. 46; Cooper *v.* Waldron, 50 Me. 80; Pray *v.* Garcelon, 17 Me. 145; Head *v.* Sleeper, 20 Me. 314; Belt *v.* Marriott, 9 Gill (Md.) 331; Brooks *v.* Somerville, 106 Mass. 271; Reed *v.* Deerfield, 8 Allen (Mass.) 522; Todd *v.* Old Colony R. Co., 7 Allen (Mass.) 207; Denny *v.* Williams, 5 Allen (Mass.) 1; Gavett *v.* Manchester, etc., R. Co., 16 Gray (Mass.) 501; Bailey *v.* Kimball, 26 N. H. 351; Colt *v.* Sixth Ave. R. Co., 49 N. Y. 671; Wombough *v.* Cooper, 4 Thomp. & C. (N. Y.) 586; Shirley *v.* Vail, 38 How. Pr. (N. Y.) 406; Brooks *v.* Buffalo, etc., R. Co., 25 Barb. (N. Y.) 600; Wittkowsky *v.* Wasson, 71 N. Car. 451.

And see generally upon this subject, 2 Thomp. Tr., § 2246, where the subject is elaborately treated, and where the above cases and definition are to be found.

"A jury cannot be permitted to find there is evidence of a fact when there is not any. The plaintiff cannot read his writ to the jury and claim a verdict without submitting any evidence, nor can he do so where the evidence is too slight and trifling to be considered and acted upon by a jury." Connor *v.* Giles, 76 Me. 132.

SCIRE FACIAS.

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I. In General.—A *scire facias* is a writ founded on some matter of record. It is called *scire facias* from these essential words in the writ, and is a warning given to the defendant to appear in court and plead in bar of the execution or show any cause, if he can, by release or otherwise, why execution should not issue on the judgment or record against him.[1] The writ must issue from the court where the record is, or the judgment was rendered.[2] But, while this is

1. Foster, Sci. Fa., 2.

2. **From Whence Issued.**—Osgood *v.* Thurston, 23 Pick. (Mass.) 110; State *v.* Brown, 41 Me. 535; State *v.* Kinne, 39 N. H. 129; Grimke *v.* Mayrant, 2 Brev. (S. Car.) 202; Carlton *v.* Young, 1 Aik. (Vt.) 332; Boylan *v.* Anderson, 3 N. J. L. 119; Wilson *v.* Tiernan, 3 Mo. 577; Vallance *v.* Sawyer, 4 Me. 62; Windham Co. *v.* Erwin, Brayt. (Vt.) 218; Dickinson *v.* Allison, 10 Ga. 557; Gibson *v.* Davis, 22 Vt. 374; Tindall *v.* Carson, 16 N. J. L. 94; Conner *v.* Neff (Ind. App. 1891), 27 N. E. Rep. 645; Schmidtke *v.* Miller, 71 Tex. 103; Challenor *v.* Niles, 78 Ill. 78; Masterson *v.* Cundifi, 58 Tex. 472.

A *scire facias* may be issued by a justice of the peace, though the record of his judgment has been removed to the common pleas. Drum *v.* Snyder, 1 Binn. (Pa.) 381. But see Brannan *v.* Kelley, 8 S. & R. (Pa.) 479, which seems to overrule this.

A *scire facias* upon a municipal claim, being an original and not a judicial writ, does not necessarily issue from the court in which the claim is filed. Schenley *v.* Com., 36 Pa. St. 29; 78 Am. Dec. 359. So, in *Pennsylvania*, upon a recognizance taken in the orphans' court to secure payment for lands taken at an appraisement, the *scire facias* thereon is issued from the common pleas. Allen *v.* Reesor, 16 S. & R. (Pa.) 14.

And *scire facias* lies in the common pleas on a recognizance taken in the quarter sessions. Bodine *v.* Com., 24 Pa. St. 69.

Scire facias on a recognizance to prosecute an appeal should be issued originally from the court appealed to. Vallance *v.* Sawyer, 4 Me. 62.

Proceedings to revive a judgment against the heirs of the defendant, so as to have execution against inherited lands, must be brought in the court where the judgment was rendered, and an independent suit in another county where a transcript has been filed to obtain a lien cannot be maintained where the lands have been sold without fraud. Thompson *v.* Parker, 83 Ind. 96.

Scire facias issued by this court is an appropriate process to obtain execution against the estate of a deceased

so,[1] it may be issued to any county in the State where the defendant can be found.[2]

The recital in the writ of former proceedings should be, in general, exact; a material variance between the writ and the record will be fatal on the plea of *nul tiel record*.[3] The writ if defective may be amended.[4]

person in the hands of his executor for arrears of alimony awarded by a decree of the supreme court against plaintiff in his lifetime. Knapp *v.* Knapp, 134 Mass. 353.

1. Cowden *v.* Starr, Wright (Ohio) 116; Carnes *v.* Crandall, 4 Iowa 151; M'Gill *v.* Perrigo, 9 Johns. (N. Y.) 259.

A voluntary bail-bond may be forfeited by *scire facias* in *Georgia* though executed in *New York*. Smith *v.* Spencer, 63 Ga. 702.

2. Challenor *v.* Niles, 78 Ill. 78; Fowler *v.* Thurmond, 13 Ark. 259; State Bank *v.* Terry, 13 Ark. 389; Dickinson *v.* Allison, 10 Ga. 577. The objection that, although some of the defendants may reside in another county, branch writs of *scire facias* cannot issue to revive a judgment against them, if of any force, is not available on general demurrer. Duncan *v.* Hargrove, 18 Ala. 77.

3. **Recital of Former Proceedings; Variance.**—Hicks *v.* State, 3 Ark. 313; Wolf *v.* Pounsford, 4 Ohio 397; Davis *v.* Norris, 8 Pa. St. 122; Porter *v.* Brisbane, 1 Brev. (S. Car.) 456; State Williams, 17 Ark. 371; Bridges *v.* State, 24 Miss. 153; Gwynn *v.* State, 64 Miss. 324; Bailes *v.* State, 20 Tex. 498; Brown *v.* State, 28 Tex. App. 297; State *v.* Patterson, 7 Baxt. (Tenn.) 246; Coleman *v.* Edwards, 4 Bibb (Ky.) 347.

Where the revival of a judgment by an amicable *scire facias* correctly recites the judgment to be revived, the addition of a clause waiving the right of exemption and providing for an attorney's collection fee, is not a substantial variance which breaks the continuity of the lien of the judgment; but such provisions, although binding on the parties and subsequent judgment creditors, cannot be enforced to the injury of existing lien creditors. Early *v.* Zeider, 137 Pa. St. 457.

An agreement to take no advantage of a variance between a *scire facias* and the recognizance does not preclude the right to insist that the judgment shall be entered according to the tenor of the recognizance and not according to the tenor of the recitals of the writ. Briggs *v.* People, 13 Ill. App. 172.

After judgment by default on *scire facias* upon a recognizance, advantage cannot be taken of a variance between the *scire facias* and the recognizance. Saffold *v.* State, 60 Miss. 928.

A *scire facias* reciting the legal effect, without pursuing the terms of the recognizance, will not support a final judgment. Tucker *v.* State, 55 Miss. 452.

4. **Amendments.**—State *v.* Arledge, 2 Sneed (Tenn.) 229; Patrick *v.* Words, 3 Bibb (Ky.) 232; Maus *v.* Maus, 5 Watts (Pa.) 315; Hazeldine *v.* Walker, 1 Har. & J. (Md.) 487; Curry *v.* State, 39 Miss. 511; Tucker *v.* State, 55 Miss. 452; Smith *v.* Brisbane, 2 Bay (S. Car.) 557. A *scire facias* that does not correctly recite the original judgment will not continue a lien after the time during which the judgment is a lien, although the court afterwards permits the *scire facias* to be amended. Arrison *v.* Com., 1 Watts (Pa.) 374.

A *scire facias* against bail cannot be amended by inserting an averment that the principal had failed to pay the debt or to render his body to prison in execution, as these are matters *in pais*, and there is nothing to amend by. Baker *v.* Harrison, 5 Litt. (Ky.) 60.

Motions to amend an original judgment cannot be allowed in an action of *scire facias* thereon, but must be made in the original cause. Clark *v.* Digges, 5 Gill (Md.) 109. But, where in *scire facias* upon a recognizance of appeal, the original judgment and recognizance were amended, on motion of the plaintiff, and the defendant pleaded *nul tiel record*, it was held that he could not afterwards object that the amendments were improperly made. Snowden *v.* Camden, 8 Mo. 502.

An amendment will be allowed in the discretion of the court even after *nul tiel record* pleaded. Condit *v.* Gregory, 21 N. J. L. 429. And see Williams *v.* Lee, 2 Term (N. Car.) 146; Willard *v.* Norris, 2 Rawle (Pa.) 56.

Of course, an immaterial variance is not fatal.[1]

As a rule, no declaration is requisite in *scire facias*, everything necessary thereto being set forth in the writ.[2]

The defendant may plead in abatement or in bar, as in other actions;[3] but in *scire facias*, upon a matter of record, the defendant cannot impeach the record by showing any defect in the transaction on which it was founded, or any other matter which might have been pleaded to the original action.[4] The only defense is a denial of the existence of the record, or a subsequent satisfaction or discharge thereof.[5]

A plea of *nul tiel record* to a *scire facias* on a judgment *nisi* based upon a forfeited recognizance averring that there is no such bond and judgment of record, is not double pleading, but simply attacks two defects in the same record. Such a *scire facias* may be amended so as to conform to the judgment on which it is based. Pounds *v.* State, 60 Miss. 925.

When a *scire facias* is defective, the court in the exercise of its discretion, may permit the plaintiff in error to take out a new process, returnable at a subsequent day in the term, or at the term next ensuing. Tandy *v.* Rowell, 54 N. H. 384.

1. Immaterial Variance.—As in the name of the principal, or in the name of the court, the defendant having duly appeared. Allen *v.* People, 29 Ill. App. 555.

Where the recognizance named the offense charged as larceny, and the *scire facias* as petit larceny, it was held that there was no substantial variance. State *v.* Millsaps, 69 Mo. 359.

For examples of variance held not fatal, see Richardson *v.* Prince George, 11 Gratt. (Va.) 190; Hersch *v.* Groff, 2 W. & S. (Pa.) 449; State *v.* Corson, 10 Me. 473; Orput *v.* Hardy, 6 Blackf. (Ind.) 456; Sanders *v.* Rives, 3 Stew. (Ala.) 109.

2. Declaration.—Wood *v.* People, 16 Ill. 171; Lasselle *v.* Godfroy, 1 Blackf. (Ind.) 298; Brown *v.* Harley, 2 Fla. 159; Calhoun *v.* Adams, 43 Ark. 238; McVeigh *v.* Old Dominion Bank, 76 Va. 267; Compton *v.* People, 86 Ill. 176; Tucker *v.* State, 55 Miss. 452.

In *New Jersey* in *scire facias* to revive a judgment, if the defendant does not appear within four days after the return day, judgment may be taken for the default in not appearing, without a declaration being filed; but if the defendant appears within that time, the plaintiff is required to declare, and the cause proceeds as in other cases. Forest *v.* Price, 37 N. J. L. 177.

3. Defenses.—2 Inst. 470; 2 Saund. 72, t.

4. Green *v.* Ovington, 16 Johns. (N. Y.) 55; Betancourt *v.* Eberlin, 71 Ala. 461; Camp *v.* Baker, 40 Ga. 148; Smith *v.* Eaton, 36 Me. 298; 56 Am. Dec. 746; Anderson *v.* Williams, 24 Miss. 684; McVeagh *v.* Little, 7 Pa. St. 279; Pittsburgh, etc., R. Co. *v.* Marshall, 85 Pa. St. 187; McFarland *v.* Irwin, 8 Johns. (N. Y.) 77; Miller *v.* Shackelford, 16 Ala. 95.

To *scire facias* on a judgment *nil debet* cannot be pleaded. The proper plea is *nul tiel record*. Bergen *v.* Williams, 4 McLean (U. S.) 125. And see Harrison *v.* Hart, 21 Ill. App. 348.

Where the affidavit of defense to a *scire facias* alleged that the note on which the judgment was entered was without consideration, that it was given on the promise and for the consideration that the plaintiff would marry and live with the defendant; that she lived with him for some time, when he was compelled by reason of her harsh treatment to leave her, it was held that defendant could not avail himself of such a defense except by application to the court to open the judgment and permit him to defend. Kincade *v.* Cunningham, 118 Pa. St. 501.

In a proceeding by *scire facias* to revive a judgment by *nil dicit*, held that a demurrer was properly sustained to an answer that the defendant had filed a plea to the declaration, which was improperly withdrawn by another attorney without authority, he having appeared and not moved to set aside the judgment. Ford *v.* Beckwith, 48 Ill. 210.

5. Dowling *v.* McGregor, 91 Pa. St. 410; Pollard *v.* Eckford, 50 Miss. 631; Langston *v.* Abney, 43 Miss. 161.

II. CLASSES—1. Where Continuation of Former Suit[1]—*a.* TO REVIVE OR CONTINUE LIEN OF JUDGMENT—(1) *In General.*—*Scire facias post annum et diem*—after a year and a day—lay at common law in real actions and on a writ of annuity, where the plaintiff did not take out execution on his judgment within a year and a day. It was given in personal actions by the Statute of Westminster II, before which act, if the plaintiff did not have execution within a year and a day, he was by common law put to a new action upon his judgment.[2] The provisions of this statute have been re-enacted generally in the *United States*, though the period within which execution may issue has been extended.[3] The writ is not a new action, as has been said, but

1. See also JUDGMENT, vol. 12, p. 150 f.

2. Foster, Sci. Fa. 2.

3. The time during which the execution was stayed by a writ of error, with security, is not included in the computation. 2 Inst. 471; Tidd 1104. Nor the time during which the plaintiff was delayed by an injunction out of chancery, sued out by the defendants. Michell *v.* Cue, 2 Burr. 660; Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579.

In *Pennsylvania* by act April 16, 1845 (§ 4, P. L. 538), the period has been extended to five years. This includes the amicable *scire facias* as well as the adverse. Dreifus *v.* Denmark, 11 Phila. (Pa.) 612. A judgment may be revived against terre-tenants within this period, notwithstanding there may have been an intermediate revival by *scire facias* without notice to the terre-tenant. Fursht *v.* Overdeer, 3 W. & S. (Pa.) 470. And where one co-tenant conveys to the other his undivided interest in land which is bound by the lien of a judgment against him and the grantee fails to record his deed, *scire facias* to revive said judgment within the five years from the date of its entry will bind the lands in the hand of the grantee, although the *scire facias* was not served on him as terre-tenant. Meinweiser *v.* Hains, 110 Pa. St. 468.

Under *Illinois* Rev. Stat., 1889, ch. 83, § 26; which provides that judgments in courts of record may be revived by *scire facias* within twenty years, it is no objection to the revival of a judgment in ejectment that the seven years during which, by the statute, money judgments are a lien upon land, have expired. Smith *v.* Steven, 123 Ill. 183.

Under *West Virginia* Code, ch. 139, §§ 11, 12, a judgment can be revived by *scire facias* against the personal representatives of the debtor within ten years from the return day of the last execution, though that time may be more than ten years from the date of the judgment; provided, such revival be made within five years from the qualification of such representative. Sherrard *v.* Keiter, 32 W. Va. 147.

Under *Virginia* Code, ch. 182, §§ 12, 13, the lien of a judgment cannot, after ten years from the date of entry, be revived by *scire facias* as against a subsequent judgment creditor. Ayre *v.* Burke, 82 Va. 338.

Under the laws of *Maryland*, where there is a total suspension of final process upon a judgment and no continuances are entered, if three years elapse from the rendition of the judgment, *scire facias* becomes necessary to revive the judgment. Mitchell *v.* Chesnut, 31 Md. 521. And this, though there has been no change of parties to the suit. Bridges *v.* Adams, 32 Md. 577. A judgment cannot be revived by *scire facias* after the lapse of twelve years; and the mere fact of an outstanding *scire facias* levied on lands, which remained unsold for want of buyers, does not form an exception to the act of limitations. Mullikin *v.* Dewall, 7 Gill & J. (Md.) 355.

The remedy by *scire facias* is not taken away by *Maryland* Acts, 1874, ch. 320, which allows the personal representative of a judgment plaintiff to take out execution without reviving by *scire facias*. Brown *v.* Chesapeake, etc., Canal Co., 4 Hughes (U. S.) 584.

In *Georgia* a *scire facias* to revive a judgment is barred by lapse of ten years after its rendition, without levying a *scire facias*. Seibels *v.* Hodges, 65 Ga. 245.

a continuation of the old one.[1] The judgment to be revived must be one on which execution could at some time have issued.[2] And though previous execution has issued, it lies in every case

Where the stay of an execution at the foot of the judgment is indefinite, if a year and a day elapse, there must be a *scire facias*. Pollard *v.* Pollard, 4 T. B. Mon. (Ky.) 359.

In *Texas* a *scire facias* may be sued out on a judgment which, though not dormant, has lost its lien. Masterson *v.* Cundiff, 58 Tex. 472. And see Phillips *v.* Lesser, 32 Tex. 741.

Ten years, not less, is a bar to a *scire facias* to revive a judgment. Laugham *v.* Grigsby, 9 Tex. 493.

Under the *Mississippi* statute (Hutch. Code, 830, 831, § 8) *scire facias* will not issue to revive a judgment against the heirs of the defendant where more than seven years have elapsed since the rendition of the judgment, although it is less than seven years since an execution was sued out. Vick *v.* Chewning, 31 Miss. 201.

In *Missouri* it is provided by Rev. St., §§ 6016, 6030, that executions may issue upon a judgment at any time within ten years after its rendition, and that *scire facias* may be sued out at any time within ten years to revive a judgment, but that none shall thereafter issue. This does not authorize *scire facias* after the time limited, even though a writ had previously been issued within the time, and returned *nulla bona*. Stewart *v.* Justices, 47 Fed. Rep. 482.

Where an execution was delayed for more than a year, at the request of the defendant, it was held that the plaintiff might take out execution without a previous *scire facias*. U. S. *v.* Harford, 19 Johns. (N. Y.) 173.

A party is not entitled at common law to maintain *scire facias* to have execution of a judgment, unless there is a change of parties, and this may be done by statute, only when the time for issuing execution is passed. Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192. And see Locke *v.* Brady, 30 Miss. 21.

The day of entry is to be excluded in the computation of the period within which judgment is to be revived by *scire facias* to continue the lien on realty. Lutz's Appeal, 124 Pa. St. 273.

1. Eldred *v.* Hazlett, 38 Pa. St. 16; Blackwell *v.* State, 3 Ark. 320; Brown *v.* Harley, 2 Fla. 159; Hopkins *v.* Howard, 12 Tex. 7; Wright *v.* Nutt, 1 T. R. 388.

It is in many ways, however, in the nature of a suit, and hence an appeal from a decision of a justice of the peace upon a *scire facias* issued by him to revive a judgment previously rendered in his court, does not have the effect of removing into the circuit court the suit in which the original judgment was rendered. Bryant *v.* Smith, 7 Coldw. (Tenn.) 113. And see Kirkland *v.* Krebs, 34 Md. 93; Bilbo *v.* Allen, 4 Heisk. (Tenn.) 31; Howard *v.* Randall, 58 Vt. 564; Hubbard *v.* Bolls, 7 Ark. 442; Potter *v.* Titcomb, 13 Me. 36; Pickett *v.* Pickett, 1 How. (Miss.) 267; Greenway *v.* Dare, 6 N. J. L. 305; Gonnigal *v.* Smith, 6 Johns. (N. Y.) 106; Winter *v.* Kretchman, 2 T. R. 46; Farrell *v.* Gleeson, 11 C. & T. 702.

On *scire facias* to revive a judgment it is erroneous for the court to proceed to a trial anew and give a wholly new judgment. Humphreys *v.* Lundy, 37 Mo. 320.

2. Horton *v.* Clark, 40 Ga. 412; Turner *v.* Dupree, 19 Ala. 198.

It lies to revive a judgment in a real action by the common law of *Maine*. Kennebec Purchase *v.* Davis, 1 Me. 309.

A judgment which appears of record satisfied cannot be the ground of a *scire facias*. Cowan *v.* Shields, 1 Overt. (Tenn.) 64.

But the writ lies where its very purpose is to vacate a satisfaction improperly entered. Arnold *v.* Fuller, 1 Ohio 458.

Scire facias is not necessary to revive a judgment of a county court of *Missouri*, it not being a court of common-law jurisdiction. Caldwell *v.* Lockridge, 9 Mo. 362.

Scire facias may be issued to revive a judgment which has been removed by a writ of error sued out without bail, and still pending, such a writ of error not being a *supersedeas*. Boyer *v.* Rees, 4 Watts (Pa.) 201.

Nor is a *supersedeas* granted on an *ex parte* application a bar to *scire facias*. Farrelly *v.* Cross, 10 Ark. 404.

Scire facias may be brought to

where the whole debt has not been levied.[1] Complete satisfaction of the judgment will alone suffice to prevent its revival in this manner.[2] Each successive writ of *scire facias* must be

revive a judgment against a township, though not owning real estate. The new judgment may be entered for the aggregate sum of debt and interest on the old one as a new principal. Conynham *v.* Walter, 95 Pa. St. 85.

It will not lie upon the record of an order for the payment of alimony pending a suit for divorce, when a resort to evidence *dehors* the record would be necessary to ascertain the amount due. Chestnut *v.* Chestnut, 77 Ill. 346.

It does not apply to judgments entered by confession under a warrant of attorney. Jones *v.* Dilworth, 63 Pa. St. 447. See Phelps *v.* Hawkins, 6 Mo. 197.

A person cannot sustain *scire facias* to vacate a judgment, regular on its face, obtained by him at a term prior to that when the *scire facias* issued. Brackenridge *v.* McCulloch, 7 Blackf. (Ind.) 334. If the defendant aliens his land before judgment, execution may issue against the alienee without *scire facias*. Young *v.* Taylor, 2 Binn. (Pa.) 218.

1. Stille *v.* Wood, 1 N. J. L. 118; Stewart *v.* Peterson, 63 Pa. St. 230.

Where execution has been taken out within the time limited, and not executed, a new writ of execution may be sued out at any time afterwards, without *scire facias* provided the first writ be returned, and continuances entered from the time of issuing it. Lewis *v.* Smith, 2 S & R. (Pa.) 142; Cowan *v.* Shields, 1 Overt. (Tenn.) 64. These continuances may be entered after the issuing of the second writ. Tidd 1104.

Where a defendant has been discharged under the insolvent laws, no *scire facias* is necessary to warrant an execution against his subsequently acquired property. Gonnigal *v.* Smith, 6 Johns. (N. Y.) 106.

Nor is it necessary, after a year and a day from interlocutory judgment in foreign attachment, before taking out a writ of inquiry. Cookson *v.* Turner, 3 Binn. (Pa.) 416; though the rule seems otherwise in other cases of interlocutory judgment. How *v.* Action, 12 Mod. 500; Troub. & Hal. Prac., § 2073.

A justice of the peace may issue execution without a previous *scire facias* upon a certified transcript of the judgment of a justice in another county, obtained within five years, although the issuing of *scire facias* might be proper. Keck *v.* Applebach, 2 P. & W. (Pa.) 465.

In *Tennessee* it is not necessary to issue a notice on *scire facias* to revive a judgment rendered before a justice of the peace, which has remained dormant for one year. Gunn *v.* Benson, 5 Yerg. (Tenn.) 221.

Where a party unnecessarily sues out *scire facias* when he might have had an immediate execution, the writ should not be quashed for that reason, but execution should not issue until he obtains judgment under the writ. Lambson *v.* Moffett, 61 Md. 426.

In *New York* it is not necessary to issue *scire facias* to revive proceedings where there has been no proceeding in a suit for more than a year after interlocutory judgment. Wright *v.* Williams, 2 Wend. (N. Y.) 632.

A judgment on a summary process may be revived by petition and process, after the form or original proceedings, and it is not necessary to proceed by *scire facias*. Cash *v.* Lyle, 2 Brev. (S. Car.) 183.

And where the clerk has made no entry on the minutes of the court of such a judgment, there is nothing on which a *scire facias* to revive could issue. Brown *v.* Coward, 3 Hill (S. Car.) 4.

Scire facias to revive a judgment is improper if an execution has been issued within a year and a day after the judgment, and the parties are not changed. Locke *v.* Brady, 30 Miss. 21.

The writ will not lie to revive a judgment confessed before a clerk who was not at the time authorized to receive the confession of judgment. Phelps *v.* Hawkins, 6 Mo. 197.

2. Black on Judg., § 484.

A subsisting levy on land is no bar to *scire facias* on the judgment to continue its lien or to substitute a representative of either party. Trapnall *v.* Richardson, 13 Ark. 543; 58 Am. Dec. 338.

A conditional appropriation by an auditor to a judgment creditor in the distribution of proceeds of the debtor's real estate will not prevent the reviv-

founded upon the judgment which immediately preceded it; for a recovery upon such a writ is a bar to any subsequent recovery upon the original judgment.[1] The writ cannot be brought in a court of chancery unless there is a statute authorizing it.[2] A similar writ lies to fix a party on a judgment given against another—the rule being that where a new person who was not a party to a judgment or recognizance, derives a benefit by or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance.[3] The writ of *scire facias* to continue the lien of a judgment (or, in some jurisdictions, of a decedent's debts) is given by statute in many States where a judgment is a lien on land for a definite period of years—the writ requiring the defendant to show cause why the judgment should not be revived and its lien continued.[4] As these writs are analogous to the other and governed by similar rules, they are here treated together.

(2) *Parties.*—The plaintiff will ordinarily be the same person who was plaintiff in the original judgment, or his legal representative, and in such case his capacity is governed by the same rules that apply to other forms of actions.[5] Where a judgment has

ing of the judgment for the whole amount, where no money has been actually received upon it, and the conditions attached to the appropriation have not been fulfilled. Masser *v.* Dewart, 46 Pa. St. 534.

Scire facias to revive a judgment alleged to be dormant, though it is not so, does not prevent it from becoming dormant. Vanderberg *v.* Threldkeld, 61 Ga. 16. And see Shepherd *v.* Ryan, 53 Ga. 563.

1. Black on Judg., § 482; Collingwood *v.* Carson, 2 W. & S. (Pa.) 220.

If the original judgment is reversed a judgment upon *scire facias* to revive cannot be supported. Mills *v.* Conner, 1 Blackf. (Ind.) 7.

If the plaintiff does not sue out execution on a judgment on *scire facias* to revive a judgment within a year and a day, he must revive it again. Vanderheyden *v.* Gardenier, 9 Johns. (N.Y.) 79; Manufacturers', etc., Bank *v.* Frederickson, 2 Miles (Pa.) 70.

2. Jeffreys *v.* Yarborough, 1 Dev. Eq. (N. Car.) 506; Curtis *v.* Hawn, 14 Ohio 185; Logan *v.* Cloyd, 1 A. K. Marsh. (Ky.) 201.

In *Tennessee*, *scire facias* will lie on a decree against an executor or administrator. Cox *v.* Cox, 2 Yerg. (Tenn.) 305.

Where a decree was rendered by a probate court, but not satisfied before the transfer of the jurisdiction of that court to one in chancery, it was held that *scire facias* was the proper remedy to revive the decree. Isom *v.* McGehee, 45 Miss. 712.

3. Foster, Sci. Fa. 6, 99. In *Pennsylvania*, after judgment against defendant in foreign attachment, a writ of *scire facias* lies against the garnishee, commanding him to appear and show cause why the plaintiff should not have execution of his judgment of the estate and effects of defendant attached in the garnishee's hands. Troub. & Hal. Prac., § 2285.

4. Black on Judg., § 482.

5. See PARTIES TO ACTIONS, vol. 17, p. 470; Black. Judg., § 488; McKinney *v.* Mehaffey, 7 W. & S. (Pa.) 276.

On the death of the nominal plaintiff in a judgment, a *scire facias* to revive it must issue in the name of such plaintiff's personal representatives, and cannot issue in the name of the original parties to the judgment, or of the beneficiary alone. Baker *v.* Ingersoll, 37 Ala. 503. But if the writ be issued in the name of the intestate, it may be amended by substituting that of the administrator. Challenor *v.* Niles, 78 Ill. 78.

If a guardian obtains judgment he may have *scire facias* thereon, even after the expiration of his office and the appointment of another guardian. Welker *v.* Welker, 3 P. & W. (Pa.) 21.

passed by assignment the action should be brought in the name of the assignor, or assignee, according to the statutory rules that exist in the jurisdiction;[1] and where the judgment is entered "for use" the court will look beyond the mere legal party, in order to protect the interests of the *cestui que use*.[2] The plaintiffs must, of course, be named in the writ.[3]

All parties to the original judgment must be made parties to the writ of *scire facias;* the plaintiff cannot drop one and proceed against the others.[4] A number of judgments against one person may be consolidated and revived in one amicable action of *scire*

Otherwise, in the case of an administrator whose letters have been revoked and an administrator *de bonis non* appointed. Weaver *v.* Reese, 6 Ohio 418.

A married woman may bring *scire facias* to continue the lien of a judgment against her husband, the judgment having been entered in her favor before they were married. Kincade *v.* Cunningham, 118 Pa. St. 501.

Where possession of land is restored by *scire facias*, all persons appearing by the record to have been evicted should be made plaintiffs. Smith *v.* Mitchell, 1 J. J. Marsh. (Ky.) 270.

In a *scire facias* to revive a decree in favor of the plaintiff's executors, there being three, only one of whom has qualified, all of them should be named in the *scire facias*. Carson *v.* Richardson, 3 Hayw. (Tenn.) 231.

Several judgments may be consolidated, all of which are for the use of the plaintiff, although some of them were obtained in the names of other persons. Reed's Appeal, 7 Pa. St. 65.

But, in Davidson *v.* State, 20 Tex. 649, a joint *scire facias* upon several judgments *nisi* was held bad.

1. Black on Judg., § 488; Murphy *v.* Cochran, 1 Hill (N. Y.) 339; Ware *v.* Bucksport, etc., R. Co., 69 Me. 97.

If one of the defendants has paid the judgment and is entitled to subrogation against his co-defendants, the writ may be issued in the name of the legal plaintiff and prosecuted for his benefit; and this may be done without first obtaining a decree of subrogation; that right may be tried on the *scire facias*. Richter *v.* Cummings, 60 Pa. St. 441; Baily *v.* Brownfield, 20 Pa. St. 41.

An assigned judgment which has become dormant may be revived by *scire facias* in the name of the original plaintiff for the use of the assignee. Mayor of Macon *v.* Bibb Co. Academy, 7 Ga. 204; Forbes *v.* Tiffany, 4 Ind. 204; McRoberts *v.* Lyon, 79 Mich. 725.

A mortgagee of lands who has obtained judgment on a writ of entry for possession against the mortgagor, and conveyed his whole title to a third party, cannot maintain *scire facias* on such judgment, when the grantee has not only received the conveyance, but has obtained possession under it and the mortgagor is occupying under him. Porter *v.* Shaw, 98 Mass. 505.

2. Peterson *v.* Lothrop, 34 Pa. St. 223.

3. *Scire facias* on behalf of a firm to have execution against real estate on the judgment of a justice of the peace, should not issue in the name of the firm but of the persons composing it. Barrackman *v.* Worthington, 5 Blackf. (Ind.) 213. See, also, Jones *v.* Martin, 5 Blackf. (Ind.) 351; Codding *v.* Moore, 5 Blackf. (Ind.) 601.

Scire facias against heirs and terretenants need not name them, but the judgment must be entered against them by name, and the execution follows the judgment in this respect. Roberson *v.* Wollard, 6 Ired. (N. Car.) 90.

4. Grenell *v.* Sharp, 4 Whart. (Pa.) 344; Funderburk *v.* Smith, 74 Ga. 515; Bolinger *v.* Fowler, 14 Ark. 27; McAfee *v.* Patterson, 10 Miss. 593; Williams *v.* Fowler, 3 T. B. Mon. (Ky.) 316.

A judgment was rendered against a woman while unmarried, and on *scire facias* against her husband judgment was rendered that it be revived, and that execution issue against both for the amount. *Held*, that an objection that the *scire facias* should have been against both, raised in the first instance on appeal after demurrer sustained, came too late. Taylor *v.* Miller, 2 Lea (Tenn.) 153.

Where a naked trustee was not

facias, although one of the judgments is also against another defendant, and when so revived the continuity of the liens is preserved.[1] Where the judgment sought to be revived was rendered against several joint defendants, they must all be made defendants to the *scire facias*, if living; and if one is dead the writ must be against the survivors and the heirs or representatives of the decedent; proceedings cannot be had against the survivors alone or the representatives alone.[2] In the ordinary case of the death of a defendant, the practice varies in the different States as to whether the heirs and terre-tenants or the personal representatives or both should be made defendants.[3] Where the judgment debtor has

joined, the judgment was yet held good as to the *cestui que trust*. Bowers *v.* Harner, 3 Phila. (Pa.) 146.

A person named in the original suit but not served with process cannot by *scire facias* be made a party defendant to the judgment therein, if it is apparent from the record that judgment could not have been legally rendered against him in that suit had he been served with process. Clinton Bank *v.* Hart, 19 Ohio 372.

Upon *scire facias* to revive a judgment against two persons jointly, held that it was erroneous to enter final judgment against one before the plaintiff had matured the case against the other also, so that a joint judgment might be entered against both—or had proceeded against him as far as he was able to proceed. Early *v.* Clarkson, 7 Leigh (Va.) 83.

1. Yeager's Appeal, 129 Pa. St. 268.

2. Black's Judg., § 491; Salnsbury *v.* Pringle, 10 B. & C. 751; 21 E. C. L. 159; Dowling *v.* McGregor, 91 Pa. St. 410; Zanesville Coal, etc., Co. *v.* Granger, 7 Ohio 165; Griffith *v.* Wilson, 1 J. J. Marsh. (Ky.) 209; Gray *v.* McDowell, 5 T. B. Mon. (Ky.) 501; Dingman *v.* Amsink, 77 Pa. St. 114; Bolinger *v.* Fowler, 14 Ark. 27; Henderson *v.* Vanhook, 24 Tex. 358. See De La Howe *v.* Gibert, 2 Bailey (S. Car.) 306; Vredenburgh *v.* Snyder, 6 Iowa. 39; Huey *v.* Redden, 3 Dana (Ky.) 488; Stoner *v.* Strohman, 9 W. & S. (Pa.) 85.

If the plaintiff does not wish to proceed against all, his remedy is by action of debt on the judgment, not by *scire facias*. Carson *v.* Moore, 23 Tex. 450.

Where a writ to revive a judgment is not served on all the original defendants, the judgment cannot be revived only as to those served, and the action discontinued as to those not served. Greer *v.* State Bank, 10 Ark. 455.

But the lien of a judgment against two persons may be continued against one by an amicable *scire facias*. Edwards' Appeal, 66 Pa. St. 89.

Where *scire facias* on a judgment against two, one of whom was dead, was brought against the survivor within ten years and, on exception, after the ten years, the representatives of the deceased were made parties, it was held that the judgment could not be revived against either. Austin *v.* Reynolds, 13 Tex. 544.

Where one of several defendants dies pending the action and the plaintiff elects to proceed against the survivors without joining the representative of the deceased, the plaintiff, after judgment rendered against the survivors, cannot maintain *scire facias* against the representative of the deceased to have him made a party to the suit. Harrell *v.* Park, 32 Ga. 555.

In *Kansas*, where one of several joint defendants has died after judgment, the judgment may be revived against his personal representative without joining the other defendants. U. S. *v.* Houston, 48 Fed. Rep. 207.

3. In *Illinois* it was held that the heirs, terre-tenants, and administrators were properly joined as defendants. Reynolds *v.* Henderson, 7 Ill. 110.

Otherwise in *Mississippi*. Barnes *v.* McLemore, 20 Miss. 316.

In *Pennsylvania*, it is not necessary that the widow and heirs of the judgment debtor should be made parties to a *scire facias* to revive and continue the lien of a judgment obtained against him in his lifetime. McMillan *v.* Red, 4 W. & S. (Pa.) 237; Middleton *v.* Middleton, 106 Pa. St. 252.

Though the proper course in such a case is to issue execution on the orig-

parted with the possession of the land during the time the land was liable to execution under the judgment, the present occupant or terre-tenant must be made a party to and must be served with the writ of *scire facias*.[1] A terre-tenant is one who has an estate

inal judgment and not on the *scire facias* against the widow and heirs, yet an error in that respect will not affect the title acquired by the sale of the real estate, when the original judgment is valid and properly revived against the administrator. Grover *v.* Boon, 124 Pa. St. 399.

The terre-tenant or occupant of the land must, however, be served; though this does not make a mere occupant a party. Clippinger *v.* Miller, 1 P. & W. (Pa.) 64; no one being entitled to take defense who has not an estate which might be bound by the judgment. Catlin *v.* Robinson, 2 Watts (Pa.) 373.

In other jurisdictions it has been held unnecessary to make the personal representatives parties in such a case. Walden *v.* Craig, 14 Pet. (U. S.) 147; Tessier *v.* Wyse, 3 Bland (Md.) 40.

Where the judgment against the testator became dormant pending *scire facias* against an executor to revive the same, it was held that the plaintiff was nevertheless entitled to proceed for the purpose of making the executor a party, and, having done so, might by amendment require the executor to show cause why such judgment should not be revived. Shepherd *v.* Ryan, 53 Ga. 563.

In *Indiana* it was said that the administrators and heirs could be properly joined. Graves *v.* Skells, 6 Ind. 107; Welborn *v.* Jolly, 4 Blackf. (Ind.) 279.

In *New York* it has been held otherwise. Strong *v.* Lee, 44 How. Pr. (N. Y.) 61. But see Campbell *v.* Rawdon, 19 Barb. (N. Y.) 494.

A *scire facias* which issues against the heirs and devisees of one deceased and does not name them but only describes them is not bad on that account. Seawell *v.* Williams, 5 Hayw. (Tenn.) 280.

Where a *scire facias* describes the premises, the possession of which is sued for as in the executor and heirs, it is not to be assumed that there is a misjoinder of parties, as the will may vest an interest in the executor. Dougherty *v.* Hurt, 6 Humph. (Tenn.) 430.

A *scire facias* against the heirs and terre-tenants of the judgment debtor will not reach property never owned by such debtor, but inherited by his children after his death from a third person. Adams *v.* Stake, 67 Md. 447.

A decree rendered against an administrator on a settlement of his administration, cannot, in *Alabama*, be revived by *scire facias*, in favor of a distributee of the estate, against the personal representative of such administrator. Hurst *v.* Williamson, 42 Ala. 296.

The *scire facias* in a proper case, must designate the representatives by name and state in what capacity they are representatives. Caller *v.* Malone, 1 Stew. & P. (Ala.) 305. But the name of a non-resident joint executor may be omitted from the writ; and if he is named, but not served with process, the plaintiff may enter a discontinuance as to him and proceed to judgment against the other. Hanson *v.* Jacks, 22 Ala. 549.

The revival of a judgment against a decedent's administrators by *scire facias* against his heirs is erroneous; but a sale of the decedent's lands under such judgment of revival is not void, and the heirs cannot recover from the sheriff's vendee. Hays *v.* Shannon, 5 Watts (Pa.) 548.

An executor or administrator cannot waive the necessity of *scire facias* to revive a suit, so as to authorize the issuing of an execution against the estate of the deceased. Gwin *v.* Latimer, 4 Yerg. (Tenn.) 22.

1. Sainsbury *v.* Pringle, 10 B. & C. 751; 21 E. C. L. 159; Dowling *v.* McGregor, 91 Pa. St. 410; Henderson *v.* Vanhook, 24 Tex. 358; Huey *v.* Redden, 3 Dana (Ky.) 488; Von Phul *v.* Rucker, 6 Iowa 187. See Jackson *v.* Shaffer, 11 Johns. (N. Y.) 512.

And where the plaintiff has actual notice that land which his judgment binds has been sold and issues *scire facias* to revive his judgment, the writ must be served upon the vendee as a terre-tenant, although the vendee may not have taken possession of the land or put his deed of record. McCray *v.* Clark, 82 Pa. St. 457.

in the land, coupled with the actual possession, derived mediately or immediately from the judgment-debtor while the land was bound by the lien.[1]

(3) *The Writ.*—It is not necessary, except in rare instances, to apply to the court for leave to issue a writ of *scire facias*.[2] The writ, as has been said, must correctly recite the judgment, a material variance being fatal on the plea of *nul tiel record*.[3] In general, a writ of *scire facias* must set out all the facts that are necessary to show a right in the plaintiff to the relief prayed for.[4]

In *scire facias* to revive a judgment in ejectment only so far as to obtain an *habere facias*, if the administrator of the deceased defendant is in possession of the land and refuses to surrender, he may, as terre-tenant, be made a party to the *scire facias*, and styling him "administrator" will not vitiate. Thompson *v.* Dougherty, 3 J. J. Marsh. (Ky.) 564.

But persons who enter as tenants after a judgment in ejectment are not necessary parties to *scire facias* to revive the judgment. Lunsford *v.* Turner, 5 J. J. Marsh. (Ky.) 104; 20 Am. Dec. 248; Murphy *v.* Cord, 12 G. & J. (Md.) 182.

The *scire facias* may be against the terre-tenants by general description. Williams *v.* Fowler, 3 T. B. Mon. (Ky.) 316; Hughes *v.* Wilkinson, 28 Miss. 600.

A mere occupier is, however, not a terre-tenant. Chahoon *v.* Hollenback, 16 S. & R. (Pa.) 425; 16 Am. Dec. 587.

In *Pennsylvania*, the issuing of *scire facias* within five years after the judgment was rendered continues the lien on lands conveyed by the defendant, although no service of the writ is actually made on the terre-tenant. Meinweiser *v.* Hains, 110 Pa. St. 468; Duncan *v.* Flynn, 9 Pa. Co. Ct. 321. But a terre-tenant must be made a party to *scire facias* to continue the lien of a judgment on land aliened by the judgment debtor. Davis *v.* Ehrman, 20 Pa. St. 256. But not, necessarily, to *scire facias* to obtain execution against the lands aliened. Young *v.* Taylor, 2 Binn. (Pa.) 218. Nor need the defendant's assignee for the benefit of creditors, nor his trustees in insolvency, be made parties to the writ of *scire facias* to revive a judgment. Clark *v.* Israel, 6 Binn. (Pa.) 391; Wrigley *v.* Whitaker, 2 W. N. C. (Pa.) 420; *In re* Huddell, 47 Fed. Rep. 207. Nor need *scire facias* to continue the lien of a judgment be served on a mere naked trustee; nor, if the judgment debtor remain in possession, upon his vendee, by unrecorded articles; nor upon lessees from year to year, nor occupants under an adverse title, nor one claiming by title paramount. Troub. & Hal. Pa. Prac., § 2085.

If a terre-tenant has no notice of the *scire facias* and proceedings under it, he will be permitted to make any available defense against the purchaser of the land at sheriff's sale, that he might have set up at the trial of the *scire facias*, in case it had been served on him. Mevey's Appeal, 4 Pa. St. 80.

After judgment by default the terre-tenants are too late to move to set aside the *scire facias* on the ground that the heirs and personal representatives of the deceased had not been previously warned, or because they were not such terre-tenants as ought to have been previously summoned. Whitney *v.* Camp, 3 Johns. (N. Y.) 86.

1. Black on Judg., § 492.

2. Lesley *v.* Nones, 7 S. & R. (Pa.) 410; Edwards *v.* Coleman, 2 A. K. Marsh. (Ky.) 249. Otherwise, where the judgment is of fifty years' standing. Pears *v.* Bache, 1 N. J. L. 207. And see Lansing *v.* Lyons, 9 Johns. (N. Y.) 84; Bank of New York *v.* Eden, 17 Johns. (N. Y.) 105; Keith *v.* Metcalf, 2 Swan (Tenn.) 74.

Where an execution has been levied on lands not belonging to the judgment debtor, the creditor cannot sue out *scire facias* on the judgment as a matter of right, but must first petition the court from which the execution issued, who may grant or refuse the writ, at their discretion. Kendrick *v.* Wentworth, 14 Mass. 57.

3. See *supra*, this title, *In General.*

4. M'Vickar *v.* Ludlow, 2 Ohio 246.

What Writ Must Set Out.—Where the term and number of the original judgment, the date of which is incorrectly recited, are not together, and no note of the revival was made on the docket of such judgment, it was held that the

original judgment was not identified in the *scire facias* so as to continue its lien. Worman's Appeal, 110 Pa. St. 25.

On *scire facias* to revive a judgment in ejectment, where the original judgment does not show the nature or extent of the plaintiff's estate in the land, it is necessary for the writ of *scire facias* to allege and for the evidence to prove that plaintiff's title has not expired since the judgment. The issue being as to the rights of the parties, an outstanding title in a third person is no defense. Smith *v.* Stevens, 133 Ill. 183; Griffith *v.* Wilson, 1 J. J. Marsh. (Ky.) 209.

A *scire facias* to revive a judgment as to costs against an administrator, the damages having been paid, is sufficient if it substantially describes the judgment, though it does not state the amount of the costs. Barron *v.* Tart, 19 Ala. 78.

And, in general, an error of form and not of substance, does not vitiate a *scire facias*. Richardson *v.* Prince George, 11 Gratt. (Va.) 190.

In *scire facias* to revive a judgment it is not necessary to aver that execution was not issued within a year and a day. Albin *v.* People, 46 Ill. 372; Weaver *v.* Reese, 6 Ohio 418.

A *scire facias* against an executor to revive a judgment against the testator must aver the death of the judgment debtor and the appointment of the executor. Walker *v.* Hood, 5 Blackf. (Ind.) 266.

So a *scire facias* against the administrator of a surviving joint debtor must aver the survivorship. Graham *v.* Smith, 1 Blackf. (Ind.) 414.

On *scire facias* to make heirs party to a judgment against administrators, and subject land taken by descent to execution, it is necessary to recite that the judgment is in force and unsatisfied; that the time allowed by the court to the administrators for the settlement of the personal estate had expired before the issuing of the *scire facias*, and that the personal property which came to the hands of the administrators had been exhausted. McVickar *v.* Ludlow, 2 Ohio 246.

A *scire facias* to revive a judgment against a trustee need not aver that the defendant was adjudged trustee. Dyer *v.* Stevens, 6 Mass. 389.

Where an execution has issued, and property has been levied upon and there is not sufficient to discharge the debt, a *scire facias* issued afterwards should be special *quoad residuum;* but if it is general it is too late after verdict to object to it on that ground. Stille *v.* Wood, 1 N. J. L. 118.

A judgment against A in 1854 was revived in 1859 and again in 1874. In the revived judgment of 1874 it was alleged that a judgment was obtained against B as terre-tenant of A. Upon a *scire facias* to revive the judgment against B's land, it was held that the writ was demurrable, because it did not show how the judgment of condemnation was revived; nor allege that there were no other lands or terre-tenants chargeable with the judgment; and because the judgment recited did not describe the land intended to be affected. Bish *v.* Williar, 59 Md. 382.

So, where in *scire facias* against a trustee, the record showed that the same judgment was for three different amounts, it was held that the plaintiff should be nonsuited as the judgment was not definite. Bickford *v.* Flannery, 70 Me. 106.

A *scire facias* to revive a decree need not state the sum paid and balance due. Carson *v.* Richardson, 3 Hayw. (Tenn.) 231.

In *scire facias* to revive an affirmed judgment it is not necessary to aver that the judgment of affirmance has been certified to the court below. Duncan *v.* Hargrove, 18 Ala. 77.

A default admits the truth of the averments in *scire facias*. Garrison *v.* People, 21 Ill. 535.

Scire facias against heirs, to subject the real estate of their ancestor to his debts, should specifically describe the lands sought to be charged. Union Bank *v.* Meigs, 5 Ohio 312.

Where a judgment was rendered by agreement with stay of execution until a certain event happened, it was held necessary that the *scire facias* to revive it should allege that the event had happened. Waller *v.* Huff, 9 Tex. 530.

A *scire facias* scarcely intelligible, not apprising the defendants that they are to show cause or to what they are to answer, is bad, though mere formal errors would not vitiate, if the substance were sufficiently and intelligibly set forth. Davidson *v.* State, 20 Tex. 649.

A *scire facias* to enforce a judgment against a trustee is insufficient if it is alleged only that the plaintiff recovered a judgment against the defendant as trustee. It should appear for what the

(4) *Service and Return.*—The service and return of the writ are regulated by local statutes. The ordinary return where the defendant has been served is *scire feci;* if the defendant is not found the return is "*nihil*" and an *alias* writ is sued out thereon. If this also be returned "*nihil,*" judgment may be taken against the defendant, two returns of "*nihil*" being equivalent to service.[1]

trustee was made chargeable. Gibson *v.* Davis, 22 Vt. 374.

An entry in the judgment record on *scire facias* that defendant had leave to answer, does not show that he made an appearance which waived any defects. Bailes *v.* State, 20 Tex. 498.

For requisites of a writ of *scire facias* against terre-tenants, see Thomas *v.* Farmers' Bank, 46 Md. 43; Worfield *v.* Brewer, 4 Gill (Md.) 265.

For requisites in *scire facias* to compel the payment of alimony, see McCracken *v.* Swartz, 5 Oregon 62.

For requisites in *scire facias* on a justice's judgment or transcript, see Wiley *v.* Logan, 5 Blackf. (Ind.) 11; Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Haworth *v.* Maxwell, 7 Blackf. (Ind.) 415; Phelps *v.* Mott, Brayt. (Vt.) 191.

In *Texas*, *scire facias* to revive a judgment against a city may be joined with an application for a mandamus to enforce its collection. Houston *v.* Emery, 76 Tex. 282.

1. Service and Return.—Compher *v.* Anawalt, 2 Watts (Pa.) 490; Barrow *v.* Bailey, 5 Fla. 9. See Dunlevy *v.* Ross, Wright (Ohio) 287.

In *Kentucky*, two returns of "*nihil*" and "no inhabitant of my county" will not authorize a judgment on a *scire facias;* there should be two returns of "not found" on writs directed to the county where the defendant resides. Calloway *v.* Eubank, 4 J. J. Marsh. (Ky.) 280.

Two *nihils* are equivalent to a *scire feci* where the terre-tenants, etc., are named in the *scire facias;* otherwise, where it is general. Cumming *v.* Eden, 1 Cow. (N. Y.) 70.

But two returns of "*nihil*" on *scire facias* do not, in *Pennsylvania*, authorize a judgment for want of an affidavit of defense. Miner *v.* Graham, 24 Pa. St. 491. Two returns of "not found" to a *scire facias*, like two returns of *nihil*, are equivalent to a service. Kearns *v.* State, 3 Blackf. (Ind.) 334; Cox *v.* M'Herron, 1 Ill. 28.

But in *Pennsylvania* a return that defendant cannot be found is a return of *non est inventus*, and not proper to *scire facias* issued to revive a judgment, which is not simply an award of execution but is also a judgment *quod recuperet.* Toolan *v.* Morrison (Pa. C. P.), 8 Lanc. L. Rev. 229.

The writ of *scire facias* must be served personally. M'Combs *v.* Feeter, 1 Wend. (N. Y.) 19; McCourtie *v.* Davis, 7 Ill. 298; Grimke *v.* Mayrant, 2 Brev. (S. Car.) 202.

But where a sheriff serves a *scire facias* upon the defendant in the writ, and also upon persons not named therein as defendants, this does not impair the writ or return. Anthony *v.* Humphries, 9 Ark. 176.

Service of *scire facias* to revive a judgment against two administrators made upon one only will not authorize judgment against both. Breckenridge *v.* Mellon, 1 How. (Miss.) 273.

The revival of a judgment by *scire facias* without service only keeps in force the local lien and does not constitute a new judgment against the person so as to prevent the operation of the Statute of Limitations. Such new or revived judgment is not an original judgment upon which a party may be sued in another State. Evans *v.* Reed, 2 Mich. N. P. 212.

A defective return is to be remedied by motion to quash the return. Mandeville *v.* McDonald, 3 Cranch (C. C.) 631.

Where *scire facias* has been issued against the heirs of a defendant, by appearing and pleading, they waive the right to take advantage of the failure of the plaintiff to serve them with a copy of the declaration. Tripp *v.* Potter, 11 Ired. (N. Car.) 121.

If a *scire facias* to have execution on a judgment by default is returned executed as to one and not found as to the other, the plaintiff may proceed for an award of execution against the former. Wilcox *v.* Ratliff, 5 Blackf. (Ind.) 561.

The return of "unsatisfied" made before the return-day upon an execution against the principal defendant

(5) *Defenses.*—The general rule with reference to the defenses allowed to a writ of *scire facias* has been stated.[1] Defenses may be invalid as going behind the original judgment,[2] or valid as

will not authorize the issuing of *scire facias* after the return day against the person adjudged trustee. Austin *v.* Goodale, 58 Me. 109.

Where a defendant in an execution has caused the officer to set off an execution in his favor with knowledge of a *bona fide* assignment of the judgment against him prior to the recovery of the judgment in his favor, which by statute made the set-off improper, it may be shown on *scire facias* by the assignee that the judgment is not satisfied, notwithstanding the officer's return showing a full satisfaction. McRoberts *v.* Lyon, 79 Mich. 25.

Where *scire facias*, addressed to a sheriff of one county, is served by the sheriff of another county, the service is a nullity. Kennedy *v.* People, 15 Ill. 418.

As no form of notice is prescribed by law to be given by a United States circuit court, if the notice given to a defendant out of the district where the court was held is actual, personal, and reasonable, although not in any form ordered by the court, and proved merely by the affidavit of an officer, not taken in his official capacity, yet adopted by the court as sufficient, the judgment rendered must be deemed valid, and an action entered thereon in a State court sustained. Comstock *v.* Holbrook, 16 Gray (Mass.) 111.

Scire facias was issued on a judgment against two persons, and returned *scire feci* as against one and "not served" as to the other. A second writ was then issued which recited the judgment against both defendants, but contained no clause of *scire facias* against either, and was proceeded with only as against the terre-tenant of the one not served before. No mention was made therein of the previous writ, nor was any reason assigned for not proceeding against both defendants and the terre-tenants of both. On joinder in demurrer to the latter writ it was held that judgment should be entered in favor of the defendant. Bowie *v.* Neale, 41 Md. 124.

Where the clerk of a chancery court failed to issue a *scire facias* during the term at which a judgment *nisi* against a witness had been rendered, an *alias* may properly be issued at the next term, requiring the defendant to show cause why the judgment *nisi* should not be made absolute. Upton *v.* Girdner, 8 Baxt. (Tenn.) 183.

A judgment was recovered against A in Illinois in 1879, and he afterwards removed to Nebraska. In 1888, the judgment was revived in Illinois without personal service upon A in that State, or an appearance by him, and suit was brought on the revived judgment in Nebraska. *Held*, that the alleged revivor of the judgment in Illinois did not affect the running of the Statute of Limitations in Nebraska, as the court had no jurisdiction over the defendant, and could make no order to affect him personally. Hepler *v.* Davis (Neb. 1891), 49 N. W. Rep. 458.

1. See *supra*, this title, *In General.*

2. **Invalid Defenses.**—In *scire facias* brought to obtain execution on a former judgment in ejectment, it is incompetent for the defendant to controvert the title determined by such judgment. Bradford *v.* Bradford, 5 Conn. 127; Thompson *v.* Hammond, 1 Edw. Ch. (N. Y.) 497: And in *scire facias* to revive a judgment in ejectment, possession of the property and payment of taxes for seven years since the original judgment is no defense, since the proceeding by *scire facias* is merely a continuation of the original suit. Smith *v.* Stevens, 133 Ill. 183.

In *scire facias* against heirs and devisees to continue the lien of a judgment entered against an executor within five years of the decedent's death, the defendants may contest the debt, not the lien. Colwell *v.* Rockwell, 100 Pa. St. 133.

The objection that a bond and warrant were usurious cannot be taken to *scire facias* on the judgment confessed on the warrant. Lysle *v.* Williams, 15 S. & R. (Pa.) 135.

If, after verdict and before judgment, the defendant dies and his administrator becomes party to the suit, and judgment passes against him, and execution is issued and returned unsatisfied, on *scire facias* against the administrator, he may well plead no assets or insolvency, for he had no time to make such

showing the nullity of the original judgment,[1] payment or release,[2]

plea in the original suit. Hatch *v.* Eustis, 1 Gall. (U. S.) 160.

On the trial of *scire facias* to revive a dormant judgment, evidence that the note on which the judgment was founded was paid before the rendition of the judgment is inadmissible. Camp *v.* Baker, 40 Ga. 148.

Where the charter of a corporation makes the stockholders personally liable for all debts except loans, and judgment is obtained against the corporation, and *scire facias* sued out against the stockholders to charge them personally, there are no defenses they can take except that they are not stockholders, or that the debt on which the judgment was founded was for a loan. Wilson *v.* Pittsburgh Coal, etc., Co., 43 Pa. St. 424.

1. Defense of Nullity of Original Judgment. *Re* Board of Administrators, 37 La. Ann. 916.

The judgment must be shown to be absolutely void; mere errors or irregularities cannot be shown. Campbell's Appeal, 118 Pa. St. 128; McFadden *v.* Lockhart, 7 Tex. 573; Anthony *v.* Humphries, 9 Ark. 176.

A stranger to a judgment has no right to appear on *scire facias* and give evidence of fraud in the recovery of such judgment. Heller *v.* Jones, 4 Binn. (Pa.) 61.

But a terre-tenant brought in by *scire facias* may show that the original judgment was void or irregular. Ulrich *v.* Voneida, 1 P. & W. (Pa.) 245. But not that it was entered without authority. Davidson *v.* Thornton, 7 Pa. St. 131.

On *scire facias* to charge the real estate of a decedent upon a judgment obtained against the executor, an allegation that the damages in the suit against the executor were assessed on an erroneous basis will not avail the defendants in the *scire facias* unless it is shown wherein the error consisted as against them. Butler *v.* Slam, 50 Pa. St. 456.

A defendant is estopped to make the defense that the judgment was rendered against him by default on insufficient service, where he has pleaded the same judgment in bar, on a plea of former recovery, in a subsequent action on the same demand. Kennedy *v.* Bambrick, 20 Mo. App. 630.

The defendant can move to set aside the original judgment because surreptitiously obtained, or the judgment will be opened if given on default in ignorance of the party's rights, or upon the showing of a defense which arose afterwards; but otherwise he can object only by showing that the judgment has been paid or never existed. Black on Judg. 249б; Weber *v.* Detwiller, (Pa. 1887), 8 Atl. Rep. 910.

In *scire facias* against the heirs where land is by statute subject to the lien of a decedent's debts, the heirs may take defense to the original claim upon the merits, and they may show that the original judgment against the personal representatives was confessed by one executor, without the knowledge of his co-executor, for a claim, part of which was barred by the Statute of Limitations. Hall *v.* Boyd, 6 Pa. St. 267. But where the executor is also sole devisee, the judgment against him as executor is conclusive, and he is estopped from setting up the same defense a second time, on the trial of the *scire facias;* and in such case it is no defense that there was sufficient personalty to pay the judgment. Stewart *v.* Montgomery, 23 Pa. St. 410.

2. Defense of Payment or Release.— Blackburn *v.* Beall, 21 Md. 208. A terre-tenant may plead that the land is discharged from the lien of the original judgment. Silverthorn *v.* Townsend, 37 Pa. St. 263.

Where a separate judgment has been rendered against one obligor on a joint and several obligation, and *scire facias* is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment. U. S. *v.* Thompson, Gilp. (U. S.) 614.

Where, on *scire facias* to revive a judgment, payment is pleaded, it is error for the court to withdraw the case from the jury, when the evidence tendered in support of the plea is such that a verdict thereon could not be set aside as being unsupported by evidence. Hartman *v.* Alden, 34 N. J. L. 518.

On *scire facias* to have execution on a judgment for dower, a defense of payment is no answer to the action. Shaw *v.* Boyd, 12 Pa. St. 215.

A partial payment to revive a judgment, but not credited, is no defense to *scire facias* to revive the judg-

a legal discharge,[1] a collateral agreement,[2] or for some other

ment. Anderson *v.* Gage, Dudley (S. Car.) 319.

Set-off or counter claim is not available as a defense. Black on Judg., § 494; Jenkins *v.* Anderson (Pa. 1887), 11 Atl. Rep. 558; Anderson *v.* Gage, Dudley (S. Car.) 319. *Contra*, Hugg *v.* Brown, 6 Whart. (Pa.) 468.

When a party has a release or other matter which he might have pleaded to the *scire facias* in his discharge, and, for want of pleading it, execution is awarded upon a *scire feci* returned, he is estopped forever, and cannot by any means take advantage of it. Anonymous, 1 Salk. 93; Jackson *v.* Robins, 16 Johns. (N. Y.) 537. But where execution is awarded upon two *nihils* returned, he may relieve himself by motion where the case is clear and the application recent. Ld. Raym. 1295. But relief is not granted on motion where the fact is disputed, or there has been a long acquiescence and several steps have been taken subsequently to the award of execution, or the ground of relief is such matter of fact as may be proper to be tried. Wicket *v.* Creamer, 1 Salk. 264; Mitford *v.* Cordwell, 2 Stra. 1198; Troub. & Hal. Prac., § 1923.

The terre-tenant may show that the plaintiff in the judgment, with notice of the alienation, has released other real estate retained by the debtor from the lien of the judgment. Taylor *v.* Maris, 5 Rawle (Pa.) 51. And see Holt *v.* Bodey, 18 Pa. St. 207.

1. Defense of Legal Discharge. — A discharge in bankruptcy is no defense to *scire facias* where the defendant was discharged before the original judgment was rendered; otherwise, where the discharge was after the judgment. Spring Run Coal Co. *v.* Tosier, 102 Pa. St. 342; Duncan *v.* Hargrove, 22 Ala. 150. See Walters *v.* Oyster (Pa. 1885), 1 Atl. Rep. 430.

The pendency of a commission of insolvency is no bar to *scire facias* against an administrator, on a judgment against him. Hotch *v.* Eustis, 1 Gall. (U. S.) 160.

Where judgment was recovered against A the administrator of B, who was surety in a guardian's bond, in May, 1844, and *scire facias* issued on the judgment in 1849, to which A pleaded his discharge as administrator in Feb., 1844, it was held that this discharge would have been a bar to a suit against A in his fiduciary capacity, and should have been pleaded by him to the original action; but as he had failed to plead it then, he was estopped to set up a defense anterior to the judgment. Gilchrist *v.* Meacham, 3 Fla. 219. See Cox *v.* Cox, 2 Yerg. (Tenn.) 305, where it was held that to *scire facias* on a decree against an administrator as such, the defendant may plead that he had fully administered at the time the decree was rendered against him.

On *scire facias* to revive a judgment, if the defendant pleads that he was formerly imprisoned for the same debt, the plea is bad for not showing how he was discharged. Ballard *v.* Averritt, 1 Tayl. (N. Car.) 69.

In the case of *scire facias* to revive a judgment of revival, a plea that the defendant was discharged as a bankrupt at a time after the original judgment but before the judgment of revival, comes too late and is inadmissible. Stewart *v.* Colwell, 24 Pa. St. 67.

2. Defense of Collateral Agreement.— Upon the trial of *scire facias* it is competent to show by parol that by reason of what has occurred since the judgment was entered the plaintiff is not entitled, according to the terms of a verbal agreement between the parties, to have his execution. Bown *v.* Morange, 108 Pa. St. 69.

An agreement entered into prior to the date of a judgment, as to the mode of its discharge, which was not to be executed until afterwards, and all payments made in pursuance of such agreement, are admissible in evidence in support of the plea of payment and satisfaction to a *scire facias*. Downey *v.* Forrester, 35 Md. 117. And see Hartzell *v.* Reiss, 1 Binn. (Pa.) 289. But it is no defense to the revival of a judgment that the plaintiff had agreed not to issue execution. Ladd *v.* Church, 6 Phila. (Pa.) 591.

A plea that the agreement by which a condition was annexed to the judgment was made while the party was an infant, is insufficient; and the issue on the allegation of infancy is immaterial. Lowry *v.* Drake, 1 Dana (Ky.) 46.

A plea to a *scire facias* on a judgment which distinctly avers an agreement to compromise the suit then pending in the court of appeals, for valuable consideration, in satisfaction

reason.[1] Irregularities appearing on the face of a *scire facias* may be taken advantage of by motion, but whenever objections to the writ involve questions of fact only, or depend

and discharge of the judgment appealed from, and the performance of all the conditions on the part of the appellee including the payment of the money agreed on, is a sufficient plea of accord and satisfaction; and a proper one in such an action. McCullough *v.* Franklin Coal Co., 21 Md. 256.

The terre-tenant may offer evidence of a collateral agreement between the original parties, the effect of which is not to impair the judgment but to restrict its lien. Sankey *v.* Reed, 12 Pa. St. 95.

But a verbal assurance by a grantor that a clause in the deed reserving the lien of a judgment owned by him, should never be enforced in whole or in part, against the grantee, one of the heirs of the defendant in the judgment, on the ground of which the deed was accepted, is a purely voluntary contract, and void in *scire facias* for revival against the grantee as an heir. Codding *v.* Wood, 112 Pa. St. 371.

The terre-tenant may show that the lien of the judgment has expired by efflux of time. Dengler *v.* Kichner, 13 Pa. St. 41; 53 Am. Dec. 441. And a person summoned as terre-tenant who has had any connection with the debtor's title, may plead that the original judgment was not a lien upon his lands, and never had been. Colwell *v.* Easley, 83 Pa. St. 31.

1. Miscellaneous Defenses.—The rule that, in a *scire facias* to revive a judgment, no defense can be availed of which existed anterior to the record, does not apply where want of jurisdiction appears on the record, and it is immaterial whether such want of jurisdiction be urged in the first or in a subsequent *scire facias* proceeding. Frankel *v.* Satterfield (Del. 1890), 19 Atl. Rep. 898.

Non-joinder of other terre-tenants is a defense. Mandeville *v.* McDonald, 3 Cranch (C. C.) 631.

But to *scire facias* against an executor to revive a judgment obtained against his testator, the defendant cannot urge in defense that there are terre-tenants whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out *scire facias* against them. Wilson *v.* Watson, Pet. (C. C.) 269.

Where a judgment plaintiff has failed to perform that which was the consideration of the judgment in an original action, such failure may be set up as an equitable defense to *scire facias* to revive the judgment. Thompson *v.* Hurley, 19 Iowa 331.

Scire facias to revive a judgment and judgment for the plaintiff thereon, is a good bar to a subsequent *scire facias* on the original judgment. Custer *v.* Detterer, 3 W. & S. (Pa.) 28.

A defense of coverture and that the defendant's husband did not consent to the arbitration upon the award in which a judgment was founded is not sufficient in *scire facias*. Taylor *v.* Harris, 21 Tex. 438.

Nor can coverture at the time of an absolute, unconditional judgment be pleaded to *scire facias* thereon where the judgment is valid on its face and neither it nor the *scire facias* shows defendant's coverture. Shupp *v.* Hoffman, 72 Md. 359.

Nor is coverture ordinarily a defense to *scire facias* to revive a judgment. Such a plea neither denies the existence of the judgment nor avers that it has been satisfied or discharged. Conlyn *v.* Parker, 113 Pa. St. 29.

In *scire facias* against the heir upon a judgment recovered against the ancestor, if no proceedings have been had against the personal representatives, such defense must be set up by plea. Rogers *v.* Denham, 2 Gratt. (Va.) 200.

It is not a valid defense to *scire facias* to revive a judgment that defendant had no notice thereof until three years after its entry, when he notified plaintiff to secure the amount from the actual debtor, for whom defendant was merely surety. Swift *v.* Aument (Pa. C. P.), 8 Lanc. L. Rev. 244.

If *scire facias* to revive a judgment issues from a court that did not render the judgment this may be pleaded in abatement. Jarvis *v.* Rathburn, Kirby (Conn.) 220.

In *scire facias* brought to have further execution of a judgment rendered upon a probate bond for the amount of a dividend decreed since the judgment, a plea, by the sureties in the bond, that the decree was ob-

partly on matters of record and partly on matters *in pais*, such objections should be presented by plea.[1] The rules with reference to replications, demurrers, etc., are the same as in other actions.[2] So are the rules regarding evidence.[3] The subjects of variance and amendments have been already treated.[4]

tained by fraud and collusion, without naming the parties to the fraud, was held bad. Potter *v.* Webb, 2 Me. 257.

That *fieri facias* has been issued, levied and returned, but never quashed, countermanded nor further proceeded in, is a good plea to *scire facias* on a judgment, because the plaintiff is not entitled to have two executions upon the same judgment at the same time. Booth *v.* Campbell, 15 Md. 569.

Where on sale of real estate, a bond and warrant of attorney are given to a creditor of the vendor, there present, on *scire facias* to revive the judgment entered on the warrant, it is a good defense that the property has been swept away by a prior incumbrance, since the entry of the judgment. McCarty *v.* Springer, 3 P. & W. (Pa.) 157.

It is no defense to *scire facias* to revive a judgment at law against the second indorser of a note that the first indorser had enjoined the execution of the judgment by bill, afterwards dismissed, and that the judgment creditor recovered judgment on the injunction bond, nor would these facts alone entitle the prior indorser to any relief in equity. Love *v.* Allison, 2 Tenn. Ch. 111.

The destruction of the record book in which judgments are written, does not destroy the judgment debts, and though the judgments are wrongfully destroyed by the court without notice to the debtors, yet when the judgments are revived by *scire facias* with notice to the debtor, they should make their objection by plea of *nul tiel record*. George *v.* Middough, 62 Mo. 549.

1. Objections, How Presented.—Campbell *v.* Booth, 8 Md. 107.

Devisees cannot object by motion that the heirs are not warned on *scire facias*, but only by a plea in abatement. Cumming *v.* Eden, 1 Cow. (N. Y.) 70.

In cases of mistake, fraud and want of authority, the remedy is by application to the court to have the judgment opened or set aside; the objection cannot be taken by plea. Withers *v.* Haines, 2 Pa. St. 438.

2. Replication.—See, for examples of replications, Roller *v.* Custar, 6 Blackf. (Ind.) 433; Palister *v.* Little, 6 Me. 350; Sharp *v.* Sharp, 3 Wend. (N. Y.) 278; Wilkinson *v.* Allen, 11 Ala. 128; Humphries *v.* Anthony, 12 Ark. 136. Of demurrers, Trapnall *v.* Terry, 27 Ark. 70; State *v.* Randolph, 22 Mo. 475; Barrow *v.* Pagles, 6 Ala. 462.

Demurrer.—On demurrer to a plea in *scire facias* the court may look back and examine into the validity of the writ. Hicks *v.* State, 3 Ark. 313.

But the fact that a *scire facias* demands more than can be obtained is not a fatal objection to it of which advantage can be taken on demurrer. Bernard *v.* Chiles, 7 Dana (Ky.) 18.

3. Evidence. — A payment which might have been pleaded to the original *scire facias* to revive a judgment, cannot be given in evidence on a second *scire facias*. Wilson *v.* Hurst, Pet. (C. C.) 441.

As to what evidence must be given in support of the original judgment, see Lynch *v.* Sanders, 9 Dana (Ky.) 59; Phelps *v.* Burton, 6 T. B. Mon. (Ky.) 36; Henkle *v.* German, 6 Blackf. (Ind.) 425; Campbell *v.* Carey, 5 Harr. (Del.) 427; Farrelly *v.* Cross, 10 Ark. 404; Shaw *v.* Boyd, 12 Pa. St. 215; Cash *v.* Lyle, 2 Brev. (S. Car.) 183.

Facts admitted on one *scire facias* cannot be controverted on a subsequent *scire facias*. Worknot *v.* Millen, 1 Harr. (Del.) 139.

4. Variance and Amendments.—See *supra*, this title, *In General*.

Where *scire facias* on a judgment is issued and the plaintiff is non-suited and issues a second *scire facias*, a variance between the latter and the former is not material, if both are for the same cause of action and between the same parties. Trice *v.* Turrentine, 13 Ired. (N. Car.) 212.

In *New York*, on leave to amend a *scire facias*, the plaintiff cannot add new parties, the necessity for whose joinder existed previous to the issuing of the writ, or where the Statute of Limitations attached. Willink *v.* Renwick, 22 Wend. (N. Y.) 608.

The court may permit the amendment of the titling of a *scire facias* to

(6) *Judgment.*—According to the practice in *England* and in most of the States of the Union, the judgment on *scire facias* is merely an award of execution.[1] In *Pennsylvania*, however, the judgment is *quod recuperet*, and is entered for the amount of the original judgment with interest thereon.[2]

b. TO RECOVER DEMANDS ARISING AFTER JUDGMENT IN DEBT OR ON BOND.—Under the statute 8 & 9 Wm. III, ch. 11, § 8, which has been re-enacted in some of the States, it is directed that in all actions upon bonds or any penal sum for the non-performance of covenants or agreements, breaches shall be assigned by the plaintiff, on which shall be assessed the damages that have arisen, and not the whole penalty of the bond; but that the judgment shall remain as a security to the plaintiff for such damages as he may sustain by further breaches, upon which he may have *scire facias* against the defendant, his heirs, etc., suggesting such breaches and summoning him or them to show cause why

revive a judgment, so that the rights of the real parties in interest may appear on the record by an appropriate entry to their use, the judgment having been assigned. Garey *v.* Sangston, 64 Md. 31.

1. **Judgment.**—Denegre *v.* Haun, 13 Iowa 240; Woolston *v.* Gale, 9 N. J. L. 32; Murray *v.* Baker, 5 B. Mon. (Ky.) 172; Bullock *v.* Ballew, 9 Tex. 498; Humphreys *v.* Lundy, 37 Mo. 320.

A judgment for money and not merely for award of execution is void. Lavell *v.* McCurdy, 77 Va. 763.

The court will give judgment according to law, and not according to the prayer of the plaintiffs. Snowden *v.* State, 8 Mo. 483.

A judgment of revival on *scire facias* against a defendant alone, is not a bar to a subsequent *scire facias* to revive against the defendant and terretenants; and such *scire facias* may issue on the original judgment or on the judgment entered on any intermediate *scire facias* to revive. Little *v.* Smyser, 10 Pa. St. 381.

If the original judgment is reversed, a judgment on the *scire facias* to revive it will fall likewise. Mills *v.* Conner, 1 Blackf. (Ind.) 7.

So far as innocent purchasers are concerned, a judgment on a *scire facias* conclusively establishes the existence of the original judgment debt, even though in fact the judgment on that *scire facias* was confessed without authority by an attorney, from ignorance, accident or design, and though satisfaction of the original judgment debt was entered of record, years before the judgment of revival was confessed. Irwin *v.* Nixon, 11 Pa. St. 419.

In a writ of error from a judgment for the plaintiff in *scire facias*, any errors in the original judgment cannot be inquired into. M'Afee *v.* Patterson, 10 Miss. 593.

When a barred judgment is revived by *scire facias* by collusion between the creditor and debtor, equity, in a suit to enforce liens against the debtor's estate, will not give effect to the revival so as to affect the rights of other lien creditors. Ayre *v.* Burke, 82 Va. 338.

On the issuance of a second *scire facias* for the revival of a judgment, the irregularity in rendering judgment on the first for want of an affidavit of defense, when such affidavit was in fact filed, though insufficient, will be deemed waived by the failure of defendant to move at the time to have the judgment reopened on account of irregularity. Campbell's Appeal, 118 Pa. St. 128.

Where a judgment was revived by an amicable *scire facias*, but no note of the revival was made on the record of the original judgment, though the *scire facias* was accompanied by a confession of judgment which was at once entered on the judgment docket, it was held that this was constructive notice to all lien creditors of the existence of such judgment and cured the omission to note the *scire facias* in its proper place. Mellon's Appeal, 96 Pa. St. 475.

2. Troub. & Hal. Pr., §§ 2079, 2088.

execution should not be awarded upon the judgment.[1] The *scire facias* must be sued out by the plaintiff in the judgment, or his personal representatives, against the defendant, his heirs, personal representatives, or assigns. It should cite all the proceedings in the former action, and suggest the additional breaches. The plea, where the condition is to indemnify, and save harmless, is *non damnificatus;* but if the condition be to discharge from liability, the special manner of performance should be set forth.[2] The subsequent proceedings are like those in the original action, the judgment being an award of execution for the damages assessed and costs of suit.

c. To Levy Residue of Debt After Eviction from Possession Under Elegit.—A writ of *scire facias* was necessary at common law to enable a plaintiff who had already levied a part of his judgment debt, or debt of record, by means of a writ of *elegit*, to levy the residue of his debt, when, from some cause or other, he becomes dispossessed of the lands extended, and could not levy the residue of the debt under the *elegit*.[3]

d. Ad Rehabendam Terram.—The writ of *scire facias ad rehabendam terram* lies for a defendant to recover back his land extended by the plaintiff, after the latter has satisfied his debt.[4] The object of the writ is to compel the plaintiff to account for the profits, which is an equitable incident of the relation maintained by the parties to the execution; and if the debt is satisfied, then to restore the land.[5] A judgment for the plaintiff to the *scire facias* entitles him to a writ of restitution.

e. Quare Restitutionem Non on Judgment Reversed.—Here the *scire facias* lay where a judgment below had been reversed in error, and the amount of the judgment levied and not paid over. To have a writ of restitution the plaintiff had to sue out *scire facias* suggesting the sum levied, etc. If the plaintiff had had execution, and the money was levied and paid, the writ of restitution might issue without a previous *scire facias*.[6]

f. Against Shareholders in Joint-Stock Companies.—In *England*, under certain statutes where execution has been issued against a company and its property is insufficient to satisfy the judgment, a *scire facias* may issue against the shareholders requiring them to show cause why execution should not be awarded against their property.[7]

g. To Hear Errors and Certify Exceptions.—*Scire facias ad audiendum errores* lay where the plaintiff in error wished to

1. Foster, Sci. Fa. 31.
2. Troub. & Hal. Pr., § 2071.
3. Foster, Sci. Fa. 47.
4. Foster, Sci. Fa. 58.
This writ still exists in *Pennsylvania* and may be sued out by the defendant where land has been extended and delivered to the plaintiff under a *liberari facias*, after the debt has been *prima facie* satisfied. Troub. & Hal. Pr., §§ 1239, 2109; Scofield *v.* Harbeson, 9 Phila. (Pa.) 38.
5. McKelvy *v.* DeWolf, 20 Pa. St. 381.
6. Foster, Sci. Fa. 64.
7. Chit. 1177–1196; Fost. Sci. Fa. 106. But consult the statutes of the various States as to the remedy and procedure in such case.

compel the defendant to appear and plead. To compel the plaintiff to assign his errors *scire facias quare executionem non* was necessary. Where a bill of exceptions was sealed by a judge *scire facias* lay from the court of error to the judge commanding him to appear to confess or deny his seal, or—upon his death—to his executors or administrators. These writs are now obsolete, however, the statutes and rules of court prescribing the remedy and procedure.[1]

2. Where Commencement of, or in Nature of, Original Action—*a.* ON FORFEITED RECOGNIZANCE.[2]—*Scire facias* against the bail on a recognizance taken in a criminal case may be brought in the name either of the people or of the county,[3] but should be brought in the county where the forfeiture occurred.[4] The writ must set forth the forfeiture,[5] though it is unnecessary to prove that an indictment has ever been found,[6] or to show by what authority the bond was taken, or the principal arrested;[7] or the title of the judge who took the recognizance, he being an officer *de facto*;[8] but it must show that the recognizance was entered into by virtue of an order of court.[9] Where every necessary fact is stated, it is sufficient, although the particularity and

1. Foster, Sci. Fa. 206, 213. See, however, Sammis *v.* Wightman, 25 Fla. 547; Clifford *v.* Keating, 4 Ill. 250. See the statutes of the various States. See also ERROR, vol. 6, p. 810; EXCEPTIONS, vol. 7, p. 113.

2. See also BAIL, vol. 2, p. 1; RECOGNIZANCE.

3. People *v.* De Pelanconi, 63 Cal. 409.

4. Smith *v.* Collins, 42 Kan. 259; Littleton *v.* State, 46 Ark. 413.

It is not void in directing the sheriff to serve the defendants if found within his county; this is all he could do in any event. Petty *v.* People, 118 Ill. 148.

5. Brown *v.* People, 24 Ill. App. 72; Conner *v.* People, 20 Ill. 381. But see People *v.* Race, 2 Ill. App. 563.

The prayer need not be for the specific sum mentioned in the bond. Howel *v.* March, 1 Mo. 193.

A *scire facias* on a judgment reciting, "being the penalty of a certain bond," etc., but not stating the amount actually due, was held not to set forth a perfect judgment, nor to contain a sufficient statement against co-sureties. Such defects could be taken advantage of by motion in arrest. McKnew *v.* Duvall, 45 Md. 501.

6. Kepley *v.* People, 123 Ill. 367; O'Brien *v.* People, 41 Ill. 456.

In Lindley *v.* State, 17 Tex. App. 120, it was held that the *scire facias* was invalid if it failed to cite the presentment of an indictment, the issue of a *capias*, defendant's arrest, the execution of the recognizance, its conditions and their breach, and the entry of a judgment *nisi*. And see State *v.* Arledge, 2 Sneed (Tenn.) 244.

The record of the original suit against the principal is no part of the record in *scire facias* against the bail, unless made so by plea. Young *v.* Simral, 3 A. K. Marsh. (Ky.) 176.

It is no defense that the preliminary hearing was continued by agreement several times without surety's consent. State *v.* Benzion, 79 Iowa 467. See State *v.* Thompson, 62 Ind. 367.

7. Werbiski *v.* State, 20 Tex. App. 131; Cushman *v.* State, 38 Tex. 181.

In *Massachusetts* the writ need not allege that the bail bond was executed by the principal. Bull *v.* Clarke, 2 Met. (Mass.) 587.

8. Sturgeon *v.* Com. (Pa. 1888), 14 Atl. Rep. 41.

In *scire facias* upon a recognizance taken by a justice of the peace it must appear that the recognizance has been returned to the court having jurisdiction of the matter. Palister *v.* Little, 6 Me. 350.

9. Reese *v.* People, 11 Ill. App. 346.

It must be averred that it was filed in the court where the appearance was to be made. Slape *v.* State, 44 N. J. L. 264.

precision necessary in an ordinary civil suit are lacking.[1] There seems to be some difference of opinion as to whether the action itself is, strictly speaking, criminal or civil in its nature.[2]

The defense interposed should strike at the record and show valid reasons why the judgment of forfeiture should not be made absolute and execution issue against the parties served.[3] But the grounds of defense should be set forth distinctly. A statement of general conclusions of law is not sufficient.[4] Under a plea of *nul tiel record* want of jurisdiction cannot be shown.[5] It

1. Thrash *v.* State, 16 Tex. App. 271; Toulmin *v.* Bennett, 3 Stew. & P. (Ala.) 220.

Where it recites that the principal has been indicted for a misdemeanor it describes the offense with sufficient particularity. Rich *v.* Colquitt, 61 Ga. 197. And see Brown *v.* State, 28 Tex. 65.

A demurrer to a *scire facias* that the recognizance did not state the crime of which the defendant is convicted, is bad, where the title of the original cause is therein stated and the record of the cause shows the crime and the recognizance is conditioned according to law and was properly entered into. State *v.* Heed, 62 Mo. 559.

It should state whatever is necessary in a petition as well as a citation. Pearson *v.* State, 7 Tex. App. 279.

It should show the legal right of the plaintiff to recover against the defendant. Frost *v.* Reynolds, 2 Dana (Ky.) 94.

In *New Hampshire*, notice given to the bail must be alleged. Emerson *v.* Brown, 2 N. H. 347.

Where the defendants are cited to appear at the next term of court, the *scire facias* is not void for the omission of the day of the month, the law fixing the date for the beginning of the term. State *v.* Ricketts, 67 Miss. 409.

The *scire facias* may be amended without notice to the principal. Hutchings *v.* State, 24 Tex. 240.

The writ performs the office of a declaration as well as process, and a default admits the facts alleged therein. Rietzell *v.* People, 72 Ill. 416.

If enough appears from the record and files of the court to entitle the State to execution, any errors or omissions in the writ will be disregarded on demurrer thereto. State *v.* Heed, 62 Mo. 559. See State *v.* Potts, 60 Mo. 368.

2. In Hart *v.* State, 13 Tex. App. 555; Cassaday *v.* State, 4 Tex. App. 96; it was held to be a criminal proceeding.

But see *contra* State *v.* Kinne, 41 N. H. 238, where it was also held that the respondents who prevailed against the State were not entitled to costs. That they are entitled to costs, see State *v.* Harlow, 26 Me. 74; Com. *v.* Stebbins, 4 Gray (Mass.) 25.

In State *v.* Posey, 79 Ala. 45, it was held that *scire facias* against bail was a civil proceeding, wherein a failure to demand a jury was the waiver of the right to one.

3. **Defenses.**—State *v.* Peyton, 32 Mo. App. 522.

Service upon one of several cognizors is sufficient to warrant award of execution as to him, though others are not found. People *v.* Mellor, 2 Colo. 705.

The defendant's answer should show cause for failure to move to set aside the forfeiture *nisi* at the earliest practicable moment. Goode *v.* State, 15 Tex. 124. It need not be sworn to. Odiorne *v.* State, 37 Tex. 122. And see McCoy *v.* State, 37 Tex. 219.

4. Sasser *v.* McDaniel, 73 Ga. 547, as that the warrant was illegal in not being founded on a sufficient affidavit, that the warrant described no offense and the bond contained no condition for the personal appearance of the principal at a particular court and hence there was no breach.

A plea by the sureties that the principal and sureties entered into the recognizance on the false and fraudulent representations of the sheriff that the principal was then in his legal custody, and confined in jail under due process of law, whereas such was not the fact, was held insufficient, the representations relating to a legal question of which the defendants were required to judge for themselves. Peacock *v.* People, 83 Ill. 331.

5. Nor that defendant was not the recognizor, or that he did not acknowl-

is no defense that the indictment was bad or defective ;[1] nor that the principal was illegally in custody when the bond was taken,[2] or prevented from fulfilling its conditions by reason of arrest in another State,[3] or had taken flight from fear of losing his life by violence ;[4] though the removal of the prisoner beyond the control of his bail by a court of competent jurisdiction is a good defense.[5] No evidence is admissible on the part of the defendant to traverse the forfeiture, or to show that it was remitted ; the record is conclusive evidence of the forfeiture.[6] Subsequent

edge himself indebted as stated in the declaration. State *v.* Sutcliffe, 16 R. I. 520.

But the defendant may plead specially that he is not the person named in the recognizance. Com. *v.* Kanenheimer, 25 Leg. Int. (Pa.) 124.

Where the bail bond has not become a part of the record by oyer or by plea of *non est factum*, the plea of *nul tiel record* does not put the bond in issue, and it can only be brought in issue by a plea of *non est factum*. Hamlin *v.* McNeil, 8 Ired. (N. Car.) 172.

1. Reeve *v.* State, 34 Ark. 610; U. S. *v.* Evans, 2 Fed. Rep. 147; King *v.* State, 18 Neb. 375; Peck *v.* State, 63 Ala. 201.

An objection that some of the grand jurors who found the indictment were not on the county list of legal jurors can be taken advantage of only by plea in abatement, and not for the first time by a surety on *scire facias*, nor can the surety in his answer to the *scire facias* set up misnomer in the indictment. Sharpe *v.* Smith, 59 Ga. 707.

An order striking from the docket one of two indictments for the same offense, was held not equivalent to a discontinuance of the other. Bradley *v.* People, 21 Ill. App. 78.

2. Littleton *v.* State, 46 Ark. 413.

Nor can the sureties object to the manner of arrest if the bond was taken by the proper officer. Peck *v.* State, 63 Ala. 201.

3. State *v.* Horn, 70 Mo. 466; 35 Am. Rep. 437.

Though this might warrant a mitigation of the penalty. Cain *v.* State, 55 Ala. 170.

Otherwise where he is in the State penitentiary. Buffington *v.* Smith, 58 Ga. 341.

The sureties themselves have the right, under some circumstances, to go into another jurisdiction and arrest the defaulting principal. State *v.* Lingerfelt (N. Car. 1891), 14 S. E. Rep. 75.

4. Sugarman *v.* State, 28 Ark. 142; Fleenor *v.* State, 58 Ind. 166.

5. *In re* James, 18 Fed. Rep. 853.

Evidence that the principal had surrendered himself to the sheriff before the forfeiture and that the fact was made known to the sureties, is admissible. Walton *v.* People, 28 Ill. App. 645. And see State *v.* Meyers, 61 Mo. 414.

6. Troub. & Hal. Pr., § 2047; Com. *v.* Nowland, 10 S. & R. (Pa.) 355; Shriver *v.* Com., 2 Rawle (Pa.) 206.

The sureties in a sheriffs' recognizance cannot show that they did not acknowledge it, for that would be to contradict a solemn record. McMicken *v.* Com., 58 Pa. St. 213.

The bail cannot set up as a defense the fact that the several amounts for which they justified does not equal double the sum at which bail was fixed by order of court; the justification is no part of their contract. People *v.* Shirley, 18 Cal. 121.

If the prayer is wrong, it is a matter of form and good on general demurrer. The court will give judgment for the right party, although the prayer of a plea be wrong. Barton *v.* Vanzant, 1 Mo. 192.

Where the plea was former recovery, a replication by the State that the trial and former recovery were not upon the merits, but a judgment in bar only, rendered upon a question of law, not involving the merits of the cause, such replication was held good and responsive to the plea. Cannon *v.* State, 17 Ark. 365.

The recognizance, indictment and preliminary affidavit and warrant are not a part of the record of *scire facias* so as to dispense with the judge's identification of them as the evidence which was offered on the trial of the *scire facias*. Colquitt *v.* Solomon, 61 Ga. 492.

A plea that the surety surrendered the principal and confessing as to the

proceedings are governed by the rules applicable to other actions.[1] Similar writs of *scire facias* on bonds and recognizances against bail in civil cases, sureties, indorsers, defaulting witnesses, public officers, etc., are regulated by statutory provisions in the different States.[2]

costs—is bad, in not averring that the principal was surrendered before default. People *v.* McFarland, 9 Ill. App. 275.

Where the bail of one committed for felony was fixed at $1,000, and the sheriff upon the agreement of defendant and State's counsel released defendant upon a bond for $500, it was held that defendant and his sureties were estopped from objecting on *scire facias* that the bond was for a less sum than that fixed by the justice. Peters *v.* State, 10 Tex. App. 302.

1. Where the recognizance is joint and several a judgment may be rendered against one upon whom process was served without service upon the other defendants. Chinn *v.* Com., 5 J. J. Marsh. (Ky.) 29. But see Thompson *v.* State, 17 Tex. App. 318.

In *scire facias* upon a recognizance for the appearance of a person charged with crime no appeal lies for the State from the judgment of the district court, sustaining a demurrer to the *scire facias* and such appeal will be dismissed on motion, with costs against the State. State *v.* Jackson, 33 Me. 259.

The evidence must not vary from the indictment. Martin *v.* State, 16 Tex. App. 265.

In *Texas* a judgment on *scire facias* may be rendered in favor of one surety and against the principal and another surety. Ray *v.* State, 16 Tex. App. 268.

The judgment entered upon a forfeited recognizance of bail is an absolute judgment, not a judgment *nisi*. If, after the entry of a joint judgment, one of the defendants dies, *scire facias* to his administrator must issue before the judgment can be reversed. U. S. *v.* Winstead, 4 Hughes (U. S.) 464.

In *Massachusetts* the death of a judgment debtor after a return of *non est inventus* upon the execution issued on the judgment, and before final judgment on *scire facias* does not discharge his bail in an action begun prior to the St. of 1884, ch. 260. Way *v.* Brigham, 138 Mass. 384.

Where the State declares on a forfeited recognizance and, at the trial, relies on a forfeited bond, the variance is fatal. Garrison *v.* State, 21 Tex. App. 342.

The effect of an order vacating a judgment *nisi* on a bail bond and quashing the *scire facias* places the matter in precisely the position occupied before the forfeiture. Anderson *v.* State, 19 Tex. App. 305.

On a continuance after the return of a *scire facias* on a recognizance which suspends the entry of confirmation of judgment as a matter of grace to the surety, he is not entitled to further notice of a rule to plead to the *scire facias*. U. S. *v.* Wallace, 46 Fed. Rep. 569.

2. Owing to the statutes abolishing imprisonment for debt, a recognizance of special bail is rarely taken at the present day. After the judgment is set forth the writ of *scire facias* on such a recognizance states that the principal has not paid the debt or damages recovered, nor rendered himself into custody; and concludes by requiring the sheriff to make known to the bail that they be before the court on the return day, to show if they have or know of anything to say why the plaintiff ought not to have execution against them for the debt or damages. Tidd 1100. If the defendant show no sufficient cause or does not surrender himself, the plaintiff may have judgment against the bail as in other actions. 3 Bl. Com. 417.

The bail may plead *nul tiel record;* or payment by, or a release to the principal or bail; or a reversal of the judgment against the principal; or that no *ca. sa.* had issued against the principal; but not that the principal died before the issuing or after the return of the *ca. sa.;* nor the principal's discharge in bankruptcy; nor that the bail-piece was acknowledged after judgment had been obtained in the original action, and was therefore void. Troub. & Hal. Pr., §§ 2031, 2032.

The judgment for the plaintiff is for the amount of the original judgment, but no damages are allowed. Knox *v.* Costello, 3 Burr. 1791. The judgment upon the *scire facias* is that the plaintiff have execution against the

bail of the judgment against the principal, so that damages arising after the judgment cannot be included. Anonymous, 2 Hayw. 378. See Foster, Sci. Fa. 303.

Where, in a joint action of debt against three obligors, three persons severally undertook by several recognizances to be special bail for each of the three defendants, and after judgment, the creditor sued out one *scire facias* against the three bail upon their several recognizances, it was held that they could not be so joined and that the *scire facias* was therefore void. Garland *v.* Ellis, 2 Leigh (Va.) 555. But where the joint *scire facias* is proper the plaintiff may take out separate executions, and one of the bail cannot take advantage of any irregularity in the proceedings against the other. Bruce *v.* Colgan, 2 Litt. (Ky.) 284.

A *scire facias* on a recognizance of special bail ought to aver before whom it was taken. M'Mahan *v.* Knox, 4 Bibb (Ky.) 450.

Scire facias lies to obtain execution against the indorser of an original writ, in case of the avoidance or inability of the plaintiff, for the costs which the defendant may recover of the plaintiff on his failing in his action. Miller *v.* Washburn, 11 Mass. 411.

It may be maintained without proving a prior arrest of the judgment debtor on the execution, or a return of the execution into the clerk's office. Davis *v.* Whitehead, 1 Allen (Mass.) 276.

In *New Hampshire*, by the act of February 9, 1791, *scire facias* against an attorney, as indorser of a writ, must allege that the defendant indorsed the writ as attorney of the plaintiff in the original suit, and that the name was indorsed near the bottom of the writ before it was served. Farnum *v.* Bell, 3 N. H. 72, where leave to amend was refused after joinder in demurrer.

In *scire facias* against the indorser of a writ the inability of the execution debtor to satisfy the execution, where that fact is relied upon to sustain the process, should be directly averred. But, if it is not, and sufficient is alleged to understand the *gravamen* relied upon, the declaration will not be adjudged bad on general demurrer. McLellan *v.* Codman, 22 Me. 308.

To maintain *scire facias* against the indorser of a writ in an action before a justice of the peace, and carried up by appeal by the plaintiff, it is not necessary for the plaintiff in *scire facias* to show due diligence on his part to collect the costs of the surety on the appeal. Wheeler *v.* Lothrop, 16 Me. 18.

Scire facias for costs against the indorser of a writ is so far a judicial writ that it is competent for the court to look at the record upon which it is founded; and a misrecital in the *scire facias* of the name of the indorser, will be considered a mere misprision of the clerk, and not sufficient to sustain a motion in arrest of judgment. M'Gee *v.* Barber, 14 Pick. (Mass.) 212.

If an attorney at law indorses a writ in favor of a resident of another State, he cannot set up in defense to *scire facias* to enforce a judgment for costs awarded against such party that, in so doing, he violated a rule of the court, prohibiting an attorney from becoming bail or surety in any civil suit or proceeding in which he is employed as attorney. Morrill *v.* Lamson, 138 Mass. 115..

Nor is it a defense to *scire facias* against the indorser of a writ that the plaintiff in taxing his costs in the action, in which he was the defendant, fraudulently procured the allowance by the clerk of sums to which he was not lawfully entitled. Sherburne *v.* Shepard, 142 Mass. 141.

In *scire facias* against a defaulting witness against whom a judgment *nisi* has been rendered, the writ, when no declaration is filed, should show by positive averment, that a subpœna had been issued and served, and then set out in substance the judgment *nisi;* in short, every material fact to entitle the plaintiff to judgment. Spence *v.* Simmons, 21 Ala. 563; Emanuel *v.* Ketchum, 21 Ala. 257.

In *scire facias* issued to enforce the penalty for the non-attendance of a witness it is not necessary to set out the subpœna *verbatim*. Smith *v.* Barger, 9 Yerg. (Tenn.) 322.

But the writ must show by direct averment of the time of service of the subpœna and of the time of the trial, that the defendant was bound to attend at that time. State *v.* Lacy, 3 Humph. (Tenn.) 225.

And it must state distinctly the legal grounds of his liability, and leave nothing to implication or inference which the law requires to render him liable. Knott *v.* Smith, 2 Sneed (Tenn.) 244.

b. ON MORTGAGES.—In some States one of the modes of foreclosing mortgages is by *scire facias*.[1] The statutes providing this remedy differ in many respects. In *Pennsylvania* the action is applicable to all mortgages whether recorded or not,[2] while in *Illinois scire facias* does not lie to foreclose a mortgage not "duly executed and recorded."[3] In *Pennsylvania* and *Ohio* any defense may be set up in the action that may be set up against the mortgage debt.[4] The defendant may plead satisfaction[5] or that there was no consideration or that the consideration has failed.[6] In *Illinois* the action is not open to the various defenses allowed in ordinary actions.[7] The want of consideration or a failure of consideration cannot be pleaded.[8] No defense can be interposed un-

1. See *Delaware* Rev. Code 1874, p. 687; *Illinois* Rev. Sts. 1874, 1877, 1880, ch. 95, §§ 17–21; Bright. Pur. Dig. (Pa.) 1883, pp. 596–599. In *Delaware*, a mortgage may be foreclosed by *scire facias*. The statute provides that upon the breach of the conditions of a mortgage, the mortgagee or those claiming under him in the county where the premises are situated sue out a writ of *scire facias* directed to the sheriff commanding him to notify the defendants to show cause why the premises ought not to be taken on execution. See Del. Laws 1887, ch. 221.

The remedy to enforce mortgages by *scire facias* is not a full and complete one. The statute giving this remedy does not deprive the equity courts of their jurisdiction to foreclose mortgages. Fox *v.* Wharton, 5 Del. Ch. 200; Giles *v.* Lewis, 4 Del. Ch. 51.

Illinois.—Though the statutory provisions concerning the foreclosure of mortgages relate chiefly to proceedings by *scire facias*, mortgages may be foreclosed in equity. See R. S. 874, 880, ch. 95, § 16; R. Code 1878, art. 16, §§ 64, 65; 2 Jones on Mortg., § 1340.

The statutory remedy of foreclosure by *scire facias* applies only to mortgages made to secure the payment of money. It does not extend to mortgages made to secure the delivery of specific articles or property, or the performance of other acts; in such cases the remedy is by ejectment, or by a bill in chancery to foreclose. McCumber *v.* Gilman, 13 Ill. 542; Illinois Rev. Stats., ch. 57, § 23; § 17, ch. 95, R. S. 1874. See Smith *v.* Dunlap, 12 Ill. 184.

Pennsylvania.—Upon the breach of the conditions of a mortgage the holder of the mortgage, at any time after the expiration of twelve months next ensuing the last day when the mortgage money ought to be paid or other condition performed, may sue forth a writ of *scire facias* from the court of common pleas for the county or city where the lands lie directed to the proper officer requiring him to notify the mortgagor or those claiming under him that he show cause why the mortgage premises should not be taken on execution for payment of the mortgage money. See 2 Jones on Mort., § 1355.

Mortgages of leasehold estates may be foreclosed in the same manner. Hoise *v.* Gray, 71 Pa. St. 198.

2. 2 Jones on Mortg., § 1355.

The action is founded on the instrument itself and not upon the registry. Lancaster *v.* Smith, 67 Pa. St. 427. The fact that the mortgage is unrecorded will not defeat the action. McLaughlin *v.* Ihmsen, 85 Pa. St. 364. An exemplification of the record may, however, be used on the trial as evidence of the instrument itself. Lancaster *v.* Smith, 67 Pa. St. 427.

3. Kenosha, etc., R. Co. *v.* Sperry, 3 Biss. (U. S.) 309.

It is essential to the right of an assignee of a mortgagee to foreclose a mortgage by *scire facias* under the provisions of § 7, ch. 95 of the R. S. of *Illinois* that the assignment should be acknowledged. Honore *v.* Wilshire, 109 Ill. 103.

4. 2 Jones on Mortg., § 1355; Raguet *v.* Roll, 7 Ohio 77; Morris *v.* Buckley, 11 S. & R. (Pa.) 168.

5. In *Delaware* also the defendant may plead satisfaction. *Delaware* Rev. Code 1874, p. 687.

6. Raguet *v.* Roll, 7 Ohio 77; Morris *v.* Buckley, 11 S. & R. (Pa.) 168.

7. Carpenter *v.* Mooers, 26 Ill. 162.

8. Hall *v.* Byrne, 2 Ill. 140; McFadden *v.* Fortier, 20 Ill. 509; Carpenter *v.* Mooers, 26 Ill. 162.

less it be that the mortgage was never a valid lien on the lands, or has been discharged or released.[1] The defendant may set off any demand in his favor.[2]

The action is generally regarded as a proceeding *in rem*.[3] It is a proceeding *in personam* only so far as the notice to the parties is prescribed by the statutes.[4] The judgment is against the property and not against the person.[5] Where the mortgage debt is payable by instalments this form of foreclosure cannot be maintained until the last instalment is due, and this fact should be alleged.[6] The writ should show on its face an immediate cause of action.[7] And the action must be brought by the person who holds the legal title to the mortgage.[8] The mortgagor or, upon his death, his personal representatives are the only necessary parties defendant.[9] The sale must be by the sheriff of the county where the land lies.[10] The effect of the sale is to extinguish the equity of redemption, and transfer the estate as fully as it existed in the mortgagor before the mortgage.[11]

c. ON MECHANICS' AND MUNICIPAL CLAIMS.—*Scire facias* upon a mechanics' lien is a method of enforcing such lien adopted in several States—among them *Arkansas, California, Maryland, Missouri, Minnesota, Pennsylvania* and *Wisconsin*.[12] In *Pennsylvania, scire facias* is also the remedy to collect the amount due on a municipal claim for paving streets, laying water-pipes, etc., but the incidents of this writ are too local in their nature to call for discussion here.

1. White *v.* Watkins, 23 Ill. 480; Woodbury *v.* Manlove, 14 Ill. 213; Camp *v.* Small, 44 Ill. 37.

2. Henderson *v.* Palmer, 71 Ill. 579; 22 Am. Rep. 117.

3. Menard *v.* Marks, 2 Ill. 25; State Bank *v.* Buckmaster, 1 Ill. 176; Snyder *v.* State Bank, 1 Ill. 161; Osgood *v.* Stevens, 25 Ill. 89; McFadden *v.* Fortier, 20 Ill. 509; Carpenter *v.* Mooers, 26 Ill. 162; Woodbury *v.* Manlove, 14 Ill. 213; Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679; Brown *v.* Scott, 51 Pa. St. 357; Wilson *v.* McCullough, 19 Pa. St. 77.

4. 2 Jones on Mortg., § 1355. See Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679.

5. Osgood *v.* Stevens, 25 Ill. 89; State Bank *v.* Wilson, 9 Ill. 57; Marshall *v.* Maury, 2 Ill. 231. See Tucker *v.* Conwell, 67 Ill. 552.

6. Osgood *v.* Stevens, 25 Ill. 89; Day *v.* Cushman, 2 Ill. 475; Carroll *v.* Ballance, 26 Ill. 9; 79 Am. Dec. 354; Kennedy *v.* Ross, 25 Pa. St. 256; Fickes *v.* Ersick, 2 Rawle (Pa.) 166.

7. Swift *v.* Alleghany Building and Loan Association, 82 Pa. St. 142; McFadden *v.* Bartholomew Fortier, 20 Ill. 509.

8. Camp *v.* Small, 44 Ill. 37.

9. Mevey's Appeal, 4 Pa. St. 80; Chickering *v.* Failes, 26 Ill. 507; Gilbert *v.* Maggord, 2 Ill. 471.

The mortgagor should not be made a party if he no longer has any interest in the property. Broomell *v.* Anderson (Pa. 1887), 8 Atl. Rep. 764.

If the wife join in the mortgage, she is the necessary party. The mortgagor's assignee in bankruptcy is not a necessary party. Gilbert *v.* Maggord, 2 Ill. 471.

When the action is brought against the mortgagor and he afterwards dies and the heirs and administrator are made parties by amendment, they must be served with process before judgment can be rendered against them. Brown *v.* Wagner (Pa. 1889), 16 Atl. Rep. 834.

10. Menges *v.* Oyster, 4 W. & S. (Pa.) 20; 39 Am. Dec. 56.

11. Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679.

12. See, for a treatment of the subject, MECHANICS' LIENS, vol. 14, p. 1.

d. TO REPEAL PATENT.—*Scire facias* was the remedy for the repeal of letters patent. It lay at the suit of the Queen, or the first patentee, where a patent for the same thing had been granted to two persons.[1]

e. TO FORFEIT CHARTER.—*Scire facias* is the proper process for ascertaining the forfeiture of a charter, where there is a legal existing body, capable of acting, which has abused its power; *quo warranto*—where there is a body corporate *de facto* only which takes upon itself to act, though, from some defect in its constitution, it cannot legally exercise its powers.[2] The principal kinds of this writ in ancient and modern practice have now

1. Foster, Sci. Fa. 236.

By U. S. Act, Feb. 21, 1793, ch. 2, process in the nature of *scire facias*, founded on a record to be made of the preliminary proceedings, was prescribed as the mode for repealing letters patent, and the jurisdiction vested in the U. S. circuit courts.

The United States can maintain a bill in equity to cancel a patent for an invention obtained through fraud. The power was not taken away by U. S. Act, 1836, repealing the provision for *scire facias* by private individuals, under the control of government attorneys, to declare a patent void, or by U. S. Rev. Stat., § 4920, permitting fraud in obtaining the patent to be set up as a defense to a suit for infringement. U. S. *v.* American Bell Tel. Co., 128 U. S. 315.

Scire facias to repeal a patent, under the *North Carolina* Act of 1798, is for some purposes a proceeding *in rem;* but when issued at the instance of a private individual, it is essentially an action *inter partes*, and a judgment therein vacating the patent will not bind those who are not parties or privies. Miller *v.* Twitty, 3 Dev. & B. (N. Car.) 14.

Scire facias lies in *Kentucky* in the name of the commonwealth for the repeal of a patent injuriously affecting the rights of others, founded upon a false suggestion, and may be brought by the first patentee. Taylor *v.* Fletcher, 7 B. Mon. (Ky.) 80.

2. 2 Kent Com. 313; Center, etc., Turnpike Road Co. *v.* McConaby, 16 S. & R. (Pa.) 140; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 4; University of Md. *v.* Williams, 9 Gill & J. (Md.) 367; 31 Am. Dec. 72; Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

In *Maryland*, there are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter: One by *scire facias* when there is a legally existing body capable of acting but who have abused their power; the other by information in the nature of a *quo warranto.* The proceedings in both cases must be at the instance of the government and in no other way. University of Maryland *v.* Williams, 9 Gill & J. (Md.) 367; 31 Am. Dec. 72.

Where proceedings are instituted in the name of the State to ascertain whether the charter and corporate powers and franchises of an incorporated turnpike company "ought by reason of non-user or abuser to be declared to be vacated and annulled," *scire facias* is the appropriate remedy.

If the *scire facias* expressly sets forth the obligation of the corporation under its charter and expressly charges the violation of that obligation and the mode and manner in which it was violated, and in the language of the act seeks "to ascertain whether the charter and corporate powers and franchises of the company ought not by reason of non-user and abuser of such powers and franchises to be vacated and annulled," it sets out a substantial cause of action and with such certainty that the defendant is fully informed of the grounds in which the plaintiff seeks to recover. Washington, etc., Road Co. *v.* State, 19 Md. 239.

The jury must find whether the conditions of the grant have been broken, and therefore, when the ground of forfeiture alleged was a long continued and willful neglect to keep the turnpike road in repair, evidence offered by them that they had kept the same in repair the principal part of the time should have been permitted to go to the jury. Vermont *v.* Turnpike Co., 11 Vt. 431.

In such a proceeding the supreme

been described. There are other uses to which it has been put under the statutes of the different States, but as these involve questions of purely local practice it is hardly in keeping with the character of this work that they should be discussed at large here.

SCOLD—(See also NUISANCES, vol. 16, p. 957).—In a legal sense a common scold is a troublesome and angry woman, who, by brawling and wrangling amongst her neighbors breaks the public peace, increases discord, and becomes a public nuisance to the neighborhood. A common scold is indictable at common law, and punished by the ducking-stool.[1]

SCOPE.—See note 2.

SCOT AND LOT.—In *English* law, certain duties which must have been paid by those who claimed to exercise the elective franchise within certain cities and boroughs before they were entitled to vote.[3]

SCRAMBLING POSSESSION.—See FORCIBLE ENTRY AND DETAINER, vol. 8, pp. 118, 168.

SCRAWL—(See also SEALS).—A word sometimes used for scroll.

SCRIP—(See generally STOCK; STOCKHOLDERS).—A certificate or schedule. Evidence of the right to obtain shares in a public company; sometimes called scrip certificate to distinguish it from the real title to shares.[4]

court was held not authorized to allow an amendment to be made. State *v.* Turnpike Co., 2 Sneed (Tenn.) 254.

In *Pennsylvania*, if a charter has been fraudulently obtained, it can be vacated either by *scire facias* to repeal the charter or to declare it forfeited, or on writ of *quo warranto* at the suit of the State. It cannot be declared void collaterally in a suit brought by the company to compel performance of contracts made with it. Kishacoquillas and Center Turnpike Co. *v.* McConady, 16 Serg. & R. (Pa.) 140.

1. U. S. *v.* Royall, 3 Cranch (C. C.) 618. Mr. Bishop in his work on criminal law says: "The adjudications are too few to enable an author to define this offense with entire certainty. It is substantially accurate to say, that a common scold is a woman who, by the practice of frequent scolding, disturbs the repose of the neighborhood." Bish. Cr. L. (7th ed.), § 1202.

2. An action was brought against the supervisor of a road district for trespass. The trial court instructed for defendant "that, if the jury believed from the evidence that Ramsey, the defendant, was acting within the scope of his duty as supervisor" in committing the act of alleged trespass, for which he is sued in this action, they are bound to find a verdict in his favor. The appellate court by McAllister, J., said: "This instruction was wrong, and calculated to mislead the jury. The ordinary import of the word 'scope,' as here used, is design; aim, or purpose; intention. The question was not whether he acted with the aim, purpose or intention of performing his duty, but whether he had such legal authority as would justify him in tearing away plaintiff's fences and exposing his crops to invasion by cattle." Linblom *v.* Ramsey, 75 Ill. 246.

It is submitted that, although "scope" has the meaning ascribed to it by the court, yet, the word as used in the connection referred to, ordinarily means "extent," "limits," etc.

3. Holthouse L. Dict., *quoted* in McCafferty *v.* Guyer, 59 Pa. St. 116; Brown's L. Dict., tit. "Lot and Scot."

4. Bouv. L. Dict.; Pub. Stats. of *Massachusetts*, 1882, p. 1295.

A scrip certificate (or, shortly, "scrip") is an acknowledgment by the projectors of a company or the issuers

SCRIPT.—In general a writing.

Where instruments are drawn in part and counterpart, the original or principal paper is called the script.

In the probate practice of *England* and in some of the *United States*, a "script" is a will, codicil, draft of a will, or testamentary document of any kind, including even written instructions for drafting a will, etc.

SCRIVENER.—In old times a scrivener was a person to whom money or property was intrusted for the purpose of lending it out to others, at a profit payable to his principal, but also at a commission or bonus for himself.[1] But the word is now more frequently used as an equivalent of conveyancer, draftsman, scribe, writer, etc.

SCROLL.—See SEALS.

SEA—(See also ADMIRALTY, vol. 1, p. 193; NAVIGABLE WATERS, vol. 16, p. 236; SEAMEN; SHIPPING).

1. The Ocean.—And in this sense the "sea" means not only the high seas (*q. v.*) but includes arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows;[2] that is to say, all waters within the ebb and flow of the tide are to be considered the "sea."[3]

2. A "Sea" may mean a general disturbance of the surface of the water occasioned by a storm, and breaking it up into the roll and lift of waves following or menacing each other; or it may refer to some particular wave or surge separate from its fellows.[4]

of a loan that the person named therein (or, more commonly, the holder for the time being of the certificate) is entitled to a certain specified number of shares, debentures, bonds, etc. It is usually given in exchange for the letters of allotment, and in its turn is given up for the shares, debentures or bonds which it represents. Lindley on Partnership 127.

1. Lott *v.* Melville, 3 M. & G. 52; Harrison *v.* Harrison, 1 Esp. 555; *Ex parte* Gem, 2 M. D. & D. 99; *Ex parte* Dufaur, 2 De G. M. & G. 246.

2. Waring *v.* Clarke, 5 How. (U. S.) 462.

3. Hubbard *v.* Hubbard, 8 N. Y. 199; Baker *v.* Hoag, 3 Barb. (N. Y.) 203; 7 N. Y. 561; *In re* Steamboat Jefferson, 10 Wheat. (U. S.) 428.

See, however, Woolwich *v.* Robertson, 6 Q. B. Div. 654; 29 Moaks' Rep. 752, where it was held that a tidal river was not within the meaning of the word "sea" as used in a statute.

4. Snowdon *v.* Guion, 101 N. Y. 463. The court, by Finch, J., said further: "When a captain reports that on a particular day he encountered a heavy sea, he uses a natural and appropriate expression, which we are not liable to misunderstand. If he says that a gale came from a particular direction, and raised a sea which delayed his progress, he properly describes the general disturbance of the water consequent upon a storm. On the other hand, if he reports that in a gale a sea carried away his boats, and another swept a seaman overboard, we understand him in each instance to refer to some particular wave or surge separate from its fellows, which worked its own particular destruction." See also BY, vol. 2, p. 704.

At Sea.—See AT, vol. 1, p. 893.

Beyond the Sea.—See BEYOND THE SEAS, vol. 2, p. 189; LIMITATION OF ACTIONS, vol. 13, p. 741.

High Seas.—See HIGH, vol. 9, p. 361.

Main Sea.—See MAIN, vol. 14, p. 1.

Nuncupative Will.—A seaman's privilege of making a nuncupative will is dependent upon his being "at sea." For this purpose a seaman on a ship permanently stationed in Portsmouth harbor has been held to be "at sea."

SEA LETTER—(See also PASSPORT, vol. 18, p. 19).—A sea letter or sea brief is one of the documents which a neutral merchant vessel must carry in time of war as evidence of her nationality. Various descriptions of this document have been given by different authorities. By one, it is described as being synonymous with passport;[1] but by others it is said to be a distinct paper relating more particularly to the cargo, as passport does to the vessel.[2]

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7. *Effect of Seal Upon Negotiability* (See NEGOTIABLE INSTRUMENTS, vol. 16, p. 281; BILLS AND NOTES, vol. 2, p. 313; CORPORATIONS, vol. 4, p. 225), 914.
8. *Acknowledgments*, 914.
9. *Adding a Seal*, 914.

I. DEFINITION.—Anciently a seal was defined to be an impression on wax;[3] but it has long been held that a seal by a wafer, or other tenacious substance upon which an impression is or may be made, is a valid seal;[4] nor does it seem necessary that an impression be made.[5] According to the weight of authority at

In re Good of McMurdo, L. R., 1 P. & D. 540. See also NUNCUPATIVE WILLS, vol. 16, p. 1012.

1. 1 Arnould Ins. 317.

2. 1 Marshall Ins. 623. PASSPORT, vol. 18, p. 19.

By § 4191 U. S. Rev. Stat., it is a penal offense to make or use any false sea letters.

3. 3 Inst. 169.

4. Tasker *v.* Bartlett, 5 Cush. (Mass.) 359. Chancellor Kent said: "The common law intended by a seal an impression upon wax, or wafer, or some other tenacious substance capable of being impressed." 4 Kent's Com. (9th ed.) 452.

5. *Re* Sandilands, L. R., 6 C. P. 411. Here the deed, when sent away for execution, had pieces of green ribbon attached to the places where the seals should be, but no wax, and was returned executed in the same condition. The court held that the sealing was sufficient. Bovill, C. J., said: "To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary. Here is something attached to this deed which may have been intended for a seal, but which, from its nature, is incapable of retaining an impression." The court cited Sugden on Powers (8th London ed.) 232, where it is said: "It is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient;

the present time an impression on the paper alone may constitute a valid seal.[1] And in many of the States, by statute or otherwise, a scroll or similar device may constitute a valid seal.[2] Where a scroll, or similar device, is sufficient, a print is

and, therefore, where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper."

1. In Jones *v.* Longwood, 1 Wash. (Va.) 42, the court said that no adjudged case was recollected which determined that a seal must necessarily be something impressed on wax. The decision in Warren *v.* Lynch, 5 Johns. (N. Y.) 239, rendered by Chancellor Kent, although not decisive, tends to support the ancient doctrine that the impression must be upon wax, or something similar. In the opinion in this case the ancient authorities are cited.

In Carter *v.* Burley, 9 N. H. 558, the court said, speaking of what purported to be an efficient notarial seal: "It is not a mere scroll, but a distinct impression upon the paper of the protest showing the character of the notarial seal. Nothing would have been added to its character by wafer or wax; and as this is not an uncommon mode of affixing official seals, we are of opinion that it is sufficient."

In Allen *v.* Sullivan R. Co., 32 N. H. 446, the court, by Parker, C. J., the same learned justice who delivered the opinion in the preceding case, remarked: "It seems to us, then, that there is nothing necessary to constitute a seal but some material of a suitable character to receive an impression and an impression bearing the character of a seal upon it." Similar decisions have been made in Corrigan *v.* Trenton Delaware Falls Co., 1 Halst. Ch. (N. J.) 52; Beardsley *v.* Knight, 4 Vt. 471; Manchester Bank *v.* Slason, 13 Vt. 334; Connolly *v.* Goodwin, 5 Cal. 220; Follett *v.* Rose, 3 McLean (U. S.) 332; Pillow *v.* Roberts, 13 How. (U. S.) 472. So in Sprange *v.* Barnard, 2 Bro. C. C. 585, a case decided in 1789, the court said: "I think the stamp equivalent to a seal without having recourse to the wafer."

In Reg. *v.* St. Paul, 7 Q. B. 232, the seal was made by impressing two marks in ink by means of wooden blocks merely; and this was deemed a valid seal.

In Bradford *v.* Randall, 5 Pick. (Mass.) 495, Morton, J., said: "A seal is an impression upon wax, or wafer, or other tenacious substance. This impression may as well be made by annexing a piece of paper as by stamping some figure or device upon it," and "so it will be sufficient if one acknowledge an impression already made to be his seal;" thus by implication asserting that an impression upon paper is sufficient.

In Hendee *v.* Pinkerton, 14 Allen (Mass.) 387, it was held that a corporate seal might be impressed directly upon and into the paper. And to the same effect is Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444; 98 Am. Dec. 115.

U. S. Rev. Stats., § 6, declares that, "In all cases where a seal is necessary by law to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance." See also Pierce *v.* Indseth, 106 U. S. 548.

In *New York*, by Code of Civ. Proc., § 960, as amended by Laws of 1877, ch. 416, it is provided that "where a seal of a public officer, or of a corporation, is authorized or required by law, it may be impressed directly on the paper." See also 2 N. Y. Rev. Stats. 2128. See also Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 133; Ross *v.* Bedell, 5 Duer (N. Y.) 466; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 318; 15 N. Y. 90; Richard *v.* Boller, 6 Daly (N. Y.) 460. The cases of the Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227, and Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493, which tended to support the contrary doctrines, have been overruled.

2. See *infra*, this title, *Statutory Regulations of Seals.*

"Every man now takes what seal he pleases," said the court by Tilghman, C. J., in Alexander *v* Jameson, 5 Binn. (Pa.) 241.

In Hacker's Appeal, 121 Pa. St. 192, the court, by Clark, J., said: "A seal is

also.[1] So the use of the word "seal" in the place of a seal has been held sufficient;[2] and a dash of the pen intended for

not necessarily of any particular form or figure; when not of wax it is usually made in the form of a scroll, but the letters 'L. S.' or the word 'seal,' inclosed in brackets or in some other design, are in frequent use. It may, however, consist of the outline without any inclosure; it may have a dark ground or a light one; it may be in the form of a circle, an ellipse or a scroll, or it may be irregular in form; it may be a simple dash or flourish of the pen. Its precise form cannot be defined; that, in each case, will depend wholly upon the taste or fancy of the person who makes it."

In *Pennsylvania*, *California*, and many of the Southern States scrolls have been held sufficient independently of statutes. Alexander *v.* Jameson, 5 Binn. (Pa.) 241; M'Dill *v.* M'Dill, 1 Dall. (Pa.) 63; Jones *v.* Logwood, 1 Wash. (Va.) 56; U. S. *v.* Coffin, Bee Adm. 140; Taylor *v.* Glaser, 2 S. & R. (Pa.) 502; Long *v.* Ramsay, 1 S. & R. (Pa.) 72; Lee *v.* Adkins, 1 Minor (Ala.) 187; Carter *v.* Penn, 4 Ala. 140; Bertrand *v.* Byrd, 4 Ark. 195; Smith *v.* Fielding, 1 Munf. (Va.) 490; Austin *v.* Whitlock, 1 Munf. (Va.) 487; Trasher *v.* Everhart, 3 Gill & J. (Md.) 246; Green *v.* Lake, 2 Mackey (D. C.) 172; English *v.* Helms, 4 Tex. 231; Hastings *v.* Vaughn, 5 Cal. 315, upholding a scroll with "seal," or "L. S.," written within. Burton *v.* Le Roy, 5 Sawy. (U. S.) 510.

And see Flemming *v.* Powell, 2 Tex. 225; U. S. *v.* Stephenson, 1 McLean (U. S.) 464; The Gallego, 30 Fed. Rep. 274.

This would appear to have been the case in *North Carolina*. See Hughes *v.* Debnam, 8 Jones (N. Car.) 127.

"Whether the instrument is under seal or not is a question to be determined by the court upon inspection; and whether or not any mark or impression shall be held to be a seal, depends wholly upon the intention of the party executing the instrument, as exhibited on the face of the paper itself." Hacker's Appeal, 121 Pa. St. 204.

In Duncan *v.* Duncan, 1 Watts (Pa.) 322, a case which recognized the scroll as a valid seal, the court declined to recognize a slip of ribbon as an adequate seal.

In Hacker's Appeal, 121 Pa. St. 203, the court said: "The world has outgrown the necessities of an age when men made their seals because they could not write; what then from necessity attested the very act of execution and the genuineness of it, is now but a mere arbitrary form, through which, however, special obligations still attach, in support of the well-recognized distinction between writings which are sealed and those that are not. Although in this and many of our sister States the law has been relaxed in favor of custom and convenience in doing business, yet this relaxation is confined to the manner of making a seal." See Alexander *v.* Jameson, 5 Binn. (Pa.) 241.

Early legislation in *New Jersey* allowed scrolls to be affixed by way of seal on instruments for the payment of money, but did not at that time affect the general rule. Hopewell *v.* Amwell, 6 N. J. L. 169, holding that an apprenticeship paper having a scroll instead of a seal, was not an "indenture" whereby the apprentice could gain a settlement under the Poor Acts. By recent legislation the use of scrolls has been authorized generally.

1. McKain *v.* Miller, 1 McMull. (S. Car.) 313; Green *v.* Lake, 2 Mackey (D. C.) 172; Doe *v.* McMahon, 4 Ill. 12; Buckner *v.* Mackay, 2 Leigh (Va.) 488; Whittington *v.* Clarke, 8 Smed. & M. (Miss.) 486; Wanzer *v.* Barker, 4 How. (Miss.) 363; Osborn *v.* Kistler, 35 Ohio St. 99. And see Giles *v.* Mauldin, 7 Rich. (S. Car.) 11.

In *Massachusetts*, it has been said that a print cannot have more effect than a penmark. Hendee *v.* Pinkerton, 14 Allen (Mass.) 381; Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251, although a stamped impression cut with a seal into the substance of the paper is a good seal without any wax, wafer or similar adhesive. Hendee *v.* Pinkerton, 14 Allen (Mass.) 381.

2. Whittington *v.* Clarke, 8 Smed. & M. (Miss.) 485; Whitley *v.* Davis, 1 Swan (Tenn.) 333; Lewis *v.* Overby, 28 Gratt. (Va.) 627.

The letters "L. S.," inside of brackets or parentheses, in the usual place of a seal, is a sufficient device in an instrument purporting to be under seal. Smith *v.* Baker, 1 Ga. Dec. 128; Williams *v.* Starr, 5 Wis. 549; McKain *v.* Miller, 1 McMull. (S. Car.) 313, where the court said that the party's intention may be referred properly to the jury

a seal.[1] The court cannot dispense with a seal to a writing in execution of a power, where the party creating the power has required one.[2]

The present trend of the law is toward the abolition of the artificial rules formerly prevailing, and the tendency of modern legislation is in the same direction, and in many States has done away in whole, or in part, with the distinction between sealed and unsealed instruments.[3]

for decision. In the latter case, the court, by Richardson, J., said: "It is not unfrequent that such letters, when circumscribed by a scrawl, either in print or handwriting, constitute, in practice, a seal. And we cannot lay it down as a rule of law that the letters alone, if used for such a purpose, may not be a valid seal. Any stamp, impression, or mark, made or adopted by the signer to a written contract, and annexed to his signature, as and for his seal, would seem to answer the purpose of sealing, in order to render such written contract a sealed instrument or deed in law. McKenzie *v.* Ivor, U. S. Dec. 1833; Evarts *v.* Kerr, Rice (S. Car.) 212; Duncan *v.* Hodges, 4 McCord (S. Car.) 239. In such a case the question is upon the intention and will of the signer." See also Mitchell *v.* Parham, Harp. (S. Car.) 3; Giles *v.* Mauldin, 7 Rich. (S. Car.) 11; Osborn *v.* Kistler, 35 Ohio St. 99.

In a case in the common pleas of Tioga county, *Pennsylvania*, it was held that plain "L. S." printed on a judgment note, and uninclosed by printing of any kind, was not a good seal. Bennett *v.* Allen, 48 Leg. Int. (Pa.) 166, averring that the case of Hacker's Appeal, 121 Pa. St. 192, did not apply. See Irwin *v.* Brown, 2 Cranch (C. C.) 314. In *New York*, scrolls are not recognized. Board of Education *v.* Fonda, 77 N. Y. 350, where "L. S." was held insufficient, is therefore not a general authority. In 1805 a Pennsylvania attorney testified in a New York court that "L. S." was sufficient in Pennsylvania. See Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362. See Eames *v.* Preston, 20 Ill. 389, where a scrawl was held good. See L. S., vol. 13, p. 1191.

1. Hacker's Appeal, 121 Pa. St. 192.

Stamps as Seals.—Stamps have been held to serve in place of wax. Van Bokkelen *v.* Taylor, 62 N. Y. 105, the court by Rappallo, J., saying: "There is nothing in the case to show that these stamps were not used as seals, or laid over some substance capable of receiving an impression, and employed for that purpose. In the absence of any such evidence the finding of the court, based upon an inspection of the instrument, cannot be disturbed." And see Sprague *v.* Barnard, 2 Bro. C. C. 585, where a power required to be executed by writing under seal was held to be well executed by having been written on paper stamped as for wills. The editor of the Reports, in a note, states that Lord Redesdale questions this part of the decision referring to McAdams *v.* Logan, 3 Bro. C. C. 310, and that Mr. Sugden thinks his decision wrong. Sugden on Powers 226, 227.

Mucilage. — In Turner *v.* Field, 44 Mo. 382, it was held that affixing by mucilage was sufficient, and the court by Currier, J., said: "The subtle and ingenious argument by which this difference is sought to be magnified into importance is too finely drawn to be of practical utility." See Burton *v.* Le Roy, 5 Sawy. (U. S.) 516; Gillespie *v.* Brooks, 2 Redf. (N. Y.) 349.

Paper Seals.—In Pease *v.* Lawson, 33 Mo. 35, the question was not whether a scroll would answer, but whether a bit of paper would do if annexed, and whether if it might, there must be a visible impression. It was held that such a paper was a good common-law seal. See also Burton *v.* Le Roy, 5 Sawy. (U. S.) 510; Brinley *v.* Mann, 2 Cush. (Mass.) 340; 48 Am. Dec. 669; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417.

2. Porter *v.* Turner, 3 S. & R. (Pa.) 108; Pepper's Will, 1 Pars. Eq. Cas. (Pa.) 445.

In Porter *v.* Turner, 3 S. & R. (Pa.) 108, an execution deficient for lacking the seal demanded by the donor of the power, was republished by a codicil under seal. It was held that the two papers should be treated as one, and that the seal on the codicil, therefore, sufficed.

3. See *infra*, this title, *Statutory Regulations of Seals*.

II. ADOPTION BY SEVERAL OF ONE SEAL.—A seal need not necessarily be affixed by the person who executes the instrument, but he may adopt one affixed by another.[1] Accordingly there may be a smaller number of seals than of signers upon an instrument, and one seal may serve for all.[2] It has been frequently held that where a sealed instrument purports on its face to be sealed by all the signers, but there are not so many seals as there are names, the court will presume that each person signing it adopted some one of the seals, and the instrument will be valid against all. But the obligors will be permitted to rebut such presumption by plea and proof.[3] However, in one instance the court refused to

1. 2 Bouv. Inst. 393; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; Perk. § 134; Carter *v.* Chaudron, 21 Ala. 88; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417; Hatch *v.* Crawford, 2 Port. (Ala.) 54.

Where one of two parties executed an arbitration bond, to which he subscribed the name of the firm, and affixed one seal, the other partner having previously read and approved the bond, and consenting that his co-partner should execute it for both and being in the store at the time of the execution, though it was not actually signed and sealed in his immediate presence, this was held a good execution of the bond, so as to make it the deed of both. Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285. See also Ball *v.* Dunsterville, 4 T. R. 313. See PARTNERSHIP, vol. 17, p. 1001.

2. Lord Lovelace's Case, W. Jones 260; Ball *v.* Dunsterville, 4 T. R. 313; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1; 2 Am. Dec. 291; Pickens *v.* Rymer, 90 N. Car. 282; 47 Am. Rep. 521; Davis *v.* Burton, 4 Ill. 41; 36 Am. Dec. 511; Northumberland *v.* Cobleigh, 59 N. H. 250; Bowman *v.* Robb, 6 Pa. St. 302; Baars *v.* Gordon, 21 Fla. 35; Cotten *v.* Williams, 1 Fla. 52; State Bank *v.* Bailey, 4 Ark. 453; Flood *v.* Yandes, 1 Blackf. (Ind.) 102; Bohannon *v.* Lewis, 3 T. B. Mon. (Ky.) 378; Shep. Touch., ch. 4, 55; Com. Dig. title "Fait," A, 2; Ball *v.* Dunsterville, 4 T. R. 314; Lovelace's Case, W. Jones 268; Cumberland Bank *v.* Bugbee, 19 Me. 27; Lambden *v.* Sharp, 9 Humph. (Tenn.) 224; Townsend *v.* Hubbard, 4 Hill (N. Y.) 358.

In Lord Lovelace's Case, W. Jones 268, it was admitted by the king's attorney, that "If one of the officers of the forest put one seal to the rolls, by assent of all the venderers, and other officers, it is as good as if every one had put his several seal; as in case, divers men enter into one obligation, and they all consent and set but one seal to it, it is a good obligation of them all." In Lightfoot *v.* Butler's Case, 29 Eliz. (Leon. 21), some of the barons thought that though one seal could be used, it must be impressed on several pieces of wax for the several parties. But any such opinion has not prevailed.

3. Davis *v.* Burton, 4 Ill. 41; 36 Am. Dec. 511; McLean *v.* Wilson, 4 Ill. 50; Yale *v.* Flanders, 4 Wis. 100; Bowman *v.* Robb, 6 Pa. St. 302; Pequawkett Bridge *v.* Mathes, 7 N. H. 230; 26 Am. Dec. 737; Tenney *v.* East Warren Lumber Co., 43 N. H. 343; Burnett *v.* McCluey, 78 Mo. 688; Lunsford *v.* La Motte Lead Co., 54 Mo. 426. In *Tennessee* it was said the jury may feel satisfied from such a clause that there has been adoption. Hollis *v.* Pond, 7 Humph. (Tenn.) 222.

And in a later *Tennessee* case, the court held that if the second signer opposite to whose name there is no seal, desires to deny that he sealed, he should aver by plea that it was not his sealed instrument. Lambden *v.* Sharp, 9 Humph. (Tenn.) 224.

Where a first signature had no seal of its own, the court allowed action of debt against all jointly, although they said that the instrument was as to the first signature a promissory note and as to the others a single bill. Rankin *v.* Roler, 8 Gratt. (Va.) 63.

The character of the instrument may itself be an evidence of adoption of another's seal; as where it purports to be under seal, and the law requires sealing. Davis *v.* Burton, 4 Ill. 41; 36 Am. Dec. 511.

A recital, we, the grantors, sign and seal, was held sufficient to show adoption of seal, although technically some of the parties who signed were not

recognize this presumption,[1] and in another, declined to treat such an inference from the recitals in a suit upon an administration bond which lacked a seal opposite to the name of one of the sureties, and remarked that what remedy might be obtained in equity was a question not before it.[2] It has been said that the *onus* is upon the party to prove the adoption of another's seal.[3] The question whether the mark is a seal is one for the court. But it has been held that whether the seal was adopted by others than the party after whose name it is placed, is a question for the jury.[4] The same contract may be the specialty of one and the parol agreement of another party to it.[5]

"grantors;" the instrument being a deed of release, and the word grantors not being used technically, and evidently referring to all who signed. Tasker *v.* Bartlett, 5 Cush. (Mass.) 359.

1. In Stabler *v.* Cowman, 7 Gill & J. (Md.) 284, in 1835 an agreement respecting the use of a stallion, and division of profits, concluded: "In virtue of which, we have hereunto set our hands and seals, this," etc. Thomas P. Stabler, L. S., John G. Cowman. *Held*, in the absence of further proof, that the seal was the seal of Stabler alone.

In connection with this case, should be considered Van Aylstyne *v.* Van Slyk, 10 Barb. (N. Y.) 383. The declaration averred that the covenant declared on was "sealed with the seals of the said defendants," and demurrer having been filed for the reason that there was but one seal, as shown on the eye, opposite the first signer's name, the court held that the averment in the declaration must be taken as true, since demurrer admits the pleading; but, said they, had defendants severally plead *non est factum*, then the *Maryland* decision, to which they alluded, would have been applicable. See Norvell *v.* Walker, 9 W. Va. 447.

2. State *v.* Humbird, 54 Md. 327. *Compare* the cases respecting the effect of the character of the instrument. And see *infra*, similar cases, in the section relating to *Recital of Seal*.

3. Hollis *v.* Pond, 7 Humph. (Tenn.) 222.

4. Yarborough *v.* Monday, 3 Dev. (N. Car.) 420.

In an Illinois case, it was said *per dictum* that if one executes an instrument with a seal, and others sign after him without a seal, they are presumed to adopt the seal already affixed. So said where there was no clause: "Witness our hands **and seals.**" Eames *v.* Preston, 20 Ill. 389. But this is doubtful. There must be some indication of adoption, and in a Pennsylvania case, a separate and joint promise, containing no such clause, and having a seal only after the first signature was not sealed at all. Biery *v.* Haines, 5 Whart. (Pa.) 565. Where there is no clause in the instrument indicating a sealing, but both names were on one line with a seal at the end thereof, it was held the seal of both. Defendants contended that their so signing indicated that they signed as partners and said one defendant could not seal for the other; but demurrer based on that theory was not sustained. Mapes *v.* Newman, 2 Ark. 569.

5. Stabler *v.* Cowman, 7 Gill & J. (Md.) 284; Eames *v.* Preston, 20 Ill. 389. See also Bohannon *v.* Lewis, 3 T. B. Mon. (Ky.) 377. And see Bierry *v.* Haines, 5 Whart. (Pa.) 566; Oldham *v.* Hunt, 4 Humph. (Tenn.) 332; Van Alstyne *v.* Van Slyck, 10 Barb. (N. Y.) 387; Yarborough *v.* Monday, 3 Dev. (N. Car.) 420. A promissory note executed by one of a firm, and the firm name with a scrawl, is a sealed instrument, as to the party who signed it, and assumpsit will not lie upon it. Eames *v.* Preston, 20 Ill. 389. Where the sealing party sued the party who did not seal upon the contract, the instrument was allowed to be read to the jury; for as to the defendant it was not his deed. Stabler *v.* Cowman, 7 Gill & J. (Md.) 284. In Oldham *v.* Hunt, 4 Humph. (Tenn.) 332, debt was sustained against the two who had signed an instrument sealed with one seal, without considering whether both had joined in the sealing. *Approved* in Hollis v. Pond, 7 Humph. (Tenn.) 222. The grantee in deed reserving a "ground rent," who does not sign and

III. STATUTORY REGULATIONS.—In most of the States the use of seals is now regulated by statute; the effect of which has been to modify or entirely change the common-law usage regarding seals. In some instances, the distinction between sealed and unsealed instruments is done away with in terms,[1] while in others

seal is not liable in covenant for the rent. Maule v. Weaver, 7 Pa. St. 329.

1. In several of the States all distinctions between sealed and unsealed instruments are abolished, except in the case of public officials and corporations. This is true of *Arkansas*, *California*, *Dakota* (*North* and *South*), the statute having been passed prior to their separation *Mississippi*, *Indiana*, *Kentucky*, and *Tennessee*. Sometimes instead of entirely abolishing this distinction, the seal is made only primary evidence of consideration, as in New York and some other States; or the necessity for a seal is done away with on certain instruments—*e. g.*, releases—as in *New Jersey*, where assignment of a mortgage (*New Jersey* Rev., p. 708, pl. 31) or of any sealed instrument (*New Jersey* Rev., p. 851, pl. 20) is valid by writing without seal. So also in *Oregon* where a discharge, total or partial, may be without seal, or by oral agreement. Hills's Annot. Laws, 1892, § 752–756. In *Alabama* it is provided that all writings which import on their face to be sealed are to be taken as sealed instruments. (*Alabama* Civil Code, 1886, § 1840.) The ninth section provides that when by law a bond is required, an undertaking without seal shall be sufficient.

Arkansas.—The constitutions of 1868 and 1874 remove distinctions between sealed and unsealed "contracts," excepting that the latter constitution revives the distinction as to limitation of actions. See Dyer *v.* Gill, 32 Ark. 410.

California.—By the *California* Civil Code, § 1629, "All distinctions between sealed and unsealed instruments are abolished." § 1628 provides that "A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written."

Obligations may be extinguished by a release "upon a new consideration, or in writing, with or without a new consideration." § 1541. "Writing imports consideration." § 1614. Unsuspected claims not affected by a general release. § 1542.

Dakota.—"The absence of the seal of any grantor or his agent from any grant of an estate in real property heretofore or hereafter made shall not invalidate or in any manner impair the same." *Dakota* Comp. L. 1887, § 3246 (§ 623, Civil Code).

All distinctions between sealed and unsealed instruments are abolished. *Dakota* Comp. L. 1887, § 3549 (§ 924, Civil Code).

"A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written." *Dakota* Comp. L. 1887, § 3549 (§ 923, Civil Code).

Indiana.—"There shall be no difference in evidence between sealed and unsealed writings; and every writing not sealed shall have the same force and effect that it would have if sealed. A writing under seal, except conveyances of real estate, or any interest therein, may, therefore, be changed, or altogether discharged, by a writing not under seal. An agreement in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed." *Indiana* Rev. St., § 450.

Conveyances of Lands. — "Conveyances of lands, or of any interest therein, shall be by deed in writing, subscribed, sealed, and duly acknowledged by the grantor or by his attorney, except *bona fide* leases for a term not exceeding three years. *Indiana* Rev. St., § 2919. See Act 1855, as to deeds made before March 1, 1855. So, all bonds and powers-of-attorney to convey real estate. Stimson's American Statute Law, p. 197, *citing Indiana* Code, 4925.

Kentucky.—"A deed or scroll shall in no case be necessary to give effect to a deed or other writing." *Kentucky* Gen. St. of 1888, p. 302 (1 R. S. 266); a marginal note says: "except as to assignment of notes," etc., said marginal note being preceded by "R. S., 266." "All unsealed writings shall stand upon the same footing with sealed writings, having the same force and effect, and upon which the same actions may be founded." Seal of

the same result is accomplished by abolishing the use of seals except by public officials and corporations.[1] In a majority of the States the purpose of such statutes has been to modify the usage of the common law that a seal should consist of an impression upon wax or some other tenacious substance capable of receiving

State, county, corporation, or notary, not dispensed with.

Pleading.—Under some old statutes making certain bonds good though executed without seal, a pleading which described one of them as a writing obligatory under the hand and seal of the defendant, was held not to vary from the unsealed instrument produced on trial. Fish *v.* Brown, 17 Conn. 341.

Montana.—"All conveyances and instruments hereafter executed, which by the common law or the statutes of this Territory are required to be executed under seal shall be as effectual without such seal to all intents and purposes whatsoever, as if the same had a seal attached thereto; and the same shall be interpreted as if the same were sealed, but this chapter shall not apply to municipal or other corporations which by law are required to attest their action under seal." *Montana* Comp. St., 1887, § 1963, p. 1206 (Act 1876, Feb. 3).

Mississippi.—"The use of private seals is dispensed with, except as to corporations, and all distinction between sealed and unsealed instruments made by private persons, either as to the rights conferred by them or the remedies on them, is hereby abolished." *Mississippi*, Rev. Code, 1880, § 993. Section 994 provides that instruments without seal shall be good as if sealed, according to the intent of the maker as expressed in the writing. Section 995 provides that the use of a seal shall not affect the instrument, nor in any way vary the rights of the parties to it. Section 996 provides that the bonds of all public officials, and all bonds in any legal proceeding, shall be obligatory on all the signers without a seal, in the same manner as if duly sealed.

Tennessee.—"The use of private seals in written contracts, except the seals of corporations, is abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect." *Tennessee* Code 1884, § 2478.

Conveyances of Lands.—In conveyances of realty a deed appears to be still regarded as necessary at law, for Jackson *v.* Dillon, 2 Overt. (Tenn.) 264, decided in 1814, stating that a deed is required, is cited by the annotators of the code; and see *Tennessee* Code, 1884, § 2820, which speaks of "deeds" of quitclaim, and "deeds" of trust. *Compare* Spencer *v.* Haynes, 4 W. N. C. (Pa.) 152.

1. The use of seals by private individuals has been rendered unnecessary in *Arizona*, *Colorado*, *Idaho*, *Iowa*, *Kansas*, *Mississippi*, *Nebraska*, *Nevada*, *Ohio*, *Tennessee*, *Utah* and *Washington*.

Arizona.—*Arizona* Rev. St. 1887, § 2783–4, abolishes seals except as to written contracts, conveyances, etc., of corporations.

Colorado.—"It shall not be necessary to the proper execution of any conveyance affecting real property that the same shall be executed under the seal of the grantor, nor that any seal or scroll or other mark be set opposite the name of the grantor." *Colorado* Laws of 1887, p. 228, § 5.

Idaho.—*Idaho* Rev. St. 1887, § 3227.

Iowa.—Seals are abolished in "written contracts," except the seals of corporations. *Iowa* Rev. Code, 1888, § 2112. Deeds of real estate need not under *Iowa* Code of 1851 be under seal. Pierson *v.* Armstrong, 1 Iowa 293; 63 Am. Dec. 440. The Code of 1888 is very similar in its provisions.

Kansas.—Private seals "in written contracts (except the seals of corporations)" are abolished. *Kansas* Gen. St. 1889, vol. 1, § 1103; Bradley *v.* Rogers, 33 Kan. 126.

Mississippi.—*Mississippi* Rev. Code, 1880, § 993.

Nebraska.—Cobbey's St., 1891, § 4417, 4418. This act, passed in 1866, legalized prior "deeds, mortgages, or other instruments in writing, for the conveyance or incumbrance of real estate, or any interest therein," executed without the use of private seals.

Nevada.—The word 'seal,' and the initial letters 'L. S.' and other words, letters, or characters of like import, opposite the name of the signer of any instrument in writing, are hereby declared unnecessary to give such instrument legal effect, and any omission to

an impression, and to allow or expressly authorize a written or printed scroll, etc.[1] Many of these statutes do not apply to official or corporate seals, but it is generally provided that such

use them by the signer of any instrument shall not be construed to impair the validity of such instrument." *Nevada* Gen. St. 1885, § 2667.

"No will, except such nuncupative wills as are mentioned in this act, shall be valid unless it be in writing, and signed by the testator and sealed with his seal, or by some person in his presence, and by his express direction." *Nevada* Gen. St. 1885, § 3002. See Sticknoth's Estate, 7 Nev. 233.

Indication of seals is permitted in telegraphic copies, by the use of the letters "L. S." or by the word "seal." *Nevada* Gen. St. 1885, § 939.

Ohio.—Act of Apr. 14, 1884; *Ohio* Rev. St. 1890, vol. 1, § 4, abolishes private seals. Official or corporate seals may be impressed on the paper. Doe *v.* Pendleton, 15 Ohio 735; Osborn *v.* Kistler, 35 Ohio St. 99.

Tennessee.—"The use of private seals in written contracts, except the seals of corporations, is abolished." *Tennessee* Code 1884, § 2478. The use of a seal to conveyances of realty appears to be still necessary.

Texas.—Stimson's Am. Stat. L., p. 197, § 1564b, 1, 4.

Utah.—Act 13 March, 1890.

Washington.—"The use of private seals upon all deeds, mortgages, leases, bonds, and other instruments, and contracts in writing, is hereby abolished, and the addition of a private seal to any such instrument or contract in writing, hereafter made, shall not affect its validity or legality in any respect." Act of Feb. 2, 1888, § 1. Section 2 validates all prior "deeds, mortgages, or other instruments in writing, for the conveyance or incumbrance of real estate, or any interest therein." 1 Hill's Gen. St., §§ 1427, 1428.

1. The statutes recited in this note show allowance of scrolls either generally or in cases indicated. The following States have by statute authorized the use of a scroll as a seal: *California*, *Connecticut* (see the quotation of statute, this note), *Florida*, *Illinois*, *Indiana*, *Michigan*, *Minnesota*, *Missouri*, *New Jersey*, *New Mexico*, *Oregon*, *Virginia*, *West Virginia* and *Wisconsin*. The *Connecticut* and *Missouri* statutes specify scrolls (see Connecticut statute) on instruments purporting to be under seal. In *Alabama* it is provided that all writings which import on their face to be sealed are to be taken as sealed instruments. (*Alabama* Civil Code 1886, § 1840, pl. 9.)

California.—A scroll or the word "seal" against the writer's signature is sufficient. Deering's Civil Code, 1885, § 1931.

Connecticut.—"All instruments in writing, executed by any person or corporation not having an official or corporate seal, purporting and intended to be a specialty or under seal, and not otherwise sealed than by the addition of the word seal or the letters (L. S.), or in the case of an official or corporate seal, by an impression of such seal upon the paper or other material employed, shall be deemed in all respects as sealed instruments, and received in evidence as such." *Connecticut* Gen. Stat. 1888, § 1085. See Fish *v.* Brown, 17 Conn. 343, respecting acts 1824 and 1838, in relation to bonds and instruments purporting to have been intended as bonds with condition, but "which have been executed without seal."

Florida.—McClellan's Digest, 1881, § 87 (act of Nov. 23, 1828).

Illinois.—Cothran's Rev. Stat. 1891, p. 303, § 1; *Illinois* Rev. St. 1845, p. 421, § 56.

Indiana.—Under *Indiana* Rev. Code 1831, p. 407, making a scrawl a seal, it is not necessary to the validity of the scrawl by way of seal, that there should be inclosed within it the word "seal," or a letter denoting that word. Kilgore *v.* Powers, 5 Blackf. (Ind.) 22. And see Anderson *v.* Wilburn, 3 Ark. 155, holding that the letters "L. S." need not be written within the scrawl. See *infra*, this title, *Recital.*

Michigan.—In General.—"A scroll or device used as a seal upon any deed of conveyance or other instrument whatever, whether intended to be recorded or not, shall have the same force and effect as a seal attached thereto, or impressed thereon, but this section shall not be construed to apply to such official seals as are, or may be provided for by law." Howell's Mich. Stat. 1882, § 5699. "Any device affixed to any deed or instrument in writing

by way of seal, by any person signing the same, executed since the thirty-first day of December, eighteen hundred and twenty-seven, or hereafter to be executed, shall be received in all courts, and upon all occasions, as evidence that the same deed or instrument was duly sealed, and equally valid and effectual, as if the same had been actually sealed; but this section shall not apply to official and corporate seals, in cases where, according to law, an actual sealing may be required." Howell's Mich. Stat. 1882, § 7510.

Set-off.—"In any action upon a sealed instrument, and where a set-off is founded on any sealed instrument, the seal thereon shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent as if such instrument were not sealed." Howell's *Michigan* Stat. 1882, § 7520.

Actions on Sealed Instruments.—"In all cases arising upon contracts under seal, or upon judgments, when an action of covenant or of debt may be maintained, an action of assumpsit may be brought and maintained in the same manner, in all respects, as upon contracts without seal, and no bond, deed of conveyance or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party." Howell's *Michigan* Stat. 1882, § 7778.

Mining and Smelting Companies.—"The want of the corporate seal to any instrument in writing shall not invalidate such instrument if in all other respects legally authorized by the corporation, and signed by the president and secretary or other duly authorized officer or officers of the corporation." Howell's *Michigan* Stat. 1882, § 4113.

Banks.—"All certificates or evidences of deposits made by the proper officers of any bank shall be as effectual to bind the bank as if made under the common seal thereof." Howell's *Michigan* Stat., Sup. 1890, § 3208, d. 1.

Minnesota.—"A scroll or device, used as a seal upon any deed or conveyance or other instrument whatever, whether intended to be recorded or not, shall have the same force and effect as a seal attached thereto, impressed thereon; but this section shall not be construed to apply to official seals." Kelly's *Minnesota* St. 1891, § 4117. Sections 4192–4195 provide for certain cases of omissions of seals or scrolls on deeds or mortgages.

New Jersey.—*New Jersey* Rev. 54, p. 387 (Acts of 1875, P. L. 56.)

Missouri.—"Every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed." *Missouri* Rev. St. 1889, § 2388; see also § 2391–2399.

Under the above statute, where a scrawl instead of a seal is used in a deed, the deed must recite that it is used as the grantor's deed, or it will not be a valid deed. Cartmill *v.* Hopkins, 2 Mo. 220; Grimsley *v.* Riley, 5 Mo. 280; 32 Am. Dec. 319; Walker *v.* Keile, 8 Mo. 301; Dickens *v.* Miller, 12 Mo. App. 408. In Walker *v.* Keile, 8 Mo. 301, the words "this indenture" were held not a sufficient recital of this fact. Where there is a real seal, the requirement as to recital does not exist. Dickens *v.* Miller, 12 Mo. App. 408. In a bond expressed to be a sealed instrument, the word "seal" printed between brackets was held to be good as a seal. Underwood *v.* Dollins, 47 Mo. 259. The requirement as to recital does not prevent adoption by several of one seal. Lunsford *v.* La Motte Lead Co., 54 Mo. 426.

Seals in Special Cases.—A mortgage not under seal is good in equity. Martin *v.* Nixon, 92 Mo. 26; McClurg *v.* Phillips, 57 Mo. 214; Henoch *v.* Chaney, 61 Mo. 129. An instrument in the form of a bond, though without seal, is good as a common-law contract. Saline Co. *v.* Sappington, 64 Mo. 72; Henoch *v.* Chaney, 61 Mo. 129. An attachment bond must be under seal. State *v.* Chamberlin, 54 Mo. 338; State *v.* Eldridge, 65 Mo. 584. An indemnifying bond in a replevin suit need not be sealed, the statutory form containing no intimation of seal beyond the word "bond." Henoch *v.* Chaney, 61 Mo. 129; see State *v.* Eldridge, 65 Mo. 584.

A sheriff's deed not under seal is void, and equity will not aid it. The case differs from that of an equitable title under a contract by parties for sale of land. "Courts of equity do not carry into effect by their decrees the incomplete execution of statutory powers." Moreau *v.* Detchemendy, 18 Mo. 522; 41 Mo. 431. See also McCoy *v.* Cassidy, 96 Mo. 429; Moreau *v.* Branham, 27 Mo. 357; Doe *v.* Pendleton, 15 Ohio 735. But an adminis-

seals may be impressed upon the paper itself, without the use of wax or other like substance.[1]

trator's sale if duly approved will pass an equitable title. Long *v.* Joplin Min., etc., Co., 68 Mo. 422; Snider *v.* Coleman, 72 Mo. 568. In Wohlien *v.* Speck, 18 Mo. 561, where the deed was held to pass no title, there had been no approval at the proper term. See as to equity in such case, Long *v.* Joplin Min., etc., Co., 68 Mo. 429.

New Mexico.—"On all deeds of conveyance, mortgages, bonds or contracts for the delivery, or making of a deed of conveyance or mortgage, and documents referring to, or in any manner affecting real estate in this Territory, a scroll may be used as a seal by the parties thereto, instead of a wafer, wax or other impression required by the common law." *New Mexico* Comp. Laws 1884, § 2742.

Oregon—Definition.—"A public seal in this State is a stamp or impression made upon wax, wafer, paper, or any other like substance, upon which a visible and permanent impression can be made. A private seal may be made in the same manner, or it may be made without an impression, by a wafer or wax attached to the instrument, or by a paper attached to it by an adhesive substance, or by a scroll or other sign made with a pen. A scroll or other sign made in a sister State, Territory of the United States, District of Columbia, or a foreign country, and there recognized as a seal, shall be so regarded in this State." Hill's Annot. Laws, *Oregon*, 1892, § 752.

Effect.—"The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may therefore be modified or discharged by a writing not under seal or by an oral agreement otherwise valid." Hill's Annot. Laws, *Oregon* 1892, § 753.

"The execution of a writing is the subscribing and delivering it, with or without affixing a seal." Hill's Annot. Laws, *Oregon*, 1892, § 754.

"An agreement in writing without a seal, for the compromise or settlement of a debt or controversy, is as obligatory as if a seal were affixed." Hill's Annot. Laws, *Oregon*, 1892, § 755.

"The last three sections shall not be construed to dispense with a seal to a deed or other writing where the same is required by any statute of the State." Hill's Annot. Laws, *Oregon*, 1892, § 756.

The period of limitation allowed on sealed instruments is ten years. (Hill's Annot. Laws, *Oregon*, 1892, § 5.) "Conveyances of lands or of any interest therein may be by deed, signed and sealed." (Hill's Annot. Laws, *Oregon*, 1892, § 3002.)

Virginia.—A scroll is sufficient as the seal of a natural person. *Virginia* Code 1887, § 2841; *Virginia* Code 1887, § 5, sub. sec. 12; Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108.

West Virginia.—A scroll is sufficient in the case of a private person. *West Virginia* Code, 1891, p. 123. pl. 15.

Wisconsin.—"A scroll or device used as a seal upon any conveyance of lands or other instrument whatever, whether intended to be recorded or not, shall have the same force and effect as a seal attached thereto, or impressed thereon, and the conveyance or instrument be of the same obligation as if actually sealed; but this section shall not apply to such official or corporate seals as are or may be provided by law." Sanborn & Berryman's Stat., *Wisconsin*, § 2215. (R. S., 1849, ch. 59, § 34; ch. 55, § 4.) § 39, ch. 86, R. S. 1858 combined with § 5, ch. 82, R. S. 1858. See § 2206*a*.

1. In the following States the statutes provide that corporate or official seals may be impressed upon the paper itself: *California*, *Connecticut*, *Dakota*, *Kansas*, *New York*, *Rhode Island*, *Virginia* and *West Virginia*.

California.—Deering's Codes (Civil) 1885, § 1932, applies to "public" or "private" seals.

Connecticut. — *Connecticut* Gen. St. 1888, § 1085. See Fish *v.* Brown, 17 Conn. 343.

Dakota.—*Dakota* Comp. Laws 1887, § 3548; Civil Code, § 923, applies to "corporate" or "official" seals.

Kansas.—*Kansas* Gen. St. 1889, vol. 2, § 6687, applies to seal of "court or public office or officer."

New York.—*New York* Code Civil Proc. 1889, § 960, applies to "seal of a public officer or of a corporation."

Rhode Island.—Whenever a seal is required to be affixed to any paper, the word "seal" shall be held to include an

In *California*[1] and *Oregon*[2] it is provided that scrolls or other devices made for a seal in other States or countries, and recognized as such where made, shall be regarded in the enacting State as valid seals. Especial statutory provisions are frequent respecting conveyances of interests in realty.[3]

impression of such seal made with or without the use of wax or wafer on the paper." *Rhode Island* Pub. St. 1882, § 14.

Virginia. — *Virginia* Code 1887, § 2841, applies to "corporate or official seal," *Virginia* Code, 1887, § 5, sub. 12, applies to "seal of any corporation, court or public officer." See Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108.

West Virginia.— *West Virginia* Code 1891, p. 123, pl. 15, applies to State seal or seal of court officer or corporation.

Independently of Statute, the impression on the paper itself would doubtless be held good. Pierce *v.* Indseth, 106 U. S. 546.

1. Deering's *California* Codes (Civil) 1885, § 1931.

2. Hill's Annot. Laws (1892), § 752–756.

3. **Provisions as to Real Estate**—*Connecticut.*—"All conveyances of lands shall be in writing, sealed and subscribed," etc. *Connecticut* Gen. St. 1888, § 2954. Conveyances of Connecticut real estate, executed in conformity to the law of the State or Territory where made shall be valid. *Connecticut* Gen. St. 1888, § 2956.

Florida.—"No estate or interest of freehold, or for a term of years of more than two years, or any uncertain interest of, . . . in . . . etc., shall be created . . . or released in any other manner than by deed in writing, sealed," etc. *Florida* Laws (McClellan), p. 213, ch. 32, § 1.

Indiana.—"Conveyances of lands, or of any interest therein, shall be by deed in writing, subscribed, sealed," etc. *Indiana* R. S., vol. 2, § 2919 of ch. 18, Conveyance of Land.

Maryland.—"Every deed conveying real estate shall be signed and sealed by the grantor or bargainor, and attested by at least one witness." *Maryland* Code, 1888, art. 21, Conveyancing, § 10. Riswick *v.* Goodhue, 50 Md. 61.

Michigan.—"Conveyances of lands, or of any estate or interest therein, may be made by deed, signed and sealed," etc. (Howell's *Michigan* St. 1882, § 5652; and see § 5653. But see § 7778, viz.: "In all cases arising upon contracts under seal, or upon judgments when an action of covenant or of debt may be maintained, an action of assumpsit may be brought and maintained in the same manner, in all respects, as upon contracts without seal; and no bond, deed of conveyance or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party."

Missouri.—The statute is similar to that of *Indiana* (see *supra*, this note). *Missouri* Rev. St., § 2401.

New Hampshire.—"Real estate may be conveyed by deed, signed and sealed." *New Hampshire* Pub. St. 1891, p. 376, §§ 1, 3. Estate without writing shall be at will merely. § 12, p. 378. And see § 13 as to trusts.

New York.—"Every grant in fee or of a freehold estate shall be subscribed and sealed," etc. Birdseye's *New York* Rev. St., vol. 1, tit. Deeds, § 2.

Oregon.—2 Hill's *Oregon* Annot. St. (1892), §§ 3002, 3003, 3004, 3011. See 3012 as to deeds of Oregon lands executed in other parts of the United States.

Rhode Island.—"No freehold, or estate over one year shall be conveyed by deed, signed, sealed," etc. *Rhode Island* Pub. St. 1882, p. 443, § 3.

South Carolina.—The form of conveyance prescribed concludes, "witness my hand and seal," etc. *South Carolina* Gen. St. 1882, § 1775.

Vermont.—The provisions in *Vermont* are similar to those in *New Hampshire* (see *supra* this note). *Vermont* Rev. Laws, 1880, § 1922, 1927, 1932, 1933. Section 1934 provides that an assignment of a lease of lands, if the lease is for a longer term than one year, shall be by deed, signed, sealed, witnessed, acknowledged, and recorded, etc. § 1934.

Washington.—"All conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance upon real estate, shall be by deed." Hill's Gen. St. § 1422 (in effect March 1, 1888).

Wisconsin.—"Conveyances of land, or of any estate or interest therein,

IV. RECITAL OF SEALS—1. Prevailing Rule. — In certain early decisions it was thought to be necessary that a deed should recite in the body of it the fact that it was sealed. This requirement was afterwards abandoned; because, since sealing and delivery, two of the essentials to a conveyance by deed must follow the writing of it, the recital of either of these things was unnecessary.[1] The latter is the prevailing rule in the United States.[2]

may be made by deed, signed and sealed," etc. Sanborn & B's *Wisconsin* Rev. St. (1889), § 2203. Under this, a seal is necessary to the validity at law of a deed or mortgage. Koehler *v.* Black River Falls Iron Co., 2 Black (U. S.) 715. Unsealed conveyance may be assigned and assignee may sue to have proper conveyance compelled. Dreutzer *v.* Lawrence, 58 Wis. 594. Section 2206*a* (ch. 348, 1883) validates writings prior thereto, purporting to convey real estate if valid in other respects but unsealed.

Wyoming.—The provisions are similar to those in *Indiana* (*supra*, this note). *Wyoming* Rev. St., 1887, § 1.

1. An obligation was thus, "for the well and faithful payment of which I bind myself by these presents, dated," etc., and not said "sealed with my seal," nor "in witness whereof," wherefore it was asked of the court, if such an obligation be good or not? And it seemed to Shelley and Fitzherbert, that the obligation is well enough, if a seal be put to the deed, etc. 1 Dyer 19*a*, 28 Hen. VIII. "For there are but three things of the essence and substance of a deed, that is to say, writing in paper on parchment, sealing, and delivery, and if it hath these three, although it wanted, *in cujus rei testimonium sigillum suum apposuit*, yet the deed is sufficient; for the delivery is as necessary to the essence of a deed as the putting of a seal to it, and yet it need not be contained in the deed that it was delivered. And note, the order of making a deed is, first to write it, then to seal it, and after to deliver it; and therefore it is not necessary that the sealing or delivery be mentioned in the writing, forasmuch as they are to be done after. And so, it was said, it was resolved in Henry the Eighth's time. See reader, 40 Edw. III, 2 a, and an opinion 7 Hen. VII, 14 a, to the contrary; but see the case cited in the time of Hen. VIII, now reported by the Lord Dyer, 28 Hen. VIII, 19, and believe, reader, the late judgments are grounded upon full and pregnant reason."

2. **Maryland.**—Trasher *v.* Everhart, 3 G. & J. (Md.) 246.

Tennessee—Scruggs *v.* Brackin, 4 Yerg. (Tenn.) 528.

South Carolina.—Relph *v.* Gist, 4 McCord (S. Car.) 267; McKain *v.* Miller, 1 McMull. (S. Car.) 313.

Pennsylvania.—Taylor *v.* Glaser, 2 S. & R. (Pa.) 502; Hopkins *v.* Cumberland Valley R. Co., 3 W. & S. (Pa.) 410; Frevall *v.* Fitch, 5 Whart. (Pa.) 325; 34 Am. Dec. 558; Biery *v.* Haines, 5 Whart. (Pa.) 563.

Mississippi.—Hudson *v.* Poindexter, 42 Miss. 304; Whittington *v.* Clarke, 8 Smed. & M. (Miss.) 480; McRaven *v.* McGuire, 9 Smed. & M. (Miss.) 34; Commercial Bank *v.* Ullman, 10 Smed. & M. (Miss.) 411. We must therefore regard Bohannon *v.* Hough, Walk. (Miss.) 461, as overruled.

Arkansas.—Cummins *v.* Woodruff, 5 Ark. 116; Jeffery *v.* Underwood, 1 Ark. 115.

Nevada.—Sticknoth's Estate, 7 Nev. 234.

Kentucky.—Hubbard *v.* Beckwith, 1 Bibb (Ky.) 492.

California.—Richardson *v.* Scott River, etc., Co., 22 Cal. 157.

Delaware.—Conine *v.* Junction R. Co., 3 Houst. (Del.) 288; 89 Am. Dec. 230.

Illinois.—Eames *v.* Preston, 20 Ill. 389.

Maine.—Wing *v.* Chase, 35 Me. 265.

Massachusetts.—Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 428.

New York.—Common Pleas—Merritt *v.* Cornell, 1 E. D. Smith (N. Y.) 335.

Ohio.—Osborn *v.* Kistler, 35 Ohio 101; Howe *v.* Dawson, Tapp. (Ohio) 169; Michenor *v.* Kinney, Wright (Ohio) 459.

Minnesota.—Under *Minnesota* Gen. St. 1878, ch. 40, § 31, declaring a scroll or device to have the effect of a seal "when used as such," it was held that the device in which was written the

2. Rule in Virginia and Alabama.—However, in *Virginia* and *Alabama* it is held that a scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear from some expression or recognition in the body of the instrument that it was intended as such.[1] This modification of the widely accepted principle is attributed to the fact that the mere presence of a scroll seal is not sufficient to prove it to have been intended as a seal. Such seals are all alike, or so nearly so as to preclude the appropriation to each individual of an ink seal of a particular and distinctive model or appearance.

Although this stricter rule is here termed the Virginia-Alabama rule, it is not without some recognition in other States, particularly in *New Jersey*.[2] Not alone in *Virginia* and in *Alabama*, but

word "seal" was clearly meant as a seal, and that the instrument before the court, a note, was a sealed instrument although there was no reference in the body of it to a seal. Brown *v.* Jordhal, 32 Minn. 135; 50 Am. Rep. 560. See also Helfer *v.* Alden, 3 Minn. 333. In the Brown-Jordhal case, the court by Gilfillan, C. J., said: "The scroll or device does not necessarily, as does a common-law seal, establish its own character," but they held that the character was plainly evinced by the word "seal" written within it.

Texas.—Excepting so far as the legislation of 1840, in introducing the common law, did in the act concerning conveyances provide that there must be recognition. See English *v.* Helms, 4 Tex. 230.

"It is the seal and not the acknowledgment of the party that constitutes the deed. (4 Mc.C. 272; Bac. Abr. Obligations, C, p. 159; 4 Comyns Dig. 157)." English *v.* Helms, 4 Tex. 232.

There are several *Virginia* cases which must be mentioned. Austin *v.* Whitlock, 1 Munf. (Va.) 487; Anderson *v.* Bullock, 4 Munf. (Va.) 442; Jenkins *v.* Hurt, 2 Rand. (Va.) 446. The instruments in each case concluded: witness our hands; concerning which fact the court, by Tucker, J., in Austin *v.* Whitlock, 1 Munf. (Va.) 487, said: "Neither, as I conceive, will the *profert* of an instrument, importing in the body of it, to be executed under the hand of the party only, support the allegation of a deed sealed with the seal of the party, although a seal be to that instrument in reality affixed, inasmuch as that may be done without the party's knowledge or intention." See Clegg *v.* Lemessurier, 15 Gratt. (Va.) 115. See opposed cases on instruments sealed yet so concluding, *infra*, this title, *Rule in Virginia and Alabama.*

1. In Baird *v.* Blagrove, 1 Wash. (Va.) 170, in 1793, occurred the first intimation of a change in this direction, although the point was not expressly decided. In 1810, however, the necessity of mentioning the seal in the body of the instrument or in the attestation clause, was decided in positive terms. Austin *v.* Whitlock, 1 Munf. (Va.) 487.

In 1824 the Virginia doctrine was enforced as the law of Alabama, two of the judges dissenting. Lee *v.* Adkins, Minor (Ala.) 187, *followed* in Carter *v.* Penn, 4 Ala. 140.

Cases sustaining the *Virginia-Alabama* doctrine: Austin *v.* Whitlock, 1 Munf. (Va.) 487; Anderson *v.* Bullock, 4 Munf. (Va.) 442; Peasley *v.* Boatwright, 2 Leigh (Va.) 198; Jenkins *v.* Hurt, 2 Rand. (Va.) 446; Cromwell *v.* Tate, 7 Leigh (Va.) 301; 30 Am. Dec. 506, historical; Tuberville *v.* Bernard, 7 Leigh (Va.) 302n; Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108.

2. In 1819 the *New Jersey* statute which allowed scrolls "by way of" seal even then on instruments for payment of money, was held not to affect a bill having an ink scroll but containing no mention of a seal in the body of the bill. Newbold *v.* Lamb, 5 N. J. L. 516, *followed* in Corlies *v.* Van Note, 16 N. J. L. 324.

In Corlies *v.* Van Note, 16 N. J. L., 324, the court by Hornblower, C. J., said, *inter alia*, as follows: "By our statute" (Rev. Laws 305), "a scroll, or ink or other device, in certain cases, are made of the same force as a wax seal, if the same has been affixed 'by way of seal.' If, then, an instrument is shown to us, with a seal in fact, that is, with wafer, or wax affixed to it, the law pronounces

in many other jurisdictions, we find conclusions expressed in regard to what may constitute a sufficient recognition in the instrument, of the seal. These determinations may not always have been required; but they are useful: first, as guides in the application of the Virginia rule; and, secondly, even where that rule has not been established, on the question of intent, for manifestly we cannot say a device is a seal if it appears that it was not meant as such. The use of technical language appropriate alone to sealed instruments will probably be regarded as a sufficient recognition by the instrument itself.[1] It is not necessary that the fact should be specified in the body of the deed if it appear from the attestation clause that the scroll was affixed by way of

it a deed, and that whether anything is said in the instrument about a seal or not. It is pronounced a deed, because it has an actual seal on it. But when a writing is shown to us, with only a scroll or the flourish of a pen at the end of or under the name, we cannot declare it a deed, unless it appears to the court that the scroll or flourish was designed for and put there 'by way of seal.' When, therefore, a writing with nothing but a blot, or scroll, or flourish after the name is shown in court, we are bound to consider and treat it as a simple contract only, unless it appears by the writing itself or by the *his testibus* clause, that the party making it intended to do so under his hand and seal." And Ford, J., in the course of his opinion, observed: "Those who sue upon deeds are bound to produce them in court by a *profert*, because, as stated in Bacon, 'it is the proper office of the court to see that they are duly executed.' So in Gould's Pleading, 'The practical use of a *profert* in pleading appears to be that it enables the court to inspect the instrument pleaded, the construction and legal effect of which are matters of law.' Gould's Plead. 438, § 33. It must appear on the face of it to be a deed, or the court cannot admit it to be such. It must purport to be a deed by saying it is a seal; as 'witness my hand and seal,' or the like; or by reference to a seal in the attestation, as 'sealed and delivered,' or the like; for the statute does not dispense with a *profert* to the court, nor with the court's office to see that it is a deed; nor does it transfer this office to a jury. The common law in these respects is not repealed by any clause in the statute, either by express words or by implication. Suppose a witness should give his opinion, under oath, that the mark was affixed there by way of seal, his opinion could not make it a seal, and if he swore that the maker said it was his seal, it would be no better for two reasons: it would then be a deed, or no deed, not according to the instrument itself, but according to the frail memory of a witness; but what is more decisive, a man could then make a deed by word of mouth, whereas by law it must be written or printed. 2 Bl. Com. 297. The only way to affix a scroll, or ink, or other device, by way of seal, is by writing 'witness my hand and seal,' or 'sealed and delivered,' or something to that effect in the instrument itself, which then becomes a deed in writing instead of being by word of mouth."

Evidence *aliunde* is not admissible. Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108, *overruling dictum* in Parks *v.* Hewlett, 9 Leigh (Va.) 511, and in one or two other cases.

1. On a question of pleading it was once said: "There are some words of art, such as indenture, deed, or writing obligatory, which, of themselves, import that the instrument was sealed; but if it be alleged that J S by his certain writing demised or covenanted, without averring that it was sealed, the court will not intend that the writing was sealed." Van Santwood *v.* Sandford, 12 Johns. (N. Y.) 197, *citing* Cro. Eliz. 571; Ld. Raym. 2537½; 8 Com. Dig. Fait. (A. 2); Pleader, 2 W. 9, 14.

In Lindsay *v.* State, 15 Ala. 43, the court said: "We cannot well mistake the design of the parties with respect to the execution of the instrument before us, as on the face of the instrument it clearly imports to be sealed. They characterize it by the use of technical language, which can alone be descriptive of sealed instruments.

a seal.[1] The word "seal" written or even printed within a scroll has commonly been held to indicate sufficiently that the scroll is there by way of seal, although in the jurisdictions where this is established, it is usually also held that the scroll is itself evidence that it was meant as a seal. Some courts, however, have held that writing the word "seal" within the scroll is not proof sufficient to show that the seal or scroll was affixed by the maker of the instrument. There is also some difference of opinion about the effect of the omission, which not unfrequently happens, of the words "and seal" in the clause "in witness whereof."[2]

They 'bind and oblige themselves,' etc.—they speak of 'the condition of the above obligation,' and upon performance of the condition, provide 'the above obligation to be void.'"

"On demand, I obligate myself, my heirs, etc., to pay unto W. Tate, guardian of J. Stropher, one hundred and one dollars, with interest from the 1st of December, 1808.

"Assumpsit for Pendleton.

"Stephen Cromwell. Seal."

Held, merely a simple contract. Cromwell *v.* Tate, 7 Leigh (Va.) 301. See Carter *v.* Penn, 4 Ala. 140. And see Buckingham *v.* Orr, 6 Colo. 587.

1. Parks *v.* Hewlett, 9 Leigh (Va.) 511—here the attestation clause was that of the witnesses, and was below maker's signature. Smith *v.* Baker, Ga. Dec. 128 (see *Georgia* Act 1838); Burton *v.* Le Roy, 5 Sawy. (U. S.) 510.

In *Texas* an early statute required that there should be recognition of the seal in the body of the instrument. In construing this statute it was held sufficient that the attestation clause—in testimony whereof, etc.—recited sealing. Flemming *v.* Powell, 2 Tex. 225; English *v.* Helms, 4 Tex. 228. The Act related to conveyances of freeholds, or of terms for more than five years. As to instruments in other cases, if the word "seal" was written in the scroll or flourish, it indicated the purpose to seal, and, *prima facie*, the scroll was to be upheld. English *v.* Helms, 4 Tex. 228.

2. The word "seal," written within the scroll, has in some cases been held to indicate that the scroll was intended as a seal, without any mention in the body of the instrument. Comerford *v.* Cobb, 2 Fla. 418; Hudson *v.* Poindexter, 42 Miss. 304; Commercial Bank *v.* Ullman, 10 Smed. & M. (Miss.) 411; McRaven *v.* McGuire, 9 Smed. & M. (Miss.) 34; Whittington *v.* Clarke, 8 Smed. & M. 480; Miller *v.* Binder, 28 Pa. St. 489; Richmond *v.* Duncan, 4 Ark. 197; Brown *v.* Jordhal, 32 Minn. 135; 50 Am. Rep. 560. But this was held not to be enough, in *Colorado*. Buckingham *v.* Orr, 6 Colo. 587. In *Virginia*, also, the word seal, within the scroll, was held not to be a sufficient indication that the scroll was put there or adopted as a seal; although in the *Virginia* case there was the further feature that the instrument concluded, "witness our hands," whereas the custom in such a clause, where there is a seal, is to add, "and seals." Jenkins *v.* Hurt, 2 Rand. (Va.) 446. With this case, may be presented Austin *v.* Whitlock, 1 Munf. (Va.) 491; Merritt *v.* Cornell, 1 E. D. Smith (N. Y.) 335.

In Clement *v.* Gunhouse, 5 Esp. 83, a sailor brought assumpsit on ship's articles which, when produced, were seen to have a seal after each name; but Mr. Justice Chambre said that "if the parties did not mean to contract by deed, the ignorance of the parties as to the effect of a seal, could not make it so. Here the words of the articles are, 'to which the parties have set their hands,' not seals. It was, therefore, not the intention of any of the parties to execute a deed." Accordingly, he refused a motion for non-suit.

In Ingram *v.* Hall, 1 Hayw. (N. Car.) 222, in the course of an opinion of great learning, Haywood, J., uses the following language of such a clause: "I would observe, then, in the first place, that this clause contains a part of the words of the deed, and the deed itself or any part of it, cannot be read, until the sealing and delivery of it be first proved; and of consequence, this clause cannot be read to prove the seal after the seal has proved the clause itself; and then as to the purpose of its proving or disproving the seal, it is totally useless; and, that such a clause is not only unnecessary in itself, but

3. Recital Not a Substitute for a Seal.—Although a recital that the parties have set their hands and seals occurs in the body of a writing, or in the *teste* clause, this is not equivalent to sealing.[1] In some States this rule has been changed by statute.[2]

V. PRESUMPTION OF CONSIDERATION.—It is a familiar rule of the common law that a seal imports consideration. Consideration in

that the words of it have always been disregarded, is proved by such an abundance of authorities, that the bare citation of them will fully establish the position that the omission of this clause or the addition of it, or the words of it, can have no influence whatever upon the writing itself. Some of them are the following: Co. Litt. 7, *a*; Stroud *v.* Gerrard, 2 Salk. 714; Blackhurst *v.* Fenner, 2 Rep. 5. The deed is good, though this clause be omitted. 2 Nels. 623, pl. 7, who cites Moor 3. It is not a conclusion of the deed, for that which is written after it is as much part of the deed as that which is written before. Also 2 Nels. 621, pl. 13, who cites 3 Bulstrode 300. 'In witness whereof, I have hereunto set my hand:' the deed is good, if there be a seal, though the clause do not mention the seal. Cunning Dict. *verbo* Deeds, cites Hetly 75, and by the like reason, if it mention hand and seal, still it can operate nothing. Moore *v.* Jones, 2 Str. 814, 815; Smith *v.* Mason, L. Ray. 1541. For the seal is not established by the words of the writing, but *e converso;* the words contained in the writing are proved to be the words of the party by his seal. And if the words contained in this clause were allowed to prove anything the party to be benefited by the deed would have nothing to do but to insert this clause: 'In witness whereof I have sealed and delivered,' and the evidence of the deed would be complete. Suppose, in the present case, that the word seal had not been in the clause, and yet the seal should appear, with the word seal within it, in the handwriting of the obligor, as was the fact here: would it not be a harsh determination to say it was not his seal? Yet we know such cases often occur . . . Again, if the instrument should be held invalid, because possibly the seal might have been affixed after the execution of it, then more good deeds would be destroyed upon suspicion than frauds prevented by it. For few men will attempt a fraud of this kind." . . . (The foregoing remarks were said respecting a sealed note for the payment of money). See also Miller *v.* Binder, 28 Pa. St. 489; Jeffery *v.* Underwood, 1 Ark. 116; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 428; Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288; 89 Am. Dec. 230.

Flourish or Dash. — An instrument concluding: Witness our hands and seals, but having merely a flourish in continuation of the last letter of the signature, was held not to have been sealed. Grimsley *v.* Riley, 5 Mo. 280; 32 Am. Dec. 319.

On the other hand, where in execution of a power requiring seal, the intention of the donee in making a dash about the sixteenth or the eighth of an inch in length, was that such dash was by way of seal, it was held that the same was sufficient, the intent being the controlling factor: only, there must be some mark, in some form; the intent alone being insufficient. Hacker's Appeal, 121 Pa. St. 192.

1. Williams *v.* State, 25 Fla. 740; Chilton *v.* People, 66 Ill. 501; State *v.* Humbird, 54 Md. 330; Stabler *v.* Cowman, 7 Gill & J. (Md.) 284; Boothbay *v.* Giles, 68 Me. 160; Maule *v.* Weaver, 7 Pa. St. 329. And see Taylor *v.* Glaser, 2 S. & R. (Pa.) 502; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; Moore *v.* Jones, 2 Ld. Raym. 1536; Warren *v.* Lynch, 5 Johns. (N. Y.) 239; Perkins, § 129.

Equity.—In *Mississippi*, such a recital was held to be evidence of an equity in the promisee of a note sufficient to prevent the maker from obtaining affirmative relief in chancery as against an unsealed instrument; but until the *Mississippi* Code of 1880 broke down distinction between sealed and unsealed instruments, the denial of affirmative relief to the maker as above indicated, was the extent of the court's power. McCarley *v.* Tippah Co., 58 Miss. 483; 38 Am. Rep. 338; McPherson *v.* Reese, 58 Miss. 749.

2. *Supra*, this title, *Statutory Regulations of Seals.*

this sense is interpreted to mean a mature and well-settled promise as distinguished from one inconsiderately made. A seal affixed to an engagement thus made was regarded as attestation so strong as not even to be open to attack.[1] This rule, however, was open to certain exceptions. It did not apply to contracts in restraint of trade where actual consideration was wanting,[2] nor where the real consideration was an illegal one.[3]

The rule of presumption of consideration did not extend to deeds under the Statute of Uses, which was directed towards conveyances made upon actual and valuable consideration.[4]

The rigor of the rule is more or less modified in equity, and in those jurisdictions where law and equity are interblended; but

1. 1 Taylor Ev. (6th ed.) 103; 1 Smith L. Cas. (7th Am. ed.) 698; 1 Chit. Cont. 20; Storm *v.* U. S., 94 U. S. 76; Lowe *v.* Peers, 4 Burr. 2225; Dorr *v.* Munsell, 13 Johns. (N. Y.) 431; Parker *v.* Parmele, 20 Johns. (N. Y.) 134; 11 Am. Dec. 253; Gazley *v.* Price, 16 Johns. (N. Y.) 227; Paige *v.* Parker, 8 Gray (Mass.) 213; Wing *v.* Chase, 35 Me. 265; 2 Bl. Com. 446; Fallowles *v.* Taylor, 7 T. R. 475.

Where an action was covenant upon agreement under seal for the execution of a good warranty deed of conveyance of certain land, it was held that the words, "a good warranty deed of conveyance," referred to the instrument only and not to the title; and that a plea that the plaintiff was not seised, or had no title, could not be maintained; for though such a plea might show a failure of consideration, yet the action being at law the defense of want of consideration was not available against the seal. Parker *v.* Parmele, 20 Johns. (N. Y.) 130; 11 Am. Dec. 253. See also Gazley *v.* Price, 16 Johns. (N. Y.) 267; Van Eps *v.* Mayor, etc., of Schenectady, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330.

Covenants.—This does not prevent recovery of damages for breach of contract contained in the deed. Parker *v.* Parmele, 20 Johns. (N. Y.) 130; 11 Am. Dec. 253.

It is often said, and truly, that a consideration is necessary to a contract. But the word consideration, with respect to instruments under seal, has a wider meaning than it does when applied to parol contracts. In the case of the seal, the consideration means merely the fixed, mature purpose resulting in the engagement, of which the form of the contract, in being sealed, is an accepted and at common law irrebuttable presumption. See Wharton, Contracts, § 493, note 2, p. 671, of ed. of 1882; CONTRACTS, vol. 3, p. 827; Maine's Ancient Law, p. 313. The word as used with regard to parol contracts, however, is confined to consideration of a valuable nature; and this use of the word has apparently a direct though very ancient source.

In Saxon times, official witnesses were elected, two or three of whom were called in to every bargain and sale; and thus they served to relieve against charge of theft, and to uphold title in civil actions. Now debts, loans, and sales appear to have had many characteristics in common. See Langdell's Summary of Contracts, Maine's Ancient Law, p. 321. Debt then was the action, on contracts of sale, and, growing out of the transaction before the official witnesses, always arose from a "business transaction," as Mr. Wharton expresses it. When, therefore, the statute *in consimili casu* authorized trespass on the case, in the cases within its application, the "similar causes" to those sustaining action of debt were business ones, or at least ones dependent on valuable consideration. This appears to have been the origin of the rule that parol contracts must be based on consideration. See Holmes' Common Law, Lecture VII; Hare on Contracts, 119. But it does not apply to specialties, excepting that in equity, where consideration was intended and none passed, relief is granted, according to the statements hereinafter contained.

2. Homer *v.* Ashford, 3 Bing. 327; 11 E. C. L. 121.

3. Illegality of consideration or impossibility of performance, may be set up against a specialty. Wharton, Contracts, § 495.

4. See DEEDS, vol. 5, p. 435; 2

not so as to defeat intent of the parties that the deed, though without consideration, should yet be operative.[1] Both law and equity notice fraud in the execution of a deed.[2]

Where, however, the fraud went to the consideration, the unwieldy nature of the remedy at law, which could not adjust itself according to whether the party's defense was sustainable in whole or only in part has frequently been held to prevent him from making defense at law based on the fraud.[3] But in *Rhode Island* and in some other States, it was held that such defense was open to an obligee where at least it was evident that no injustice would be done to plaintiff.[4]

Saund. Uses 45; Shep. Touch. 221; 2 Bl. Com. 338; 4 Cruise's Dig. 27, 136, 145; Chitty on Contracts (Am ed. of 1874), p. 7.

1. See *infra*, this title, *Equitable Remedies in Connection with Seals.*

2. As where a deed is surreptitiously substituted in the place of the one intended. Canoy *v.* Troutman, 7 Ired. (N. Car.) 155; Gant *v.* Hunsucker, 12 Ired. (N. Car.) 254; 55 Am. Dec. 480; Nicholls *v.* Holmes, 1 Jones (N. Car.) 360; McArthur *v.* Johnson, Phil. (N. Car.) 317; 93 Am. Dec. 593; McKersall *v.* Cheek, 2 Hawks (N. Car.) 343, overruled.

Or where a deed is read falsely to a blind or to an illiterate person, 2 Bl. Comm. 304; Manser's Case, 2 Co. 3; McArthur *v.* Johnson, Phil. (N. Car.) 317; 93 Am. Dec. 593; Bigelow on Fraud (ed. of 1877), vol. 1, p. 328. And see Thoroughgood's Case, 2 Co. 9; Shulter's Case, 12 Co. 90; Anonymous, Skin. 159; 2 Atk. 327.

If the party could read but would not, or, being an illiterate or a blind man, should neglect to have the deed read or its contents declared, then he could not complain, at law, but only in equity. Shep. Touch. 561; *cited* in Bigelow on Fraud (ed. of 1877), vol. 1, p. 328. See also McArthur *v.* Johnson, Phil. (N. Car.) 317; 93 Am. Dec. 593. But compare statements herein touching fraud in regard to consideration.

3. Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177; Harsthorn *v.* Day, 19 How. (U. S.) 211; McArthur *v.* Johnson, Phil. (N. Car.) 317; 93 Am. Dec. 593; Logan *v.* Simmons, 1 Dev. & B. (N. Car.) 16; Taylor *v.* King, 6 Munf. (Va.) 358; 8 Am. Dec. 746; Wyche *v.* Macklin, 2 Rand. (Va.) 426; Rogers *v.* Colt, 21 N. J. L. 18; Stryker *v.* Vanderbilt, 25 N. J. L. 482; Lord *v.* Brookfield, 37 N. J. L. 552 (although in an earlier New Jersey case, in 1819, the court by Southard, J., said: "I do not well comprehend the grounds of this distinction"); Huston *v.* Williams, 3 Blackf. (Ind.) 170; 25 Am. Dec. 84; though see Pence *v.* Smock, 2 Blackf. (Ind.) 315; Reynolds *v.* Rogue, 5 Oh. Con. 110.

More or less with Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177, is Holley *v.* Younge, 27 Ala. 203, and perhaps Wood *v.* Goodrich, 9 Yerg. (Tenn.) 266.

Indiana legislation made defense of fraud legal in actions on bonds and writings obligatory, except conveyances of real estate, and instruments negotiable by the law-merchant. Huston *v.* Williams, 3 Blackf. (Ind.) 170; 25 Am. Dec. 84, decided in 1833.

4. Phillips *v.* Potter, 7 R. I. 289; 82 Am. Dec. 598. See also Partridge *v.* Messer, 14 Gray (Mass.) 182; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Hoitt *v.* Holcomb, 23 N. H. 552; Herrin *v.* Libbey, 36 Me. 350. The following is an outline of the reasons and authorities inducing these courts to so hold: That one who has practiced fraud shall not derive any advantage from it is a rule of the common law coeval with the law itself. Not only have bills of sale of goods and chattels been set aside, on this principle, but likewise grants and feoffments of land, and judgments of courts. Wood's Inst. 299, and cases there cited; 2 Roll. Abr. 23, 549; 3 Dyer 294, a, 295 b; 6 Cro. Eliz. 86; Skin. 357, pl. 4. The early statutes on the subject defined new remedies rather than new rights. 13th Elizabeth, ch. 5, against fraudulent deeds, alienations, etc., was declaratory of the previous law. Says Lord Coke: "It appeareth," by its enacting clause, "what the law was before the making of this act." Co. Litt. 290, tit. Release, 76 title Exchange. "All deceitful practices in defrauding another

One or two States abandoned more or less the strict common-law rule, without awaiting the legislative authority which we will see in other States.[1]

are condemned by the common law," and this, "without the express provision of any act of Parliament." (2 Bac. Abr. 594.) Lord Mansfield said: "The rules and principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes" 13 Eliz., ch. 5, and 27 Eliz., ch. 4. "Thus," says the opinion in the Rhode Island case, which has been used largely here, "whether the rule, that fraud in the consideration of a contract vitiates it, rests upon the common law, or upon the statute, in either case it is equally affirmed." A deed of composition, which one creditor is induced to sign by the payment of money, is no bar to an action on the death of another creditor who signs it without knowledge of such payment. Partridge *v.* Messer, 14 Gray (Mass.) 180; Kahn *v.* Gumberts, 9 Ind. 430. And see Wedlake *v.* Sargent, 8 Eng. L. & Eq. 404; Mallalieu *v.* Hodgsons, 16 Q. B. 689; 71 E. C. L. 689. In D'Aranda *v.* Houston, 6 C. & P. 511; 25 E. C. L. 516, to debt on bond, plea was allowed of fraud, etc., in the consideration. And see Evans *v.* Edmonds, 13 C. B. 777; 76 E. C. L. 777. In Mann *v.* Ditchbourn, 1 M. & R. 460, referred to in 80 E. C. L. 223, Lord Abinger was disposed to doubt the D'Aranda-Houston case. In Feret *v.* Hill, 15 C. B. 207; 80 E. C. L. 207, A procured B to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, he converts the premises into a common brothel, whereupon B forcibly expelled him. *Held*, that A might maintain ejectment—the fraudulent misrepresentation and the subsequent illegal use of the premises, not being sufficient (at law) to avoid the lease, the case being on the face of it a perfectly valid one. See Clarke *v.* White, 12 Pet. (U. S.) 178.

1. In Albertson *v.* Halloway, 16 Ga. 377, in debt upon a sealed note, it was said, in 1854, that the theory of consideration arose simply from the ancient solemnity and deliberation with which a specialty was entered into; and that when in later times the seal came to be affixed to a constantly increasing variety of documents in the commercial life of prosperous people, the solemnities attending the ancient specialty were disregarded in the new instruments, so that as to them the inference which courts were constrained to draw from the deliberation of the common-law documents could not have the same degree of force. The prohibition of a denial of consideration was therefore to be restricted to the ancient, common-law "specialties." The new sealed instruments, called into being by the exigencies of trade and commerce, do not work such a prohibition. Accordingly a plea of failure of consideration, without fraud, was allowed to be pleaded to a sealed note. Albertson *v.* Halloway, 16 Ga. 377. By statute, in *Georgia*—where the case just mentioned was decided, the defendant is given the further ability to plead a partial failure of consideration. Martin *v.* Bartow Iron Works, 35 Ga. 320, decided by the United States district court in *Georgia*. See apparently, Walker *v.* Walker, 13 Ired. (N. Car.) 335, the language of which is not clear on the question, and is directed towards deeds in general, although the action is one on a single bill.

California.—The system here "recognizes none of the old forms of action;" but the court may be quoted as saying of the "senseless" rule: "The difference between instruments sealed and unsealed is at least, at this day, a mere arbitrary and unmeaning distinction made by technical law, unsustained by reason." Ortman *v.* Dixon, 13 Cal. 36. And see Irwin *v.* Brown, 2 Cranch (C. C.) 314, where it was held that a signature to a bill, "Witness my hand and seal, W. D." followed by the seal, could, as to the seal and reference thereto, be considered as surplusage. But the case is condemned as contrary to weight of authority. See 1 Dan. Negot. Inst., § 31.

Notwithstanding the argument of the *Georgia* court, it has been held frequently that paper in the ordinary form of a promissory note, but under seal, is non-negotiable, unless statute provides otherwise. Clegg *v.* Lem-

Statutes in many States have abolished the irrebuttable force of the presumption, so as to allow proof of the want or failure of consideration.[1]

esurier, 15 Gratt. (Va.) 108; Hopkins *v.* Cumberland Valley R. Co., 3 W. & S. (Pa.) 410; Clarke *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256; Parks *v.* Duke, 2 McCord (S. Car.) 380; Brown *v.* Jordhal, 32 Minn. 135; 50 Am. Rep. 560; Muse *v.* Dantzler, 85 Ala. 361; McCummen *v.* Campbell, 82 Ala. 567; Laidley *v.* Bright, 17 W. Va. 779; Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 289; 89 Am. Dec. 230. As to corporation notes, see *infra*, this title, *Corporate Seals.*

See 1 Dan. on Negot. Instr. (ed. of 1891), § 31, *et seq.*; Tiedeman on Commercial Paper, § 32.

See also BILLS AND NOTES, vol. 2, p. 313.

Statutes making bills or notes under seal, negotiable.—*Colorado*, *Dakota*, *Florida*, *Georgia*, *Illinois*, *Kansas*, *Massachusetts*, *Nebraska*, *North Carolina*, *Ohio*, *Tennessee*, are mentioned in Daniel on Negotiable Instruments, (ed. of 1891), § 33.

Federal Court.— The Federal court will follow the State court, in its ruling as to presumption of consideration from a seal, when the instrument is not strictly of a commercial character. Martin *v.* Bartow Iron Works, 35 Ga. 324; *citing* Swift *v.* Tyson, 16 Pet. (U. S.) 1.

An eminent writer has gone so far as to say of the presumption of consideration: "Whether this influence from the use of a seal can now be made with sufficient force to sustain the very great difference made by the law between sealed instruments and those which have no seal, might be doubted. The distinction rests now, perhaps, more on the difficulty of disturbing a rule established by long use and of very extended operation." Parsons on Contracts, vol. 1, p. 429.

1. See *infra*, this title, *Statutory Regulations of Seals.*

An old *Kentucky* statute was construed to apply to total failure only, not to partial failure; such failure "that if the money had been paid an action could be maintained for its repetition." Touching plea, it was held that to plead failure, simply, was too general; the plea should show how the consideration failed. Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472; Coleman *v.* Harper, 1 A. K. Marsh. (Ky.) 602. See Withers *v.* Greene, 9 How. (U. S.) 213, reviewing laws which had been enacted in *Alabama* and *Virginia*, and noticing the later doctrine, that where defendant at law could by cross-action maintain suit for damages for total or partial failure of consideration, he might defend in the original suit; which doctrine becomes applicable in the case of sealed instruments, when these are made by statute to stand on same principles as do parol writings, respecting the presumption of consideration. See also Van Buren *v.* Digges, 11 How. (U. S.) 461; Winder *v.* Caldwell, 14 How. (U. S.) 434.

Alabama.—Code 1886, § 2667 (2981): "The defendant may by plea impeach or inquire into the consideration of a sealed instrument in the same manner as if it had not been sealed." This does not appear to interfere with the rule respecting parol evidence to vary written contracts. So that a recital of consideration will prevent admission of parol evidence to show that a sealed instrument reciting consideration was voluntary. But equity will regard deeds as voluntary, notwithstanding recital of consideration, if the consideration is nominal. Kinnebrew *v.* Kinnebrew, 35 Ala. 628.

A bond sued on can be impeached only by a special plea. Johnson *v.* Caffey, 59 Ala. 331.

Kentucky.— "The consideration of any writing, with or without seal, may be impeached or denied by pleading, verified by oath." *Kentucky* Gen. Stat. (Bullitt and Feland, 1888), p. 303, § 3.

New York.—As to the form of pleading, notice, etc., see Tallmadge *v.* Wallis, 25 Wend. (N. Y.) 114.

Georgia Code, 1882, § 2739 (2697). (2703), provides " . . . In some cases a consideration is presumed, and an averment to the contrary will not be received. Such are generally contracts under seal, . . . "

Oregon (Hill's Annot. L., § 753). "The seal affixed to a writing is primary evidence of a consideration . . . " Writings under seal may be modified or discharged by parol or orally.

Also, in other States, by enactment the seal is only presumptive evidence.

Where statute abolished distinction between sealed and unsealed instruments, it was held that the want or failure of consideration in whole or in part might be shown.[1]

A statute in *New York* provided that in actions on sealed instruments, the seal shall be only presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed. There is similar legislation in other States.[2]

of consideration: *New York* Civ. Code 840; *New Jersey*, Evidence, 16, 52; *Michigan* 7520, 4327, 5947; *Wisconsin* 4195, so provides as to seals upon executory instruments thereafter executed.

Compromise or settlement of a debt or controversy is valid as if sealed in *Indiana*, *Tennessee*, *California*, *Oregon* Civ. Code, *Alabama*, Stimson's Am. St. Law.

Writings are by some statutes made presumptive evidence of consideration. See *infra*, this title, *Statutory Regulations*.

Among these, are:

California Civ. Code 1885 (Deering), § 1614.

Tennessee.—"Contracts in writing."

There would seem to be no difference between sealed and unsealed instruments, as to consideration, in some States; such seems to be the case, in *Kentucky*, *Tennessee*, *Texas*. See Stimson's Am. Stat. Law, § 1564 B (6).

1. Williams *v.* Haines, 27 Iowa 251. But see *supra*, this title, note respecting a *Kentucky* law, note 1, p. 163.

The writing is presumed to be founded upon consideration; but the presumption may be rebutted by evidence. Byers *v.* Harris, 67 Iowa 685. That writing implies consideration. See also Wolverton *v.* Collins, 34 Iowa 238; Henderson *v.* Booth, 11 Iowa 212; Linder *v.* Lake, 6 Iowa 164; Towsley *v.* Olds, 6 Iowa 526; Blake *v.* Blake, 7 Iowa 46; Jones *v.* Berryhill, 25 Iowa 289.

2. The *New Jersey* statute is similar. P. L. 1875, p. 56; *New Jersey* Rev., p. 387, pl. 52. And see *Michigan* Ann. St. (Howell's), §§ 7520, 4327, 5947.

Arizona Rev. St. 1887, § 2784, provides that consideration shall be imported by contract in writing as fully as if sealed.

Wisconsin Annot. St. (Sanborn & Berryman), § 4195. "A seal upon an executory instrument, hereafter executed, shall be received as only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed."

Oregon Annot. L. (Hill, 1892). "The seal affixed to a writing is primary evidence of a consideration."

New York.—Now a failure of consideration may be pleaded. Case *v.* Boughton, 11 Wend. (N. Y.) 106.

Partial failure may be shown in reduction of amount to be recovered. Tallmadge *v.* Wallis, 25 Wend. (N. Y.) 114; Burton *v.* Stewart, 3 Wend. (N. Y.) 236; 20 Am. Dec. 692; Reab *v.* McAlister, 8 Wend. (N. Y.) 109.

Or to show fraud inducing entry into a composition deed. Russell *v.* Rogers, 15 Wend. (N. Y.) 351—the former *New York* decisions not allowing such proof at law.

As to antecedent contracts the statute is construed more strictly. Wilson *v.* Baptist Education Soc., 10 Barb. (N. Y.) 309.

Where a party received what he contracted for, he cannot show that it was valueless, in the absence of fraud or misapprehension. Fay *v.* Richards, 21 Wend. (N. Y.) 626.

But a statute which in its change of the common-law rule appears to apply only to actions on the instrument itself, or to those where it is made the basis of a set-off (Torry *v.* Black, 58 N. Y. 190), will not, if so construed, enable mortgagor to go into equity for a cancellation of a mortgage alleged to have been made without consideration, or upon a consideration which had failed. Calkins *v.* Long, 22 Barb. (N. Y.) 97. And see Gilleland *v.* Failing, 5 Den. (N. Y.) 308.

But the statute was held not to apply to a specialty given in evidence for a collateral purpose; as where a defendant who was sued in assumpsit for money had and received, claimed title to the money under a mortgage executed by plaintiff's testatrix. Plaintiff could not show absence of consideration as to the mortage. Gilleland *v.* Failing, 5 Den. (N. Y.) 308.

The *New York* statute mentioned does not change the rule that a written contract cannot be varied or enlarged by parol proof.[1] But admission of proof of false representations is not forbidden by the rule; and under the statute is allowable. Thus, in defense of suit upon a charter-party, false representations of the capacity of the vessel may be shown.[2]

The statute allowing proof of want of consideration cannot operate against a sealed release intended as a gift.[3]

VI. EQUITABLE REMEDIES IN CONNECTION WITH SEALS.—Equity early began to furnish remedies in matters of specialties where the narrow procedure of the common law was inadequate.[4] Thus, payment of a debt secured by such an instrument, could be shown by a debtor who had not obtained a release or surrender under seal.[5] The necessity for *profert* and oyer of a sealed instrument, now dispensed with at law, was likewise relieved against.[6] Equity refused its aid in the enforcement of voluntary agreements under seal,[7] although where a trust is actually created in favor of a volunteer, a court of equity will then enforce its execution.[8] A distinction has sometimes been drawn between

1. Johnson *v.* Miln, 14 Wend. (N. Y.) 195; M'Curtie *v.* Stevens, 13 Wend. (N. Y.) 527.

2. Johnson *v.* Miln, 14 Wend. (N. Y.) 195.

3. Gray *v.* Barton, 55 N. Y. 68; 14 Am. Rep. 181.

Compare Torry *v.* Black, 58 N. Y. 185, *reversing* 1 Thomp. & C. (N. Y.) 42; 65 Barb. (N. Y.) 414, where it was said a release executed by a guardian under seal, expressing a valuable consideration, is, *prima facie*, valid and effectual, and if the ward, after becoming of age, seeks to impeach it, the burden is on him to show that it was not made in good faith but in fraud of his rights.

4. See CONTRACTS, vol. 3, p. 827, note 1; SPECIFIC PERFORMANCE. See also Pollock on Contracts 183.

5. Pomeroy's Eq. Jur. (ed. of 1881), § 70. At common law, a discharge not under seal could not be pleaded against a specialty. Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Tucker *v.* Baldwin, 13 Conn. 136; 36 Am. Dec. 384; Crawford *v.* Millspaugh, 13 Johns. (N. Y.) 87. Inability to so plead, was made ground for chancellor's interference, in Hurburt *v.* Phelps, 30 Conn. 42; Headley *v.* Goundry, 41 Barb. (N. Y.) 279. *Connecticut*, usage from the origin of the courts, secured a recognition to pleas of unsealed receipts in full. Tucker *v.* Baldwin, 13 Conn. 143; 36 Am. Dec. 384. Yet they did not become thereby, technical discharges, nor prevent the relief in equity. Hurlbut *v.* Phelps, 30 Conn. 42.

The release when not under seal must be upon actual consideration. Kidder *v.* Kidder, 33 Pa. St. 268; *condemning* Wentz *v.* Dehaven, 1 S. & R. (Pa.) 312. Equity will enjoin the suit at law, in case of such a release. Hurlbut *v.* Phelps, 30 Conn. 42; Sibthorp *v.* Moxon, 3 Atk. 580; Gilbert *v.* Wetherell, 2 Sim. & Stu. 254; Major *v.* Major, 19 Eng. L. & Eq. 106; Linthicum *v.* Linthicum, 2 Md. Ch. 21.

6. Pomeroy, Eq. Jur., § 71; Story, Eq. Jur., § 81.

7. Meek *v.* Kettlewell, 1 Hare 464; Houghton *v.* Lees, 1 Jur. N. S. 862, 863; Ord *v.* Johnston, 1 Jur. N. S. 1063, 1065; Jefferys *v.* Jefferys, 1 Cr. & Ph. 138; Hervy *v.* Audland, 14 Sim. 531; Webb's Estate, 49 Cal. 541; Minturn *v.* Seymour, 4 Johns. Ch. (N. Y.) 497; Shepherd *v.* Shepherd, 1 Md. Ch. 244. Agreements, if under seal, when under meritorious consideration, as in favor of a wife, are however on a different footing. Burling *v.* King, 66 Barb. (N. Y.) 633; M'Intire *v.* Hughes, 4 Bibb. (Ky.) 186; Mahn *v.* Mahn, 7 B. Mon. (Ky.) 579; Caldwell *v.* Williams, 1 Bailey Eq. (S. Car.) 175.

8. Colman *v.* Sarrell, 3 Bro. C. C. 12; 1 Ves. Jr. 50; Ellison *v.* Ellison, 6 Ves. 656; Pulvertoft *v.* Pulvertoft, 18 Ves. 84; Meek *v.* Kettlewell, 1 Hare 464; *Ex parte* Pye, 18 Ves. 149; Webb's Estate, 49 Cal. 541; Stone *v.* Hackett, 12 Gray (Mass.) 227; Kekewich *v.*

bonds upon consideration which has failed, and those where none was intended; the latter being regarded as a gift,[1] even though as to creditors it may be void under the statute of 13th Elizabeth.[2]

VII. Essentiality of Seal.—See Bonds, vol. 2, p. 448; Contracts, vol. 3, p. 823; Corporations, vol. 4, p. 242; Coupons, vol. 4, p. 430; Deeds, vol. 5, p. 423; Mortgages, vol. 15, p. 725; Municipal Securities, vol. 15, p. 1204; Public Officers, vol. 19, p. 378; Railroad Securities, vol. 19, p. 694.

VIII. Miscellaneous—1. Conflict of Laws—(See *infra*, this title, *Judicial Notice; Public Seals*).—The mode and time of suing on a contract must be governed by the *lex fori*.[3]

Accordingly, although an action of covenant will lie on an unsealed instrument in the State where the contract was executed, such action will not lie in another State where covenant can be brought only on a contract under seal.[4] Nor is the rule

Manning, 1 DeG. M. & G. 176; Jones *v.* Lock, L. R., 1 Ch. 25; Nason *v.* Colburn, 99 Mass. 342; Dennison *v.* Goehring, 7 Pa. St. 175; 47 Am. Dec. 505, defining executory trusts and following authorities recited in this note. "The question must be simply this, whether the relation of a trustee and *cestui que trust* has been actually established or not." Meek *v.* Kettlewell, 1 Hare 470, per Vice Chancellor Wigram. And see Wheatley *v.* Purr, 1 Keen 551; Collinson *v.* Pattrick, 2 Keen 123.

1. Sherk *v.* Endress, 3 W. & S. (Pa.) 255; *In re* Campbell's Estate, 7 Pa. St. 100. And see 2 Williams on Executors, 871; Lechmere *v.* Carlisle, 3 P. Wms. 223; Lomas *v.* Wright, 2 Myl. & K. 769; Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301. A striking instance is presented in Hill *v.* Spencer, Amb. 641.

Where an actual valuable consideration is intended to pass, and furnishes the motive for entering into a contract, a party may defeat it in equity by showing a failure of consideration at any time before its final execution. Yard *v.* Patton, 13 Pa. St. 278; Steinhauser *v.* Witman, 1 S. & R. (Pa.) 438; Hart *v.* Porter, 5 S. & R. (Pa.) 201; Hessner *v.* Helm, 8 S. & R. (Pa.) 178.

The remark of Gibson, C. J., in Sherk *v.* Endress, 3 W. & S. (Pa.) 255, was, that such a voluntary bond will be regarded as a gift, both in law and equity. In view of the authorities which have been mentioned, holding that unexecuted voluntary agreements will not be enforced, in equity, the Chief Justice will probably be understood to mean that the bond will be so far recognized that the chancellor will not destroy it but will let the law take its course. And see, in accordance with this idea, Hervey *v.* Audland, 14 Sim. 531, and the mention therein of the trial before Chief Baron Pollock, where the law apparently did take its course. It has been held in *Pennsylvania*, that in order to induce the equity judge to enforce an equitable assignment of a chose in action, being an executory contract, there must be a consideration to support it. Kennedy *v.* Ware, 1 Pa. St. 445; 44 Am. Dec. 145. And this is, no doubt, the explanation of the uncertainty in which this subject is sometimes (Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 336) said to be involved. The equities being equal, the volunteer having the law shall prevail. Black *v.* Cord, 2 Har. & G. (Md.) 103. See also Specific Performance.

2. Sherk *v.* Endress, 3 W. & S. (Pa.) 255.

3. British Linen Co. *v.* Drummond, 10 B. & C. 903; 21 E. C. L. 194; Trimbey *v.* Vignier, 1 Bing. N. Cas. 159; 27 E. C. L. 336; De la Vega *v.* Vianna, 1 B. & Ad. 284; 20 E. C. L. 388; Pearsall *v.* Dwight, 2 Mass. 84; 3 Am. Dec. 35; Byrne *v.* Crowninshield, 17 Mass. 55; Bank of U. S. *v.* Donnally, 8 Pet. (U. S.) 361; Jones *v.* Hook, 2 Rand. (Va.) 303; 14 Am. Dec. 783.

Appointment of Agent to Reclaim Property.—See Com. *v.* Griffith, 2 Pick. (Mass.) 17.

4. Bank of U. S. *v.* Donnally, 8 Pet.

any different where by the *lex loci contractus* a scroll or other device has the same effect as a seal, but in the State of the forum such device is not recognized. The court must test the device by the law of the forum.[1]

"The form, proof and authentication of contracts are governed by the law of the country where they are made," in regard to the question of their legality.[2]

Whether any seal is necessary, upon a protest of a bill of exchange, is determined by the *lex loci contractus*.[3]

(U. S.) 362. Nor can the legislation of the one State, as to the obligation or remedy on the unsealed note, cause the note to be regarded, without the jurisdiction, as any other than one unsealed. U. S. *v.* Donnally, 8 Pet. (U. S.) 371.

An instrument may be negotiable in one State, and yet may be incapable of negotiability by the laws of another State; and the remedy, in the courts of the latter, must be according to the law there in force. Bank of the U. S. *v.* Donnally, 8 Pet. (U. S.) 361.

1. Story, Conflict of Laws, § 558, ch. XIV; Le Roy *v.* Beard, 8 How. (U. S.) 451; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; *denying* Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362.

These cases answer the doubt expressed in U. S. *v.* Stephenson, 1 McLean (U. S.) 464, and in Adam *v.* Kerr, 1 B. & P. 360. Accordingly, assumpsit was properly brought, in *New York*, on an instrument executed under scroll by way of seal in *Wisconsin*, the *New York* law requiring the seal known to the English common law. Le Roy *v.* Beard, 8 How. (U. S.) 451. Also debt was held to be the action in a suit in *Maryland* upon a *Virginia* paper which was a simple contract in *Virginia*, but which under *Maryland* law was a sealed instrument. Trasher *v.* Everhart, 3 Gill & J. (Md.) 244. See also Bank of U. S. *v.* Donnally, 8 Pet. (U. S.) 361. And see Warren *v.* Lynch, 5 Johns. (N. Y.) 239; Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285; see Waln *v.* Waln, 14 N. J. L. 205.

See CONFLICT OF LAWS, vol. 3, p. 575.

2. CONFLICT OF LAWS, vol. 3, pp. 558, 559.

The law of *England* was held to control the question whether an English document upon which action was brought in *New York* was properly sealed so as to relieve it from illegality as usurious, under certain privileges allowed in 2 & 3 Vict., ch. 37. Curtis *v.* Leavitt, 15 N. Y. 89. See Cope *v.* Alden, 53 Barb. (N. Y.) 350. See Fisher *v.* Otis, 3 Chand. (Wis.) 83, *criticising* Story, Conflict of Laws, § 293*c*, and note.

We must not confound matters of merit with the objections—such as limitations, or forms of suit—arising from the law of the forum. Thus, Story says: "And here the general rule is, that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated." Story, Conflict of Laws, § 331, *et seq.*, stating the rule and the limitations upon it. And see Story, Conflict of Laws, § 575. And as to the converse proposition, that a discharge by law in a place where the contract was not made or to be performed (as by insolvency) will not ——— be a discharge of it in any other country, see Story, Conflict of Laws, § 342. Accordingly, it may be that the decisions alluded to, denying effect to foreign seals of a character unknown to the law of the forum, will not hold with respect to releases executed under, say, scroll seals in the foreign place. See Waln *v.* Waln, 14 N. J. L. 205.

Oregon.—Scroll or other signs, made for a seal, in other States, territories, or countries, and recognized as such where made, shall be so regarded in *Oregon*. Hill's Annotated Laws (ed. of 1892), §§ 752–756.

California.—Similar provision exists in *California*, as to scrolls or other signs, made in a sister State or foreign country, and there recognized. Deering's *California* Codes, etc. (Civil), 1885, § 1931.

3. Bank of Rochester *v.* Gray, 2 Hill

But authentication of contracts to a foreign jurisdiction must observe the laws of that jurisdiction.

Legislative forms of verification of instruments, coming from without a jurisdiction, are now quite general. The practitioner should consult the statutes of the forum in which it is proposed to offer the foreign documents. The decisions rendered upon the common law, may possibly be regarded as superseded so far as they are covered by the legislation indicated, but are presented in the note.[1]

(N. Y.) 227; Tickner *v.* Roberts, 11 La. 14; 30 Am. Dec. 706; Story, Conflict of Laws, 260*a*. See Pillow *v.* Roberts, 13 How. (U. S.) 472; Pierce *v.* Indseth, 106 U. S. 546.

The mode of authenticating a foreign protest, so as to make it evidence, was held to depend on the *lex fori*, in Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227. In the United States Supreme Court the foreign notarial seal was held sufficient to prove presentation and note payment of a foreign bill of exchange. Pierce *v.* Indseth, 106 U. S. 546.

1. **Letter of attorney**, executed with reference to the laws or judicial proceedings of another country, must observe the laws of that country respecting seals. Harman *v.* Harman, 1 Baldw. (U. S.) 130.

Public Instruments.—The forms of public instruments are regulated by the laws of the country in which they are made. Story, Conflict of Laws, 260*a*; Tickner *v.* Roberts, 11 La. 14; 30 Am. Dec. 706. In Coit *v.* Millikin, 1 Den. (N. Y.) 376, the court were of opinion that the law required them to reject the great seal of the State of *Michigan* in authentication of a copy of an act of the legislature of that State, because the seal was impressed on the paper alone, which the court held to be an objection. Similar objection was made by the court in Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227, to the seal of a foreign notary. See also, Richard *v.* Boller, 6 Daly (N. Y.) 460.

See Story, Conflict of Laws, § 635*c*; § 630*b*. It may be remarked that Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227, and Coit *v.* Milliken, 1 Den. (N. Y.) 376, have both been overruled on the impression question; and statutes also have authorized impressions on the paper.

Notarial Seals, at Common Law.—The seals of notaries are taken notice of, judicially, at common law. See NOTARY PUBLIC, vol. 16, pp. 757, *et seq.*; Pierce *v.* Indseth, 106 U. S. 546.

The *Louisiana* court, indeed, confined the rule, in the case of foreign notaries, to foreign bills, except in so far as the statute of 1837 in that State affected the rule. See Rosine *v.* Bonnable, 5 Rob. (La.) 163; Schneider *v.* Cochrane, 9 La. Ann. 235; 61 Am. Dec. 204. But Lord Eldon credited the genuineness of the certificate of a notary of Prince of Wales's Island, East Indies, to a power of attorney. Hutcheon *v.* Mannington, 6 Ves. Jr. 823. And see *Ex parte* Worsley, 2 H. Bl. 275, where the notarial seal proved a warrant to suffer a recovery. So with the seal of a notary of a sister State, affixed to a certificate of acknowledgment. Green *v.* Gross, 12 Neb. 117. Depositions have been received, certified under seal of foreign notary. Cole *v.* Sherard, 11 Ex. 482. And see Omealy *v.* Newell, 8 East 368; note to Walron *v.* Van Moses, 8 Mod. 322.

Ship's protest, in a salvage case, is well proven by the notarial seal, the notary "being an officer long recognized throughout the commercial world." The Gallego, 30 Fed. Rep. 271. See further, NOTARY PUBLIC, vol. 16, p. 758. As to the credit extended to a notary's certificate, after its authenticity is proved, see NOTARY PUBLIC, vol. 16, p. 775, *et seq.*

Effect of Legislation.—In 15 and 16 Victoria, it was enacted that in the case of acknowledgments, affidavits, etc., resort should be had, in countries subject to the queen, to notaries or other officials therein indicated; and that in foreign countries not under the queen, the proofs, acknowledgments, etc., could be made before British consuls and Vice-consuls. Although there was no express abrogation of the previous law illustrated by the case before Lord Eldon, yet the English practice now appears to be to

2. Judicial Notice.—The public seal of a sovereign State or kingdom is taken notice of judicially by courts of justice in other States.[1] But judicial notice is not taken of the seal of an unac-

require other proof of the notarial signature than his seal, in cases other than those under the law-merchant. This was furnished by counsel, in caution, in Haggett *v.* Iniff, 5 De G. M. & G. 910; and was required by the court, in 1884, in *In re* Earl's Trust, 4 K. & J. 300. And see *In re* Davis' Trusts, L. R., 8 Eq. 98; De Leon *v.* Hubbard, 1 W. N. (for 1883, English) 197, here even the verification by the Secretary of State of the notarial signature did not suffice, there being no statement of the notary's "power to administer oaths" (Act 21 and 22 Vict. ch. 95, § 31). In the case of a small fund of £35, Kindersley, V. C., received the notarial seal and seal of State, and dispensed with other verification of the notary's signature on the personal undertaking of the solicitor. Mayne *v.* Butler, 13 W. R. 128.

In Denmead *v.* Maak, 2 McArthur (U. S.) 477, it was remarked as follows, in the opinion delivered:

"The Revised Statutes, § 1778, enact that in all cases where oaths may be administered by justices of the peace, they may be made before any notary public in any State or Territory; and they are to have the same force and effect as if made before a justice of the peace. This relates to the instrument, in order to give the facts therein stated the weight of evidence; but there is no express requirement that the notarial certificate and seal are to be certified by any other official. When acknowledgments of deeds are made beyond the limits of the district, the certificate of the officer taking such acknowledgment is to be accompanied by the certificate of the clerk, register, etc., to the effect that at the date of the acknowledgment the person taking the same was in fact the officer he purported to be. But this is required by the express terms of the law (Rev. Stats. D. C., § 443), and the certificate in such case is made essential to the validity of the conveyance. No such requirement is made with regard to affidavits unless they are made before an officer of whose authority to administer oaths the court cannot take notice. There is no other provision of our statutes requiring the certificate of a notary to be verified by any other than his own seal, and when we have before us, as in the present case, the law of the State of Maryland, making the certificate of a notary under his seal sufficient evidence of his having administered an oath in his official character, we think this court can also take notice that the affidavit was sworn to before a properly qualified officer."

1. The public national seal of a kingdom, or sovereign State, is, by the common consent and usage of civilized communities, the highest evidence and the most solemn sanction of authenticity, in relation to "laws or to proceedings, either diplomatic or judicial, that is known in the intercourse of nations; and as such, is taken notice of judicially, by courts of justice in other States." Griswold *v.* Pitcairn, 2 Conn. 90; Anonymous, 9 Mod. 66; U. S. *v.* Johns, 4 Dall. (U. S.) 416; Church *v.* Hubbart, 2 Cranch (U. S.) 238; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Peake's Ev. 73, and note.

The seal is presumed to have been affixed by the proper officer until the contrary appears. Coit *v.* Millikin, 1 Den. (N. Y.) 376; U. S. *v.* Johns, 4 (U. S.) 412; 1 Wash. (U. S.) 363; U. S. *v.* Amedy, 11 Wheat. (U. S.) 392; State *v.* Carr, 5 N. H. 367. As to the use of governor's seal-at-arms, in place of a public seal, see Hadfield *v.* Jameson, 2 Munf. (Va.) 71.

A writing purporting to be the record of a judgment, or decree, of the supreme court of Copenhagen, but without certificate, was held to be well authenticated as a copy of a record, by the great seal of Denmark affixed thereto; this, without certificate or signature, was regarded as enough; although, in fact, there was extrinsic proof presented. Griswold *v.* Pitcairn, 2 Conn. 90.

Since it is no part of the duty of a consul to authenticate the laws of a foreign country in which he is stationed, his seal affixed to his certificate of such a law is of no effect. Church *v.* Hubbart, 2 Cranch (U. S.) 237.

The State seal of a sister State was rejected in one case because not upon wax or other tenacious substance. Coit *v.* Millikin, 1 Den. (N. Y.) 376. And in another case, similar objection was

knowledged government.[1] The seals of foreign municipal courts must, however, be proved by extrinsic evidence;[2] but the seals of admiralty courts appear to prove themselves.[3] The seals of a private corporation must be proved.[4]

The statutes on the subject of authentication of papers going to or coming from foreign countries, or other States of the Union, present a safe means of proof; and prudence requires the observance of the means thereby prescribed without testing how far the rules above recited, adopted long prior to these statutes, may still have force in the cases covered by such enactments.[5]

3. Public Seals.[6]—A scroll does not amount to a "seal of office." There have been occasions where the duty of the public authorities to affix their official public seals has been allowed to be performed subsequent to delivery of the instrument or record.[7]

raised against a seal of a foreign notary. Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227. (See *supra*, this title, *Conflict of Laws.*) It may be remarked that these two cases have already been overruled, as to a position taken by them that an impression stamped on the paper itself is not good unless authorized by statute, as is indicated elsewhere herein.

Apparently, we must distinguish between the common law of a foreign country and its statutes. The former must be proved by parol. See Lincoln *v.* Battelle, 6 Wend. (N. Y.) 483; Kenney *v.* Van Horne, 1 Johns. (N. Y.) 394; Consequa *v.* Willings, 1 Pet. (C. C.) 229. See also 1 Phil. Ev. 443. See Charlotte *v.* Chouteau, 33 Mo. 194, on reading from reports of decisions.

1. The seal of an unacknowledged government cannot be permitted to prove itself. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610; Berne *v.* Bank of England, 9 Ves. 347. "This was repeatedly declared by Lord Eldon, with respect to the new governments of South America, before their independence of Spain was completely established and formally acknowledged by the British cabinet." Note to Berne *v.* Bank of England, 9 Ves. 347.

2. Griswold *v.* Pitcairn, 2 Conn. 90; Gilb. L. Ev. 20; Peake, Ev. 72, 3; Henry *v.* Ady, 3 East 221; Collins *v.* Lord Mathew, 5 East 473; Delafield *v.* Hand, 3 Johns. (N. Y.) 310; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 484; Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 519.

3. But the courts of admiralty, being courts acting under the law of nations, appear to be more favorably treated. See Yeaton *v.* Fry, 5 Cranch (U. S.) 343.

4. Den *v.* Vreerlandt, 7 N. J. L. 352; Moises *v.* Thornton, 1 T. R. 303.

5. It may be remarked that under 15 & 16 Vict., providing for affidavits, etc., before British consuls, in foreign countries not under the queen, was held not to dispense with the old law so as to prevent an affiant in Birmingham, Alabama, from making affidavit before a notary there, there being no British consul or vice-counsel resident within 150 miles of the place. Cooke *v.* Wilby, 25 Ch. Div. 770. And see Mayne *v.* Butler, 13 W. R. 128. See however, *supra*, this title, *Conflict of Laws.*

6. See *infra*, this title, *Judicial Notice; Conflict of Laws.*

7. Hendrix *v.* Boggs, 15 Neb. 470. And see Watson *v.* Jones, 85 Pa. St. 124, where it is said that the private seals of commissioners are the same as no seals at all, as being of no significance in passing title; but, in this case, a deed by county commissioners conveying public lands, was held to be valid, although the lawful seal was not attached by the authorities until on a trial of a trespass suit wherein defendant endeavored to evade liability by reason of the omission of the seal.

Color of Title.—A master's deed, though sealed by the master several years after its delivery, creates good "color of title," so as to bring the terre tenant holding thereunder within the benefits of the *Illinois* seven years, limitation act of 1839. Davis *v.* Hall, 92 Ill. 85. An unsealed sheriff's deed constitutes such "color of title." Kruse *v.* Wilson, 79 Ill. 233.

A statute authorizing public seals to be made in a prescribed manner has been held to have no extra-territorial force so as to validate seals so made by an official of another State upon a paper sued on in the enacting State.[1]

4. Corporate Seals—(See also CORPORATIONS, vol. 4, pp. 238–245).—The power to have a common seal is peculiar to a corporation; and a number of unincorporated persons cannot adopt a seal and attribute to it the force and efficacy of a corporate seal.[2] Nor is a limited partnership, although a *quasi* corporation, authorized or required to use a common seal.[3] The corporate seal, being the only organ by which a body politic can oblige itself by deed, a contract on behalf of the corporation by an agent who affixes his private seal has the effect of binding the corporation only by simple contract.[4]

Divesting Statutes.—Following the rule of strict construction appertaining to the statutory requirements in proceedings to transfer title to land on tax sales (1 Blackw. Tax. Titles (5th ed.), § 469), the failure of a comptroller to add the seal required on certificates of notice, is fatal, and cannot be cured by the affixing of the seal by his successor. Lockwood *v.* Gehlert, 53 Hun (N. Y.) 15; affirmed on appeal, 127 N. Y. 241. So as to an omission of an official seal from certified lists of unpaid taxes. Hannel *v.* Smith, 15 Ohio 134. A seal required to a tax deed by a treasurer is the seal of his office, and a scroll is not sufficient. Hendrix *v.* Boggs, 15 Neb. 470; Sullivan *v.* Merriam, 16 Neb. 157; and see Watt *v.* Gilmore, 2 Yates (Pa.) 330. A tax deed lacking a seal is inadmissible in evidence. Day *v.* Day, 59 Miss. 318, where Bowers *v.* Chambers, 53 Miss. 259, is said to be exceptional, under a special statutory provision.

Verification of notice of Mechanic's lien must be under the notary's seal under *Washington* Laws, 1889–90, p. 474; Gates *v.* Brown, 1 Wash. 470. And the same is true in *Wisconsin* of a deed by county clerk. Haseltine *v.* Donahue, 42 Wis. 576.

In *Pennsylvania*, where county commissioners conveyed land belonging to the county, but sealed the deed with their private seals instead of with their official seal, the conveyance was held good. The court by Gibson, C. J., alluding to the jealousy with which adherence to divesting proceedings is guarded, said: "The common-law principle is inapplicable to a disposition by the owner himself."

Actions of boards of supervisors shall not fail because of the omission of the clerk to copy of record the seal as well as the ordinance (Santa Clara *v.* Southern Pac. R. Co., 66 Cal. 642); or to attest an election proclamation by his seal. San Luis Obispo Co. *v.* White (Cal. 1890), 24 Pac. Rep. 864.

1. Bank of Rochester *v.* Gray, 2 Hill (N. Y.) 227; Coit *v.* Millikin, 1 Den. (N. Y.) 876; both overruled on another point.

A statute dispensing with certain requisites as to public and corporate seals, does not extend to the individual seals of town commissioners, even when their private seals have been authorized by law. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 133.

The unauthorized addition of a seal by the county clerk to county warrants will not bring them within the provisions of the Statute of Limitations respecting sealed instruments. Crudup *v.* Ramsey, 54 Ark. 168.

2. Grant on Corp. 645 80 Law Lib. 76, *citing* Cooch *v.* Goodman, 2 Q. B. 580.

3. Stevens *v.* Philadelphia Ball Club, 142 Pa. St. 61.

4. Ang. & A. Corp. § 295; Bank of Columbus *v.* Patterson, 7 Cranch (U. S.) 304; Haight *v.* Iahler, 30 Barb. (N. Y.) 218; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 65; 10 Am. Dec. 193; Tippets *v.* Walker, 4 Mass. 597; Mitchell *v.* St. Andrews Bay Land Co., 4 Fla. 200; Bank of Metropolis *v.* Guttschlich, 14 Pet. (U. S.) 19; Whitford *v.* Laidler, 94 N. Y. 145; Fleckner *v.* Bank of U. S., 8 Wheat. (U. S.) 357; Female Orphan Asylum *v.* Johnson

43 Me. 184; Saxton *v.* Texas, etc., R. Co., 4 N. Mex. 203.

Though a deed purport to be that of a corporation, a seal affixed as that of the agent who signs it, cannot be treated as the deed of the corporation, and a declaration in the instrument that the seal is affixed as that of the agent is conclusive of its character and effect. If a private seal be adopted, it must be used as the seal of the corporation. Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

A deed purporting to be the deed of a corporation, but which is not sealed with the corporate seal, is void. Danville Seminary *v.* Mott (Ill. 1891), 28 N. E. Rep. 54; South Mo. Land Co. *v.* Jeffries, 40 Mo. App. 360; Savings Bank *v.* Davis, 8 Conn. 191. See also CORPORATIONS, vol. 4, pp. 238–245.

As to public contracts, on behalf of government, see Stinchfield *v.* Little, 1 Me. 231; 10 Am. Dec. 65.

Assumpsit against a bank on a contract under the seals of the president and cashier was held well brought. Bank of Metropolis *v.* Guttschlich, 14 Pet. (U. S.) 19.

Power to Act Without Seal.—As to power of the corporation to act without seal, see Bank of Columbia *v.* Patterson, 7 Cranch (U. S.) 305; CORPORATIONS, vol. 4, p. 242.

Right to Custody of Corporate Seal.—See St. Stephen's Church Cases, 25 Abb. N. Cas. (N. Y.) 230; First M. E. Church *v.* Stewart, 27 Barb. (N. Y.) 553; Berks, etc., Turkpike Road *v.* Myers, 6 S. & R. (Pa.) 16; 9 Am. Dec. 402.

Private Seal Adopted as Corporate Seal.—Since corporations, like individuals, usually have the power to adopt and discard seals at their pleasure, it has been held in several cases that they may act by the seal used by the official in his personal affairs, if they adopt the same as a corporate seal. See CORPORATIONS, vol. 4, p. 243; Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 39; Tenney *v.* East Warren Lumber Co., 43 N. H. 343; Eureka, etc., Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall (U. S.) 488; Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150; Taylor *v.* Heggie, 83 N. Car. 244; Mill Dam Foundery *v.* Harvey, 21 Pick. (Mass.) 417; Parr *v.* Greenbush, 42 Hun (N. Y.) 232; (*Reversed* on other grounds in 112 N. Y. 246); South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 36; Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 160; Pickens *v.* Rymer, 90 N. Car. 282; 47 Am. Rep. 521; 1 Dillon Mun. Corp. (3d ed.), § 190; Brown *v.* Jordhal, 32 Minn. 135; 50 Am. Rep. 560; *New Mexico* Laws, §§ 2623, 2664. See Saxton *v.* Texas, etc., R. Co., 4 N. Mex. 201.

Where a Wafer or Other Seal May be Adopted.—A wafer or other seal, known to the law, may be adopted. See St. Philip's Church *v.* Zion, etc., Church, 23 S. Car. 297, where the court, quoting Field Corp., § 297, said: "It is immaterial what is used as a seal when an impression is required, provided it is something adopted by the corporation, or by its authorized agent, and is placed upon the instrument by the proper agent, or even by his direction. When executed by the proper agent or officer of the corporation and sealed, though by the impression of the common desk seal of a merchant, it will be presumed to be the seal of the corporation until rebutted by competent evidence." And the learned judge quoting from note to section 288 goes on to say: "A note authorizing a committee to sell land empowers them to make the necessary deeds in the name of the corporation, and if the committee consists of several who all sign their names, only one seal is necessary." See also Decker *v.* Freeman, 3 Me. 338, and cases cited by the court in St. Philip's Church *v.* Zion, etc., Church, 23 S. Car. 297, who say further: "Authority to make a deed would imply power to adopt a seal where no regular corporate seal has been shown to have been adopted by the body." See also in this connection, Relph *v.* Gist, 4 McCord (S. Car.) 267; Mill Dam Foundery, *v.* Hovey, 21 Pick. (Mass.) 428.

Corporation Seal Must be Proved.—The seal of a private corporation must be proved. It is not evidence of its own authenticity. Ang. & A. Corp., § 226; Den *v.* Vreelandt, 7 N. J. L. 352; Moises *v.* Thornton, 1 T. R. 303; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381; Mnnn *v.* Pentg, 2 Sandf. Ch. (N. Y.) 257; Foster *v.* Shaw, 7 S. & R. (Pa.) 516; Leasure *v.* Hillegas, 7 S. & R. (Pa.) 313; Darnell *v.* Dickens, 4 Yerg. (Tenn.) 7; City Council *v.* Moorhead, 2 Rich. (S. Car.) 430; Farmers', etc., Turnpike *v.* McCullough, 25 Pa. St. 303; Chew *v.* Keck, 4 Rawle (Pa.) 163.

5. Presumption that Instrument was Sealed.—The presence of a seal doubtless gives rise to the presumption that it was on the

Where a corporate seal has been unauthorizedly placed upon an instrument, it may become the act of the corporation by delivery of the deed by the proper authority, or by direction of a stockholders' meeting. 1 Wood, Conv. 192.

The statutory abolition of private seals effected in some States does not in all of those States do away with corporate seals on deeds. 3 Wash. Real. Prop. 288. See *infra*, this title, *Statutory Regulations of Seals.*

Whether or not the seal has been duly affixed is a matter for the consideration of the jury. Berks, etc., Turnpike Road *v.* Myers, 6 S. & R. (Pa.) 11; 9 Am. Dec. 402.

Under legislation requiring acknowledgment of a deed before it is recorded, the officer or agent who, in behalf of the corporation, affixes the common seal to an instrument, is, in the absence of any statutory provision, deemed the party executing it. He also stands to the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined as to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by the authority of the board of directors, Bowers *v.* Hechtman, 45 Minn. 238; Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 60; Kelly *v.* Calhoun, 95 U. S. 710.

Presumption as to Genuineness of Seal.—Where the signature of the officer of the corporation executing the instrument is proved, the seal will be presumed genuine until the presumption is rebutted. Blackshire *v.* Iowa Homestead Co., 39 Iowa 624; Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 113; Flint *v.* Clinton Co., 12 N. H. 433; City Council *v.* Moorhead, 2 Rich. (S. Car.) 430; Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305; Phillips *v.* Coffee, 17 Ill. 154; 63 Am. Dec. 357.

Where the seal is affixed and the signatures of officials, to whom such a contract is regularly entrusted, are proved, the authority is presumed until disposed. See CORPORATIONS, vol. 4, pp. 243-4.

The authority of a bank cashier is not disproved merely by proof that the directors had not voted on the subject. His power is a large one, and he acts in many instances with only tacit approval of the principals. Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 95.

But where an act is forbidden by statute, except after a previous vote of the directors, proof that there was no such vote overcomes the presumption of authority. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

A certificate that the seal was affixed by the proper official is not sufficient to authorize the instrument to be recorded, or to be read in evidence without further proof. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

But certificate of the official affidavit of the order and resolution is enough without producing and proving the resolution. Hunter *v.* Hudson River, Iron, etc., Co., 20 Barb. (N. Y.) 494.

Seal as Evidenced of Assent of Corporation.—The common seal, affixed by a proper official in the line of his authority, is evidence of the assent and act of the corporation. Geggett *v.* New Jersey Mfg. Co., 1 N. J. Eq. 541; 23 Am. Dec. 728; Berks, etc., Turnpike Road Co. *v.* Myers, 6 S. & R. (Pa.) 12; 9 Am. Dec. 402; St. Louis Public Schools *v.* Risley, 28 Mo. 419; 75 Am. Dec. 131; Reed *v.* Bradley, 17 Ill. 325; Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207; Jackson *v.* Campbell, 5 Wend. (N. Y.) 574; 1 Kyd on Corp. 268; Flint *v.* Clinton Co., 12 N. H. 434.

Unless legislation requires something further. Blackshire *v.* Iowa Homestead Co., 39 Iowa 624; Chicago etc, R. Co. *v.* Lewis, 53 Iowa 113.

Superfluous Sealing.—Where a seal was not required, the affixing of the president's private seal could not injure the instrument. Sherman *v.* Fitch, 98 Mass. 59.

The Unauthorized Presence of a Private Seal does not Make a Contract a Specialty—And the action against the company on the contract is assumpsit. Saxton *v.* Texas, etc., R. Co., 4 N. Mex. 201; Aug. & A. Corp., § 295; Bank of Columbia *v.* Patterson, 7 Cranch (U. S.) 304; Haight *v.* Sahler, 30 Barb. (N. Y.) 218; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 65; 10 Am. Dec. 193; Tippets *v.* Walker, 4 Mass. 597; Mit-

deed at the time of delivery;[1] that such was the fact must be the conclusion where the deed recites the declarations of grantor and witness that it is sealed, and after its delivery, on being found and recorded, there is a seal upon it.[2] When a certificate of acknowledgment to a deed taken by an officer having an official seal is copied by the recorder of deeds and copy does not show that seal was attached to the certificate, the court will presume that the original certificate had the seal attached, provided it is stated in the body of the certificate as copied that the officer taking acknowledgment affixed his seal.[3]

chell *v.* St. Andrew's Bay Land Co., 4 Fla. 200; Bank of Metropolis *v.* Guttschlich, 14 Pet. (U. S.) 19; Whitford *v.* Laidler, 94 N. Y. 145; Fleckner *v.* Bank of U. S., 8 Wheat. (U. S.) 357; Female Orphan Asylum *v.* Johnson, 43 Me. 184.

1. Todd *v.* Union Dime Sav. Inst., 118 N. Y. 347; Ball *v.* Taylor, 1 C. & P. 417, 11 E. C. L. 438.

Recitals of seal, aided by testimony of witnesses that grantor had sealed, will justify decree giving rights as under sealed instrument against the other party and his creditors. Riswick *v.* Goodhue, 50 Md. 57.

Where the seal is detached by accident, equity will grant relief. Mitford's Pleading, tit. Accident 106, old ed 1. Maddock Ch., tit. Accident 24; 1 Sto. Eq., §§ 95, 109, 174.

2. Todd *v.* Union Dime Sav. Inst., 118 N. Y. 347. And see Le Franc *v.* Richmond, 5 Sawy. (U. S.) 603; Starkweather *v.* Martin, 28 Mich. 471; Geary *v.* Kansas City, 61 Mo. 378; Flowery Min. Co. *v.* North Bonanza Min. Co., 16 Nev. 302; Jones *v.* Martin, 16 Cal. 165; *In re* Sandilands, L. R., 6 C. P. 411; Williams *v.* Sheldon, 10 Wend. (N. Y.) 654.

Record Copy.—Nor does a previous record, wherein no copy of a seal appears, prevent this conclusion, even though a witness who had been a clerk in the recorder's office, testifies that a certain dash on the previous record was a mark customary where deeds had no seal, it not appearing who made the dash, and there being affirmative testimony of a seal at time of delivery. Todd *v.* Union Dime Sav. Inst., 118 N. Y. 344.

The seal of the grantor to an old deed was not presumed from the fact of recital in the deed that he had sealed and record of the deed. Williams *v.* Bass, 22 Vt. 352. And see Switzer *v.* Knapps, 10 Iowa 72; 74 Am. Dec. 375. So omission of a signature of a mortgagor to the instrument was held to prevent validity in its recording; nor could placing the signature on the record, after prescribed time allowed for recording, have any effect. Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

Powers.—Mr. Sugden refers to a decision of Lord Elden that a deed attest to have been under seal and delivered will in the absence of contrary evidence be presumed to have been sealed, although no impression appears on the parchment. Sugden on Powers (1 Am. ed.) 236.

3. Ballard *v.* Perry, 28 Tex. 347; Witt *v.* Harlan, 66 Tex. 660; Coffey *v.* Hendricks, 66 Tex. 676; McCoy *v.* Cassidy, 96 Mo. 429; Hammond *v.* Gordon, 93 Mo. 223; Griffin *v.* Sheffield, 38 Miss. 359; 78 Am. Dec. 646; Hedden *v.* Overton, 4 Bibb (Ky.) 406, stating also respecting the *Virginia* practice before the separation of *Kentucky*, that such practice was as above indicated; Sneed *v.* Ward, 5 Dana (Ky.) 188. And see Long *v.* Joplin Min., etc., Co., 68 Mo. 430. The case of Schuster *v.* Weissman, 63 Mo. 552, is overruled on this point.

Compare Hammond *v.* Gordon, 93 Mo. 224, which is a strong illustration of the readiness of the courts to uphold official acts. On a trial, the recorder's copy of a sheriff's deed having been ruled out, the original was offered in evidence. It was fifty years old. It bore no indication of seal to the acknowledgment, and experts testified that it could never have been sealed. Notwithstanding, the certified copy, made ten years before the trial, in its recital of a seal, was held to raise presumption of a seal, which had become obliterated.

6. Seals on Wills.[1]—A seal is not necessary to the validity of a will, either of personal or real property, unless required by statute. It has no bearing on the character of testamentary instruments.[2] But where a seal is torn off under circumstances which show that the tearing was regarded by the testator as a revocation, the will is revoked.[3]

7. Effect of Seal Upon Negotiability.—See NEGOTIABLE INSTRUMENTS, vol. 16, pp. 481–2; BILLS AND NOTES, vol. 2, p. 313; CORPORATIONS, vol. 4, p. 225.

8. Acknowledgments.—Acknowledgments of deeds are invalid unless certified under the seal of the official whenever the statute requires such seal.[4]

9. Adding a Seal to the signature of the maker of a note, or to the signature of one of several makers of a note, or detaching the seal of a bond, has the effect of changing the character of the instrument, and is a material alteration which avoids it.[5]

1. See, in general, WILLS.

2. 1 Williams on Executors [10] note *x*; *In re* Diez, 50 N. Y. 88; Hight *v.* Wilson, 1 Dall. (Pa.) 94; Pollock *v.* Glassell, 2 Gratt. (Va.) 453; Wright *v.* Wakeford, 17 Ves. 459; 6 Cruise Digest 48; Piatt *v.* McCullough, 1 McLean (U. S.) 69; Avery *v.* Pixley, 4 Mass. 462.

Ohio.—An old law required seals of wills of real estate, but it was repealed Dec. 22, 1824. Williams *v.* Burnet, Wright (Ohio) 53. See Piatt *v.* McCullough, 1 McLean (U. S.) 69, on the effect of the adoption by the governor and judges in *Ohio* of *Pennsylvania* act on wills.

Nevada.—A statute, in 1862, provided that wills should be sealed. But it is unnecessary to mention the seal in the instrument; nor need the seal remain, having been affixed. Sticknoth's Estate, 7 Nev. 223. *Nevada* Gen. St. § 3002.

New Hampshire.—"A will not executed under seal shall be as effectual as though sealed by the testator." *New Hampshire* Pub. St. 1891, p. 521 (ch. 186).

3. Price *v.* Powell, 3 H. & N. 340; in which several cases on the question are cited: Davies *v.* Davies, 1 Lee Eccl. Rep. 444; Lambell *v.* Lambell, 3 Hagg. Eccl. Rep. 568; Doe *v.* Harris, 6 A. & E. 209; 33 E. C. L. 57; E. C. L.; Onyons *v.* Tryers, Prec. ch. 460; Bigge *v.* Bigge, 3 Notes of Cases 605. And see Avery *v.* Pixley, 4 Mass. 462; White's Will, 25 N. J. Eq. 501.

In Hyde *v.* Hyde, 1 Eq. Ab. 409, it was proved that revocation was not, by tearing off the seals, intended. The case of Price *v.* Powell, 3 H. & N. 340, first above cited, is under the 1 Vict. ch. 26, § 20, where the expression touching revocation by means of such a nature is, "by tearing or otherwise destroying." The instrument passed upon recited that it was sealed, as did the attestation clause.

4. See ACKNOWLEDGMENT, vol. 1, p. 157, note 3; 158, note 1, for full treatment of this topic.

5. U. S. *v.* Linn, 1 How. (U. S.) 104; Marshall *v.* Gongler, 10 S. & R. (Pa.) 164; Vaughan *v.* Fowler, 14 S. Car. 355; s. c., 37 Am. Rep. 731; Piercy *v.* Piercy, 5 W. Va. 199; Biery *v.* Haines, 5 Whart. (Pa.) 563; Powers *v.* Ware, 2 Pick. (Mass.) 451; Rawson *v.* Davidson, 49 Mich. 607.

Defacement of the seal of a bond avoids the instrument if done by the obligee. Evans *v.* Williamson, 79 N. Car. 86.

SEAMEN—(See also MARITIME LIENS, vol. 14, p. 425; NAVIGATION, vol. 16, p. 270; PILOTS, vol. 18, p. 443; SALVAGE; SHIPPING; WRECKS).

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I. INTRODUCTION.—Seamen are a class of men peculiarly in need of protection. The courts of maritime law not only extend toward them a guardianship, but the codes of all commercial nations contain many provisions in their behalf. In *England* and the *United States* the subject is regulated almost entirely by statute. It is designed here to state briefly the application of these statutes and the adjudications respecting them.

II. WHO ARE SEAMEN.—A seaman is one whose occupation is to assist in navigating a ship. Although the "sea" does not include the lakes nor rivers above the tide, yet the word "seamen," when used in a statute giving them relief or protection, includes those who are concerned in prosecuting navigation in aid of commerce on non-tidal as well as tidal waters.[1]

1. Wolverton *v.* Lacy, 8 Law Rep. N. S. 672; The Brandywine, Newb. Adm. 5; Black *v.* The Louisiana, 2 Pet. Adm. 268.

In a broad sense, the term may extend to the master and officers; in a narrow one it means only one of the crew. Abb. L. Dict. 452.

Wherever, in a statute, the words "master and crew" occur in connection with each other, the word "crew" embraces all the officers as well as the common seamen. U. S. *v.* Winn, 3 Sumn. (U. S.) 209.

The term includes *cooks*. Allen *v.* Hallett, Abb. Adm. 576; The Mentor, 4 Mason (U. S.) 84; Orozimbo, Abb. Adm. 576; Trump *v.* Thomas, Bee Adm. 86. Stewards. Wolverton *v.* Lacey, 8 Law Rep. N. S. 672. *Chambermaids*. Gurney *v.* Crockett, Abb. Adm. 490. *Coopers*. U. S. *v.* Thompson, 1 Sumn. (U. S.) 168. *Carpenters*, *pilots*, *surgeon* and *boatswain*. U. S. *v.* Thompson, 1 Sumn. (U. S.) 170; Sheridan *v.* Furbur, B. & H. Adm. 435; The Lord Hobart, 2 Dods. 103; Wheeler *v.* Thompson, 1 Stra. 107.

Clerk of a Steamboat.—Trainer *v.* Superior, Gilp. (U. S.) 514; The Sultana, 1 Brown Adm. 35; The Prince George, 5 Hagg. Adm. 376; Wilson *v.* The Ohio, Gilp. (U. S.) 505; U. S. *v.* Harriman, 1 Hughes (U. S.) 525.

Landsmen employed aboard a vessel, and who render slight assistance in working a ship, while they are really carried as passengers, incidental to their maritime service, are not entitled to be recognized and paid as mariners.

III. SHIPPING COMMISSIONERS.—Shipping commissioners are public officers charged with the general supervision of the contracts of seamen and the enforcement of laws for their protection and relief. They are authorized by statute to charge certain fees which are used to pay their compensation, and such other expenses as may be necessary to insure the proper administration of their duties.[1]

IV. SHIPPING ARTICLES.—Contracts for the hire of seamen to serve on vessels bound to any foreign port, or from a port in one State to a port in any other than an adjoining State, are required by statute to be in writing,[2] and signed in the presence of a shipping commissioner.[3] The description of the voyage must be definite.[4] If the voyage is not sufficiently described, the seaman

The Sarah E. Kennedy, 29 Fed. Rep. 264. See The G. Barber, 29 Fed. Rep. 269.

One who secretes himself on board a vessel and is discovered after the vessel is at sea is not one of the crew, though he works as such in the pursuance of the requirement of the master that he should work as a condition that he should have food. U. S. *v.* Small, 2 Curt. (U. S.) 241. See Luscomb *v.* Osgood, 1 Sprague (U. S.) 82.

1. U. S. Rev. Sts., §§ 4501–4507.

The act of Congress, June 19, 1886, authorizing a shipping commissioner to charge fees for shipping crews for vessels engaged in the "coastwise trade," extends to vessels engaged in the carrying trade on a navigable river. Ravesies *v.* U. S., 37 Fed. Rep. 447; 35 Fed. Rep. 917.

A person who is not a shipping commissioner is not authorized to charge fees for shipping seamen. U. S. *v.* Rose, 12 Fed. Rep. 576.

2. U. S. Rev. Sts., § 4520.

Contracts of seamen upon tug boats not engaged in foreign commerce, are not required to be in writing. Milligan *v.* B. F. Bruce, 1 Newb. Adm. 539.

Nor does the statute apply to seamen shipping in a foreign port. Gladding *v.* Constant, 1 Sprague (U. S.) 73.

Nor is a whaling voyage a foreign voyage within the statute. The Atlantic, Abb. Adm. 451. See Taber *v.* U. S., 1 Story (U. S.) 1.

A general coasting and trade voyage in which the vessel is trading at different ports, is within the meaning of the statute. The Crusade, Ware (U. S.) 437.

So are voyages on the lakes and public navigable waters connecting the same. The Pacific, 23 Fed. Rep. 154; Wolverton *v.* Lacey, 18 Law Rep. N. S. 672.

Illinois and *Michigan* are adjoining States within the meaning of the statute. Thorson *v.* Peterson, 9 Fed. Rep. 517.

The term State includes a Territory. *In re* Bryant, Deady (U. S.) 118. See Graham *v.* The Exporter, 21 Int. Rev. Rec. 110.

There is nothing in the statute which requires a contract to be made in writing or print between the master of the vessel and the seamen before the latter are received on board. U. S. *v.* The Thomas W. Haven, 3 Fed. Rep. 347.

3. U. S. *v.* Steamship City of Mexico, 11 Blatchf. (U. S.) 489; 7 Ben. (U. S.) 31.

This rule does not apply to agreements with seamen for a voyage from the United States to a port in the West Indies. U. S. *v.* Brig Grace Lothrop, 95 U. S. 527; 1 Holmes (U. S.) 342.

Nor to vessels engaged only in and for voyages coastwise between the Atlantic ports of the United States. U. S. *v.* Smith, 95 U. S. 536.

A sailor who has signed shipping articles in presence of a consul speaking the same language as himself, shall not absolve himself from duty thereunder by alleging that he did not understand what he agreed to. The Exile, 20 Fed. Rep. 878.

4. The Christiana, Deady (U. S.) 49; Magee *v.* The Moss, Gilp. (U. S.) 219; The Osceola, Olc. Adm. 450.

Shipping articles providing for a voyage "from Boston to Valparaiso, or other ports of the Pacific Ocean, at and from thence home, direct or *via* ports

may leave the vessel at any time.[1] Ambiguous clauses susceptible of two constructions, one favorable and the other unfavorable to the seaman, will be construed in favor of the seaman.[2] The word "or" cannot be construed to mean "and."[3] The words "or elsewhere" are to be construed in subordination to the principal voyage.[4]

Seamen will be protected against unfair or new and unusual stipulations.[5] Stipulations contravening the language and policy

in the East Indies or Europe," are not sufficiently definite. Wope *v.* Hemenway, 1 Sprague (U. S.) 300.

So a voyage described as follows: "From Liverpool to Calcutta, thence, if required, to any ports or places in the Indian, Pacific, and Atlantic Oceans and China and eastern seas; thence to a port for orders and to the Continent of Europe, if required, and back to the final port of discharge in the United Kingdom, the term not to exceed three years," is not sufficiently definite. Roberts *v.* Knights, 7 Allen (Mass.) 449.

Shipping articles signed by seamen at Philadelphia, describing the voyage as "from that port to Portland, Maine; thence to some one or more ports east, if required by the master, and back to a western port of discharge, the term not to exceed two months," are sufficiently precise and definite to be binding upon the parties. U. S. *v.* Bain, 5 Fed. Rep. 192.

So shipping articles signed by seamen to a port A, and a market, are definite enough to be binding. U. S. *v.* Staly, 1 Woodb. & M. (U. S.) 338.

1. Snow *v.* Wope, 2 Curt. (U. S.) 301; Brown *v.* Jones, 2 Gall. (U. S.) 477.

2. Wope *v.* Hemenway, 1 Sprague (U. S.) 300; 2 Curt. (U. S.) 301; The Disco, 2 Sawy. (U. S.) 474; Jansen *v.* Heinrich, Crabbe (U. S.) 226.

Where there is a doubt as to the meaning of shipping articles, the seamen have the benefit of the doubt. 2 Parsons on Shipp. & Adm. 35. See Wope *v.* Hemenway, 1 Sprague (U. S.) 300; Lanarkshire, 2 Spinks Adm. 192; The Minerva, 1 Hagg. Adm. 347; The Hoghton, 3 Hagg. Adm. 100.

3. Douglass *v.* Eyre, Gilp. (U. S.) 147.

4. The Sarah Jane, B. & H. Adm. 411; Brown *v.* Jones, 2 Gall. (U. S.) 477; U. S. *v.* Staly, 1 Woodb. & M. (U. S.) 338; Ely *v.* Peck, 7 Conn. 239; The George Home, 1 Hagg. Adm. 370; The Brutus, 2 Gall. (U. S.) 526; Anonymous, 1 Hall Am. L. J. 209; Gifford *v.* Kollock, 19 Law Rep. N. S. 21; The Minerva, 1 Hagg. Adm. 347; The Countess of Harcourt, 1 Hagg. Adm. 248; The Eliza, 1 Hagg. Adm. 182. *Compare* Jones *v.* Buchanan, 5 Hughes (U. S.) 40.

Where a mariner shipped on a voyage to the Pacific Ocean "or elsewhere" on a trading voyage, and from thence back to Boston, with a stipulation that two months' wages should be paid at Canton, the voyage being in fact a trading voyage to the Northwest Coast for furs—held, that the outward voyage terminated at Canton and the return to the Northwest Coast from Canton was not authorized, and that, therefore, it was not a desertion in the mariner to leave the ship at Canton, the ship being about to return to the northwest. Brown *v.* Jones, 2 Gall. (U. S.) 477.

Under shipping articles "for a voyage from Baltimore to Curaçoa and elsewhere," a voyage from Baltimore to St. Domingo direct is not authorized. Anonymous, 5 Hughes (U. S.) 32.

5. The Two Fannys, 25 Fed. Rep. 285; The Australia, 3 Ware (U. S.) 240; The Rochambeau, 3 Ware (U. S.) 304; Somerville *v.* The Francisco, 1 Sawy. (U. S.) 390; The Ringleader, 6 Ben. (U. S.) 400; Mayshew *v.* Terry, 1 Sprague (U. S.) 584.

In Schooner Highlander, 1 Sprague (U. S.) 510, the court by Sprague, J., said: "Whenever an unusual clause is introduced into the shipping articles impairing the rights of seamen or imposing any additional duties or obligations on them, two conditions are required: first, that the seaman had the agreement so explained to him that he fully understood the meaning; and, second, that a reasonable compensation was given him for the renunciation of the right or for the new obligation assumed." See Mayshew *v.* Terry, 1

of the statute,[1] or lessening the right of seamen to their wages are void.[2] Stipulations which derogate from the general rights and privileges of seamen will be held void in admiralty, unless it shall appear that the nature and operation of the stipulations were fully explained to the seamen,[3] and that an additional compensation was allowed entirely adequate to the new restrictions imposed thereby.[4] The courts, however, will sustain an agreement not to bring suit for wages after the discharge until a certain time after such discharge;[5] or a stipulation that any seaman who terminates his contract before the end of the voyage shall receive only a portion of his wages;[6] or that a seaman will not absent himself from the vessel without leave "until the voyage is ended and the vessel is discharged of her cargo;"[7] or that he will not sue for wages until the vessel is unladen.[8]

In case of alterations every intendment is made against those who write out the articles. If a line is filled out erroneously, a new line ought to be written which will be free from alterations

Sprague (U. S.) 584; Heard *v.* Rogers, 1 Sprague (U. S.) 556.

1. The San Marcos, 27 Fed. Rep. 567; Harden *v.* Gordon, 2 Mason (U. S.) 541.

So far as shipping articles provide for a forfeiture of wages in excess of that provided by statute, they are contrary to law. The San Marcos, 27 Fed. Rep. 567.

The act of Congress forfeiting three days' wages for unauthorized absence from the ship of less than forty-eight hours, does not prevent a more stringent stipulation of the same nature in shipping articles from being enforced. Dunn *v.* Comstock, 2 E. D. Smith (N. Y.) 142.

2. The Juliana, 2 Dods. 504; Edwards *v.* Childs, 2 Vern. 727; Buck *v.* Rawlinson, 1 Bro. P. C. 137.

3. The Almatia, Deady (U. S.) 473; Brown *v.* Lull, 2 Sumn. (U. S.) 443; The Sarah Jane, B. & H. Adm. 401; Harden *v.* Gordon, 2 Mason (U. S.) 541. See Hard *v.* Rogers, 1 Sprague (U. S.) 556; Matern *v.* Gibbs, 4 Sprague (U. S.) 158; Mayshew *v.* Terry, 1 Sprague (U. S.) 584; The Cypress, B. & H. Adm. 83; The David Pratt, 1 Ware (U. S.) 500; The Betsy and Rhoda, 2 Ware (U. S.) 117; The Samuel Ober, 15 Fed. Rep. 621; Somerville *v.* The Francisco, 1 Sawy. (U. S.) 390.

A clause in the shipping articles, authorizing the master to disrate any seaman whom he should judge indisposed or incompetent to his duty, which had been in use only three years, and was not brought specially to the notice of the seaman, at the time he shipped, was held not to be binding on him. Matern *v.* Gibbs, 1 Sprague (U. S.) 158.

A stipulation that seamen will prosecute their suits for wages in courts of common law only, amounts to a waiver of their lien upon the vessel, and is void, without it be proved that the matter was fully explained to them before they entered into the stipulation, and that no prejudice to their rights would be incurred by them therefrom. The Sarah Jane, B. & H. Adm. 401.

4. The George Home, 1 Hagg. Adm. 370; Schooner *v.* Highlander, 1 Sprague (U. S.) 510; The Mary Paulina, 1 Sprague (U. S.) 45; Heard *v.* Rogers, 1 Sprague (U. S.) 556; Freeman *v.* Baker, B. & H. Adm. 380; The Sarah Jane, B. & H. Adm. 401; The Cypress, B. & H. Adm. 83; Brown *v.* Lull, 2 Sumn. (U. S.) 443; The Almatia, Deady (U. S.) 473; The Rochambeau, 3 Ware (U. S.) 304; The Australia, 3 Ware (U. S.) 240; Harden *v.* Gordon, 2 Mason (U. S.) 541; The Juliana, 1 Dods. 504; The Quintero, 1 Low. (U. S.) 38.

5. Smith *v.* The Columbus, 43 Fed. Rep. 686.

6. Kelly *v.* Topsy, 44 Fed. Rep. 631.

7. Webb *v.* Duckingfield, 13 Johns. (N. Y.) 390; 7 Am. Dec. 388.

8. Grannin *v.* Hartshore, B. & H. Adm. 454.

and ambiguity.[1] If the amount of wages is omitted by mistake or accident, without fraud, it is competent for either party to show by parol testimony what the contract was in relation to wages;[2] but if there is a dispute about the wages to be paid and the evidence concerning parol variations is conflicting and unsatisfactory, the contract will be enforced as it reads.[3]

If the rate of wages is fixed in the articles, the stipulation will be sustained,[4] even though a special promise is made to pay for extra labor or exposure in the course of duty.[5] If no fixed rate is agreed upon, or the seamen have shipped under a verbal agreement, the court will allow them the highest rate existing at the time at the port of departure.[6] If disputes arise as to the rate of wages to be paid, the court will incline to allow a claim to the rate paid by other like vessels leaving the same port at the same time on a like voyage. If the seamen can be held to a less rate by reason of a verbal contract, such contract must be clearly established.[7] If from any cause a seaman is unable to read the contract, he may show that it differs from his oral engagement, upon clear proof that the written contract was not read or explained to him.[8] A contract signed by a seaman unable to read is not binding where it is not read to him nor any information given as to its contents.[9]

1. The Richard Vaux, 20 Fed. Rep. 654.

The act of 1840 in regard to erasures of shipping articles applies to alterations which would vary their effect in respect to seamen. Immaterial erasures will be disregarded. The Eagle, Olc. Adm. 232.

2. Wickham *v.* Blight, Gilp. (U. S.) 452.

3. The L. B. Snow, 15 Fed. Rep. 282; The Honora Carr, 31 Fed. Rep. 842.

4. The Isabella, 2 Rob. Adm. 241; White *v.* Wilson, 2 B. & P. 116; Veacock *v.* M'Call, Gilp. (U. S.) 329. *Compare* Page *v.* Sheffield, 2 Curt. (U. S.) 377; Parker *v.* The Caliope, 2 Pet. Adm. 272.

5. 2 Parson's on Shipping, 43; The Dawn, Davies (U. S.) 121; Harris *v.* Watson, Peake Cas. 72; Stilk *v.* Myrick, 2 Camp. 317; Harris *v.* Carter, 3 E. & B. 559; 25 Eng. L. & Eq. 520.

6. Rollins *v.* Steamer E. O. Standard, 4 Fed. Rep. 750; The Crusader, 1 Ware (U. S.) 437.

7. The Acorn, 15 Fed. Rep. 751.

Where the rate differs by custom in the eastern and the western waters, an eastern fleet fishing in western waters is to be governed by the custom prevailing in such waters as to payment of the seamen. The S. L. Goodal, 6 Fed. Rep. 539.

8. The Samuel Ober, 15 Fed. Rep. 622. See Wope *v.* Hemenway, 1 Sprague (U. S.) 300; The Quintero, 1 Low. (U. S.) 38; The Elvine, 19 Fed. Rep. 528; Page *v.* Sheffield, 2 Curt. (U. S.) 377; Sweeney *v.* Cloutman, 2 Cliff. (U. S.) 85.

Where the shipping articles are silent as to wages, the seamen may prove by parol what wages were stipulated for, or they may claim the highest rate payable at the port of shipment, within the three months next preceding the date of the articles. The Warrington, B. & H. Adm. 331. See Rollins *v.* Steamer E. O. Standard, 4 Fed. Rep. 750.

Seamen were held not bound by written contract under U. S. Act, July 20, 1790, and were permitted to prove that the shipping articles did not set forth correctly the agreement, and the courts, without impeaching proofs, have held such agreements as are injurious to the seamen, void. The Juliana, 2 Dods. 504; The Minerva, 1 Hagg. Adm. 347; The Cypress, B. & H. Adm. 83; Harden *v.* Gordon, 2 Mason (U. S.) 541.

9. Johnson *v.* The Frank S. Hall, 38 Fed. Rep. 258; The Samuel Ober, 15 Fed. Rep. 621.

The voyage must be made in compliance with the description.[1] If a number of ports are stated, they must be visited as they stand in the articles without returning to any which have been visited.[2] Deviation from the stipulated voyage may discharge seamen of their obligations.[3] What deviation will free a seaman from his contract is a question of fact to be determined from usage and the course of trade.[4] Where shipping articles authorize the master to use his discretion in stopping at intermediate ports, it is no violation of his contract to stop at a place not named;[5] nor is it a deviation to change the voyage with the sole view of avoiding danger.[6] A change of voyage from that specified in the shipping articles, to operate as a discharge of the contract, must be willful,[7] and must be actually resolved on and known to a seaman.[8]

If the voyage is not made in the order prescribed, limitations as to time are not binding on the seamen.[9] If there are no limitations of time specified in the articles of a freighting voyage, either party, that is, the master or the mariner, may put an end to the contract at pleasure, provided it is not done at a time or under circumstances particularly inconvenient or injurious to the other party.[10] So if a series of voyages are agreed upon in writing, they may be terminated or varied by mutual consent of the master and crew and a new voyage substituted by parol agreement.[11]

1. The City of New Orleans, 33 Fed. Rep. 683; The Gem, 1 Low. (U. S.) 180; The Lola, 6 Ben. (U. S.) 142.

2. The Ada, Davies (U. S.) 407.

3. Potter *v.* Allen, 2 Root (Conn.) 63; The Moslem, Olc. Adm. 298.

4. Desty on Shipp. & Adm., § 146; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229.

It is not such deviation as will discharge seamen from their articles if a ship, through necessity for repairs, puts into a port to make them. And it is the duty of the seamen to remain by the vessel if the repairs can be made within a reasonable time. Botker *v.* Towner, 3 E. D. Smith (N. Y.) 132.

If a vessel stops at sea on meeting another vessel and takes on the crew rendered helpless by disease, it is not such deviation as will authorize seamen to leave the vessel. The George Nicholaus, Newb. Adm. 449.

Under shipping articles providing for "a voyage to commence at Baltimore and proceed to Batavia; thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore," an extension of the voyage to Japan is authorized. Jones *v.* Buchanan, 5 Hughes (U. S.) 40.

When in the shipping article of an English vessel, the voyage is described to be "from Liverpool to Savannah and any port or ports of the United States or the West Indies and of British North America, the term of service not to exceed twelve months," held that the voyage intended was confined to the ports on the eastern shore of the continent; that the articles did not authorize a voyage to San Francisco on the Northwest Coast. The Ada, 2 Ware (U. S.) 407.

5. Wood *v.* The Nimrod, 1 Gilp. (U. S.) 83; The Moslem, Olc. Adm. 289.

6. Patrick *v.* Ludlow, 3 Johns. Cas. (N. Y.) 10; 2 Am. Dec. 130.

7. The Moslem, Olc. Adm. 289; Wood *v.* The Nimrod, Gilp. (U. S.) 83.

8. Douglass *v.* Eyre, Gilp. (U. S.) 147.

9. The William Jarvis, 1 Sprague (U. S.) 485. See Lanarkshire, 2 Spinks Adm. 192.

10. The Crusader, 1 Ware (U. S.) 437.

11. Piehl *v.* Balchen, Olc. Adm. 24.

Both parties—the master[1] and the mariner[2]—are held strictly to their engagements. Where seamen, pursuant to their contracts, present themselves at the wharf where the vessel is and offer their services, but, without good reason, are refused admission to the vessel, they may sue *in rem* in admiralty for their stipulated wages.[3] So they will not suffer, because, without their fault, they are kept unemployed by reason of the ship's idleness.[4] So, where a seaman signs a contract to perform a voyage he is bound to a specific performance and cannot elect to pay damages for non-performance of it.[5] Contracts made by minors should be liberally and equitably construed;[6] though the law is liberal in construction, still minors are bound by their contract where fraud is not practiced on them.[7] Contracts made by the master with seamen will not be dissolved by the substitution of a new master in consequence of the sickness or death of the first master.[8] Agreements made by seamen under duress are not binding.[9] And shipments made contrary to the language and policy of the statute are void.[10]

1. The Belle of Oregon, 19 Fed. Rep. 924. See Papping *v.* The Sirius, 47 Fed. Rep. 825.

2. The Exile, 20 Fed. Rep. 878.

Where the testimony of the libelants as to the length of the voyage is contradictory, the court will not disregard the written articles. Luttke *v.* The Brucklay Castle, 36 Fed. Rep. 923.

3. The Acorn, 32 Fed. Rep. 638.

By articles, the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, at all times ready and willing to make the fish, and then left her and sued for their shares of the catch. *Held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract, and that they were entitled to be paid their shares. Goodrich *v.* Barque Domingo, 1 Sawy. (U. S.) 182.

4. The Alanson Sumner, 28 Fed. Rep. 670.

5. *Ex parte* Pool, 2 Va. Cas. 276.

6. The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; Hernaman *v.* Bowden, 3 Burr. 1844; Brice *v.* The Nancy, Bee Adm. 429.

A minor after becoming of age filed a petition to become colibelant in a libel by certain seamen of a vessel under their written contract for wages, in which petition nothing was said in regard to his minority. It appeared that he was neither intelligent nor provident, but that having heard that his associates had brought a suit for wages, obtained the services of the lawyer who was acting for the rest. *Held*, that there was not sufficient evidence of intelligent action to show a ratification of the contract, and he was not estopped from avoiding his written contract for compensation and recovering pay on *quantum meruit*. Burdett *v.* Williams, 30 Fed. Rep. 697.

7. Desty on Shipp. & Adm., § 149. See The Sarah Jane, B. & H. Adm. 410; The Warrington, B. & H. Adm. 335; The Triton, B. & H. Adm. 284; Goodridge *v.* Peabody, 2 Dane Abr. 462. *Compare* Hotspur, 3 Sawy. (U. S.) 194.

8. U. S. *v.* Hamilton, 1 Mason (U. S.) 446.

9. The Lola, 6 Ben. (U. S.) 142; Mayshew *v.* Teny, 1 Sprague (U. S.) 584; Stratton *v.* Babbage, 18 Law Rep. N. S. 94.

10. Harden *v.* Gordon, 2 Mason (U. S.) 541; Snow *v.* Wope, 2 Curt. (U. S.) 301; 1 Sprague (U. S.) 300; 8 Law Rep. N. S. 590. The San Marcos, 27 Fed. Rep. 567.

A seaman was hired without signing shipping articles on a vessel about to proceed on a voyage from a port in one State to a port in a State not adjoining. *Held*, that he could leave the vessel at any place. The Pacific, 23 Fed. Rep. 154.

U. S. Rev. St., § 4523, making void shipments of seamen made contrary to statute, etc., has no application to

In the absence of shipping articles there is an implied contract that the seaman will be returned to the port of shipment. In such case where he has not been employed for a specific period of time, he is entitled by way of compensation to the amount of his necessary transportation and expenses, together with his rate of wages from the date of his discharge to the date of his arrival at the port of shipment.[1]

V. WAGES—1. In General.—There are a number of ways in which seamen may be hired. The most common and well-established practice is to hire them for a definite voyage or voyages, or sometimes for a definite period on monthly wages.[2] The right to wages commences either at the time at which the seamen commence to work or at the time specified in the shipping articles.[3] Shipping articles being the proper and usual documents of a ship for the voyage, are, in admiralty, always admitted as evidence of the term of hire, but the evidence is not conclusive.[4] If it is shown by a satisfactory preponderance of extrinsic evidence that the articles are invalid, they will not control.[5]

contracts whereby fishermen ship for shares in the catch. The Cornelia M. Kingsland, 25 Fed. Rep. 856.

Wages in Advance.—Sec. 10 of U. S. Act of June 26, 1884, known as the "Dingley Bill," makes it unlawful to pay wages in advance of the time they are actually earned. Where, at the time of shipping, a seaman signs a written contract at a rate lower than that verbally agreed upon and receives the difference as an advance, he is entitled under this act, on completion of the voyage, to recover the amount verbally agreed to without deduction of the sum advanced. The Samuel E. Spring, 27 Fed. Rep. 764.

The provisions of this section do not apply to steamboats engaged in trade and navigating the inland waters of the United States. U. S. *v.* King, 23 Fed. Rep. 138.

Provisions as to Forfeiture of Wages.—In so far as shipping articles provide for a forfeiture of wages in excess of that provided by statute for the same offense, they are contrary to law; and where they contain a stipulation that, if any seaman should absent himself at any time without liberty, the wages due at the time should be forfeited, such forfeiture must be limited to cases of desertion. The San Marcos, 27 Fed. Rep. 567.

1. Worth *v.* Steamboat Lioness No. 2, 3 Fed. Rep. 922; The Hudson, 8 Fed. Rep. 167.

2. 2 Parson's Shipp. & Adm. 47. See The Cadmus, B. & H. Adm. 139; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229. See The Wanderer, 20 Fed. Rep. 655; The Pacific, 18 Fed. Rep. 703.

3. U. S. Rev. Sts., § 4524.

4. Willard *v.* Door, 3 Mason (U. S.) 161. See The L. B. Snow, 15 Fed. Rep. 282; Wait *v.* Gibbs, 4 Pick. (Mass.) 298.

The shipping articles are not the sole evidence of the seaman's rights. Effect must be given to an agreement made by the shipping agent at the time when the articles were signed and relied upon by the seamen as forming part of the contract, where such agreement is clearly proven. Statements, representations, and agreements made with seamen by shipping notaries, when the articles are signed, bind the ship, and that without reference to the instructions which the captain has given the notary. When the shipowner allows a shipping agent to employ a crew for him, he holds out to the seamen that the shipping agent has authority to bind the ship by the contract which he makes. The actual bargain made between the shipping agent and the seaman, at the time of the shipment, binds the ship. The Lola, 6 Ben. (U. S.) 142.

5. The Elvine, 19 Fed. Rep. 528; The Brookline, 1 Sprague (U. S.) 104. See The Richard Vaux, 20 Fed. Rep. 654.

Shipments of seamen must be made in compliance with the provisions of the statute. Any seaman shipped contrary to these provisions may leave the service at any time and may recover the highest rate of wages of the port from which he was shipped, or the sum agreed to be given him at his shipment.[1] Where a seaman ships without signing articles and performs his duty until the vessel reaches port, he is entitled, when he leaves her to recover on *quantum meruit* for the time served.[2] So a seaman who ships with the understanding that he is to perform services generally in return for his transportation and board, and performs services as cook, in the absence of the regular cook, who told him, though without authority, to take his place, may recover on *quantum meruit* for what such services were actually worth.[3] If one who has signed for the voyage at a certain rate per month, is advanced during the voyage to fill the place of a superior, he will be entitled to the pay of the superior grade.[4]

2. How Affected by Breaking Up of Voyage.—Where a voyage is broken up before completion by the fault or wrongful act of the master, the seamen discharged are entitled to their wages for the full voyage and a reasonable compensation for damages.[5] But

1. Jameson *v.* The Regulus, 1 Pet. Adm. 212; Rollins *v.* Steamer E. O. Standard, 4 Fed.Rep.750; The Warrington, B. & H. Adm. 335; Graham *v.* The Exporter, 21 Inter. Rev. Rec. 110; The City of Fremont, 2 Biss. (U. S.) 415; Milligan *v.* The B. F. Bruce, Newb. Adm. 539; Wickham *v.* Blight, Gilp. (U. S.) 452; Snow *v.* Wope, 2 Curt. (U. S.) 301.

Where the master of a vessel has dispensed with shipping articles, in order to hold the seamen to less than the usual rate, the verbal contract must be clearly established. The Acorn, 15 Fed. Rep. 751.

The acts of Congress of 1790 and 1840, entitling seamen shipped without written articles, to demand the highest rate of wages, etc., do not apply to fishing vessels. Seamen shipped on these, by parol agreements, can recover only the wages agreed for. The Ianthe, 3 Ware (U. S.) 126. *Compare* The Australia, Ware (U. S.) 240.

2. Kelly *v.* The Topsy, 44 Fed. Rep. 631.

The right of seamen to wages is not founded on the articles, but in the service. Mahoon *v.* Brig Glocester, Bee Adm. 395.

Where a seaman had served one season in the capacity of engineer, and shipped again without any agreement as to wages, held, that his last year's wages were to be received as the measure of wages for his subsequent work. Milligan *v.* The B. F. Bruce, 1 Newb. Adm. 539.

Minors.—Where a minor, without the knowledge of his father, concealed himself on board of a whaling ship, and was not discovered till the vessel was at sea, but was not left by the master in care of the American consul at Fayal, the first port at which the ship touched, to be returned to his home; on a suit brought by his father to recover compensation for the minor's services, the court allowed such proportion of the pay given to those who shipped as boys, as the time after the ship left Fayal bore to the time of the whole voyage. Luscom *v.* Osgood, 1 Sprague (U. S.) 82.

3. Johnson *v.* The Frank S. Hall, 38 Fed. Rep. 258.

4. King *v.* American Steamship, 1 W. N. C. 15; The Blohm, 1 Ben. (U. S.) 228; The Fanny Gardner, 5 Biss. (U. S.) 209.

A seaman who was shipped as a cook on a foreign voyage, and who performed extra services as stevedore in a foreign port, may proceed in the admiralty for compensation for extra services, though his wages as cook have been paid in full. The Charles F. Perry, 1 Low. (U. S.) 475.

5. The City of New Orleans, 33 Fed. Rep. 683; The Heroe, 21 Fed. Rep. 525. See The Maria, B. &

if the voyage is broken up in a foreign port without fault on the part of the owner of the vessel, seamen shipped under a time contract which has not expired, are entitled only to wages up to the date of their return home and provision for such return, in the absence of proof or probability of further damage.[1] If the voyage is broken up by reason of the wreck or loss of the vessel, and the services of the seamen are terminated before the period

H. Adm. 331; Hindman *v.* Shaw, 2 Pet. Adm. 264; The Ocean Spray, 4 Sawy. (U. S.) 113; Hoyt *v.* Wildfire, 3 Johns. (N. Y.) 518; Campbell *v.* The Uncle Sam, 1 McAll. (U. S.) 77; Hart *v.* Littlejohn, 1 Pet. Adm. 115; Boulton *v.* Moore, 14 Fed. Rep. 922; Sullivan *v.* Morgan, 11 Johns. (N. Y.) 66; Van Beuren *v.* Wilson, 9 Cow. (N. Y.) 158; 18 Am. Dec. 491; Campbell *v.* Steamer Uncle Sam, 1 McAll. (U. S.) 77; The Mary, 1 Paine (U. S.) 180.

Some roustabouts shipped for the round trip from Cairo to New Orleans and back. When the boat arrived in New Orleans, the voyage was broken up by the direction of the owner on account of ice in the river above Cairo. The river was free below Cairo, and there was no reason beyond the will of the owner why the voyage was not completed. *Held*, that on their discharge, libelants were entitled to their wages for the round trip and their necessary expenses in returning home. The City of New Orleans, 33 Fed. Rep. 683.

The master of the vessel engaged in a fishing adventure negligently omitted to procure salt, in consequence of which the voyage was terminated twenty-five days before the close of the season. *Held*, that the men were entitled to compensation, and for this purpose were to be credited for the twenty-five days lost with the same number of fish as they had caught for the twenty-five days preceding the breaking up of the voyage. The Page, 5 Sawy. (U. S.) 299.

If a seaman enters into an engagement for a specified voyage, and the boat or vessel is disabled before reaching the port of delivery, and another boat or vessel is chartered or substituted in its stead, it is his duty to proceed on such substituted vessel. But if the freight is simply transshipped or transferred to another boat bound for the same destination, it is unjust and unreasonable to say that the crew of the former can be forced to go and serve on the latter, else they will forfeit their whole pay. Rebetto *v.* How, 44 Mo. 52.

Interruption.—If a voyage be interrupted without the fault of the crew, they are entitled to receive wages during the time they work on board the vessel in port. Bray *v.* Ship Atlanta, Bee Adm. 48.

Violation of Revenue Laws.—Where a voyage is broken up abroad by a seizure for violating the revenue laws of a foreign country, the seamen are only entitled to wages to the time of the seizure. Oxnard *v.* Dean, 10 Mass. 143. *Compare* Lemon *v.* Walker, 9 Mass. 404.

1. Swift *v.* The Frank and Willie, 45 Fed. Rep. 488; Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; Thorson *v.* Peterson, 14 Fed. Rep. 742. See The Graf Klot Trautvetter, 5 Hughes (U. S.) 237.

A vessel was run on a reef in a well-known channel where there was plenty of room, and was lost. The master was a man of experience on the waters and accounted for the occurrence by his chronometer being wrong. The sailors brought suit against the owner of the vessel to recover wages for the whole voyage, alleging that the voyage was broken up by the fault of the owner. *Held*, that as it did not appear that the accident was the result of negligence or incompetency of the master, or that when the vessel sailed the chronometer was not a proper one in good order, it could not be held that the voyage was broken up by the fault, fraud, or neglect of the owner. Hill *v.* Murray, 6 Ben. (U. S.) 141.

Where a ship loaded with railroad iron was abandoned in heavy weather by the master because of a leak, it was held, upon libel filed by the seamen to recover wages for the whole voyage on the ground of fraudulent abandonment, that the master, having acted according to his best judgment, the seamen were only entitled to wages up to the time of the abandonment. White *v.* Adams, 5 Ben. (U. S.) 355.

Attachment of Vessel.—Where a sea-

contemplated in the agreement by reason of such misfortune, such seamen are entitled to wages for the time of service prior to such termination, but not for any further period.[1] But if, at the request of the master, they remain with the vessel, they are entitled to full wages.[2] Where a vessel is wrecked the decision of the master as to the actual termination of the seamen's services will be supported unless some wrong or injustice be practiced on the seaman. Survey and condemnation of a vessel is not a necessary ingredient of wreck.[3]

So where seamen ship late in the season for a trip on the Northern Lakes, the master has the right to discharge the crew upon equitable terms, which, in most cases, is the payment of their wages until the vessel is laid up, and their transportation to the port of shipment or destination.[4]

man ships for a certain voyage and the vessel is seized under process at an intermediate port, he is entitled only to wages then due, when it appears that he can obtain other similar employment at equal or better wages and there is no proof of any special damage or of return expenses to his home. The Augustine Kobbe, 37 Fed. Rep. 696.

In The Gazell, 1 Sprague (U. S.) 378, it was held that the court would not permit seamen to burden a ship attached under process by unnecessarily and willfully adhering to her. But if they have acted with propriety and good faith in remaining by the vessel, they might be protected.

So in Wolf *v.* The Oder, 2 Pet. Adm. 261, it was held that damages for loss of time and expense on shore might be sometimes allowed, but should only be where unwarrantable delay was produced by the fault of the owner or master. *Compare* The Hudson, Olc. Adm. 396.

1. U. S. Rev. Stat., § 4526. See The Two Catherines, 2 Mason (U. S.) 319; Gallagher *v.* Murray, 10 Ben. (U. S.) 290; Daniels *v.* Atlantic Mut. Ins. Co., 24 N. Y. 447; Thompson *v.* Faussat, Pet. (C. C.) 182.

By the old rule, if no freight was earned, no wages were due. Henop *v.* Tucker, 2 Paine (U. S.) 151; Poland *v.* The Spartan, 1 Ware (U. S.) 139; Walton *v.* The Neptune, 1 Pet. Adm. 144; Reed *v.* Hussey, B. & H. Adm. 525; Dunnett *v.* Tomhagen, 3 Johns. (N. Y.) 154; Giles *v.* Brig Cynthia, 1 Pet. Adm. 203; McQuirk *v.* Ship Penelope, 2 Pet. Adm. 276; The Niphon, 3 Law Rep. N. S. 266; Anonymous, 1 Ld. Raym. 639; The Two Catherines, 2 Mason (U. S.) 332; Edwards *v.* Child, 2 Vern. 727; Stark *v.* Mueller, 22 Fed. Rep. 447.

This rule has been abolished. See U. S. Rev. Sts., § 4526.

The master has the power, as a general rule, to determine whether there is any hope of getting his ship afloat after a disaster, and until he gives it up, the owners cannot object to paying the wages of the crew, on the ground that there was no chance of saving her. Tarleton *v.* Mallory, 10 Ben. (U. S.) 46; Gallagher *v.* Murray, 10 Ben. (U. S.) 290.

Vessel Voluntarily Stranded.—The crew of a vessel voluntarily stranded to avoid being driven on a rocky and dangerous part of the coast, are entitled to wages, while employed in saving the cargo, even after the sale of the vessel is determined upon. Barnard *v.* Adams, 10 How. (U. S.) 270.

Whaling Voyage.—Where a whaling voyage is from necessity broken up in a foreign port, the master, on request of the seamen, is authorized to pay to them their respective shares of the proceeds, by delivering to them at such foreign port portions of the oil taken, although by the shipping articles the distribution of proceeds was to be made after the return of the vessel to the home port. Hussey *v.* Fields, 1 Sprague (U. S.) 394.

2. Thorson *v.* Peterson, 10 Biss. (U. S.) 530; 14 Fed. Rep. 742.

3. Flanagan *v.* U. S., etc., Mail S. S. Co., 30 Fed. Rep. 202.

4. The Zach Chandler, 10 Biss. (U. S.) 372; 7 Fed. Rep. 684.

In Boulton *v.* Moore, 14 Fed. Rep. 922, it is held that the seamen are also entitled to wages during the necessary

3. By Capture.—A contract for seamen's wages will not be dissolved by capture of the vessel, unless the capture is followed by condemnation. A capture merely suspends the contract, which is revived or extinguished by the ultimate acquittal or condemnation.[1] The seamen, therefore, are not bound to quit the ship immediately upon the capture, nor can the master compel them to receive a discharge. They have a right to remain by the ship until a sentence of condemnation or acquittal has passed, or all reasonable hope of recovery is gone.[2] So, where they refuse to leave a ship, which is finally acquitted, they are entitled to full wages,[3] which reattach on restoration after capture.[4] Where a vessel is taken and condemned, wages are due the seamen up to the time of condemnation.[5] If the vessel is ransomed, antecedent wages cannot be recovered.[6]

4. By Sickness.—A seaman who by reason of sickness is unable to perform duty during a portion of the voyage is nevertheless entitled to his wages for the whole voyage,[7] even though he was obliged to be left at a foreign port.[8] If, however, the sickness

time occupied in their return to the place of shipment.

1. The Saratoga, 2 Gall. (U. S.) 164; Willard *v.* Dorr, 3 Mason (U. S.) 91; Emerson *v.* Howland, 1 Mason (U. S.) 45. See Hitchen *v.* Wilson, 4 Am. L. J. 275; Pitman *v.* Hooper, 3 Sumn. (U. S.) 306; Willard *v.* Dorr, 3 Mason (U. S.) 161; The Saratoga, 2 Gall. (U. S.) 164; Beale *v.* Thompson, 4 East 545; Langstrom *v.* The Hazard, 2 Pet. Adm. 384; Brooks *v.* Dorr, 2 Mass. 39; The Ocean Spray, 4 Sawy. (U. S.) 112; Bouysson *v.* Miller, Bee Adm. 190; Cranmer *v.* Gernon, 2 Pet. Adm. 390; Giles *v.* Brig Cynthia, 1 Pet. Adm. 215; Johnson *v.* Sims, 1 Pet. Adm. 215; Bronde *v.* Haven, Gilp. (U. S.) 592; Galloway *v.* Morris, 3 Yeates (Pa.) 445.

2. Emerson *v.* Howland, 1 Mason (U. S.) 45. See Willard *v.* Dorr, 3 Mason (U. S.) 91.

It is the right and duty of the mariners of a neutral ship, after capture, to remain by the ship, while there is any hope of recovering the property; such hope is generally gone when there is a sentence of condemnation, and *a fortiori*, when there is a sale thereof, pending the proceedings, or under the sentence of condemnation. Brown *v.* Lull, 2 Sumn. (U. S.) 443.

A mariner who quits his ship after capture without the assent of the owners, and where he has not been forced to leave by the captors, is not entitled to wages up to the time of the capture. Cavan *v.* Martin, 3 Call (Va.) 228.

3. Wesley *v.* Biays, 4 Am. L. J. 275.

An American ship, having been captured, was recaptured and restored to the owners, on payment of salvage; full wages for the whole voyage were decreed to a seaman, deducting therefrom his proportion of the salvage paid. Hart *v.* Ship Littlejohn, 1 Pet. Adm. 115; Howland *v.* Brig Lavinia, 1 Pet. Adm. 123.

4. Sheppard *v.* Taylor, 5 Pet. (U. S.) 703.

5. Vandever *v.* Tilgham, Crabbe (U. S.) 66.

If a neutral ship, after capture, is condemned and sold, and afterwards, on appeal, the sentence is reversed, and freight for the full voyage is allowed in damages, the seamen are entitled to wages up to the time of the condemnation, if they remained by the ship so long. Willard *v.* Dorr, 3 Mason (U. S.) 161.

6. The Saratoga, 2 Gall. (U. S.) 168; Yeates *v.* Hall, 1 T. R. 73; Wiggins *v.* Ingleton, 2 Ld. Raym. 1211; Phillips *v.* McCall, 4 Wash. (U. S.) 141; The Velasco, Blatchf. P. C. 56; The Friends, 4 Rob. Adm. 143; Pitman *v.* Hooper, 3 Sumn. (U. S.) 61; Beale *v.* Thompson, 4 East 548.

7. Neilson *v.* The Laura, 2 Sawy. (U. S.) 242; Highland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222; Shakerly *v.* The Latona, Crabbe (U. S.) 63; The Centennial, 4 Woods (U. S.) 150.

8. Mahoon *v.* Brig Glocester, Bee Adm. 395; Croucher *v.* Oakman, 3 Allen (Mass.) 185; Chandler *v.*

is owing to his own malconduct, no wages will be allowed.[1] Nor can a seaman left sick at a foreign port claim wages to the end of the voyage when he obtains his discharge at his own solicitation and against the advice of the master.[2] Where seamen leave a ship and enter a hospital in a foreign port with the intention of rejoining her, it is the duty of the master to inquire at the hospital for such seamen. If he neglects to do so and sails without them, he is liable to an action by them for damages for the loss of wages.[3]

Where a seaman ships for a whole voyage and dies before the return of the vessel, his representatives are entitled to the full wages.[4] But if he ships as an able bodied seaman, when, in fact, he has a fatal disease of which he dies, a claim by his representatives for the wages will not be allowed.[5]

5. By Discharge.—Where a seaman is discharged in a foreign country with his own consent,[6] or by reason of the unseaworthi-

Grieves, 2 H. Bl. 606, n. See Hainey *v.* Tristam Shandy, Bee Adm. 414; Nevitt *v.* Clarke, Olc. Adm. 316; Shakerly *v.* Pedrick, Crabbe (U. S.) 63; Shakerly *v.* The Latona, Crabbe (U. S.) 63.

A seaman shipped on board a schooner for a voyage from Philadelphia to Charleston and back, not to exceed three months in duration. The voyage was completed in a little over a month. A few days after leaving Philadelphia, the seaman was taken sick and was unable to do any work until the schooner reached Charleston, where he helped get the vessel to the wharf and was then sent to the hospital, the vessel returning without him. *Held*, that he was entitled to recover wages for the whole voyage. Hyland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222.

But where a seaman left sick at a foreign port might have joined the ship but would not, his claim for wages was allowed only until the time he might have rejoined the ship. Williams *v.* Brig Hope, 1 Pet. Adm. 135.

1. Highland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222; Johnson *v.* Huckins, 1 Sprague (U. S.) 67; Jones *v.* Sears, 2 Sprague (U. S.) 43; Walton *v.* The Neptune, 1 Pet. Adm. 142; Hart *v.* Littlejohn, 1 Pet. Adm. 115.

A seaman, during sickness occasioned by his own fault, is liable for the expenses of his subsistence; but not for the wages paid another man in his place. Johnson *v.* Huckins, 1 Sprague (U. S.) 67.

2. Raymond *v.* The Ella S. Thayer, 40 Fed. Rep. 901. See The Vigilant, 30 Fed. Rep. 288.

Seamen disabled in a ship's service are entitled to be cured at her expense. But where they have obtained a discharge therefrom at their own request and admitted to a hospital, the vessel is not liable for expenses thereafter incurred by them. Raymond *v.* The Ella S. Thayer, 40 Fed. Rep. 902.

3. Farrell *v.* French, B. & H. Adm. 275; Nevitt *v.* Clarke, Olc. Adm. 316.

A sick seaman who is left by the master in a foreign port without his consent and without being discharged, is entitled to his wages up to the end of the voyage, or until he can get back to his home port. The Heynsohn *v.* Merriman, 1 Fed. Rep. 728.

4. Highland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222; Walton *v.* The Neptune, 1 Pet. Adm. 142; Armstrong *v.* The Neptune, 1 Pet. Adm. 142; Scott *v.* Brig Greenwich, 1 Pet. Adm. 155; Sims *v.* Jackson, 1 Pet. Adm. 157, n.; 1 Wash. (U. S.) 414. *Compare* Carey *v.* The Kitty, Bee Adm. 255.

5. Writer *v.* The Richmond, 2 Pet. Adm. 263.

6. U. S. Rev. Sts., § 4582.

The statutes authorizing the discharge of seamen with their own consent were not intended to apply to a case in which the seaman is confined to his bed on shore, at the time the vessel is to sail, by a severe injury or illness incurred in the service of the ship. Such a discharge is nothing more than a recognition of the fact that he cannot go to sea. The statute

ness[1] or sale of the vessel, he is entitled to one month's wages over and above the wages due him when discharged.[2] If he is wrongfully discharged during the voyage, he is entitled to a compensation which shall be a complete indemnity for the illegal discharge, which is ordinarily measured by the loss of time and the

was intended for a case in which there is some choice exercised, to go or stay. If a fair contract, with full understanding, should be arrived at, it might be upheld, though the man were more or less ill; but that he should lose the right to be cured, and sent home, by a mere assent to the necessity of leaving him behind, is not within the true intent of the statute. Callon *v.* Williams, 2 Low. (U. S.) 1.

Where by the mutual consent of a seaman and the mate, the mate while in command assisted the seaman to leave the vessel and paid his fare on a railroad to the nearest hospital, it was held that the seaman was not guilty of desertion because the mate was, *pro hac vice*, the master, and that the seaman was entitled to the extra wages. The Caroline E. Kelly, 2 Abb. (U. S.) 160; 7 Phila. (Pa.) 570.

Where a seaman is induced to assent to his discharge, upon payment of a nominal sum, from just apprehension of future ill treatment, arising from the misconduct of the master, such assent is given under a species of duress, and is no bar to a recovery of the amount actually due to him at the time of his discharge. Bates *v.* Seabury, 1 Sprague (U. S.) 433.

A seaman in the whaling service, when discharged during the voyage at his own request, is not disqualified from making a settlement of his wages, upon the payment of a sum fairly and intelligently agreed upon, when the amount to become due him is uncertain and depends upon the future success of the voyage. Green *v.* Swift, 14 Fed. Rep. 877.

Discharging Seamen Without Wages.—A discharge of an American seaman from an American vessel in a foreign port because the captain had no funds to pay and could sail no further, held to be, with the seaman's "consent," within § 4582, requiring three months' pay to be paid to the consul, two thirds to the seaman on engaging return; in absence of a consul, he could recover two months' extra pay by libeling the owners on his return. Gove *v.* Judson, 19 Fed. Rep. 523.

1. U. S. Rev. Sts., § 4561; Act of June 26, 1884, ch. 121, § 4. See Pray *v.* U. S., 10 Ct. of Cl. 453.

2. U. S. Rev. Sts., § 4582; Act of June 26, 1884, ch. 121, § 5; Wolf *v.* The Oder, 2 Pet Adm. 261.

If the extra pay is given to the consul it discharges the owner's liability therefor. Drew *v.* Pope, 2 Sawy. (U. S.) 72.

If the extra pay be not given to the consul, it is recoverable by the seaman in his libel. Orne *v.* Townsend, 4 Mason (U. S.) 541; Emerson *v.* Howland, 1 Mason (U. S.) 45.

If the seaman is named as an American citizen on the master's list of the crew, it is no objection to the recovery of the extra wages that his name is omitted as an American citizen in the list of the crew certified in the collector's office under § 4588. Orne *v.* Townsend, 4 Mason (U. S.) 541.

Sailors who ship at New York for a voyage via Mobile to South America and return, are entitled, upon the seizure of the vessel under process at Mobile, only to wages then due, it appearing that they can obtain other similar employment at equal or better wages, and there being no proof of any special damage or of return expenses to their homes. The Augustine Kobbe, 37 Fed. Rep 696.

Where sale is rendered necessary by shipwreck or other casualty, it is doubtful whether the statute applies; but it does apply to a voluntary sale on account if the vessel's unseaworthiness rendered so by natural wear or by her imperfect condition when sent to sea. There seems to be no ground for a distinction so far as the mariners are concerned between a sale for positive profit and one for the purpose of avoiding a loss. Wells *v.* Meldrun, B. & H. Adm. 342. See Hoffman *v.* Yarrington, 1 Low. (U. S.) 168; The Dawn, 1 Ware (U. S.) 485.

Burden of Proof.—The burden is on the master to show that the extra wages have been paid. Orne *v.* Townsend, 4 Mason (U. S.) 541.

To Whom the Rule Applies.—A seaman in the whaling service discharged

expenses incurred in returning to the country of his departure.[1] So if he is compelled to desert by the cruelty of the master, he is entitled to full wages[2] to the successful termination of the voyage or to his return home.[3] A master is authorized to discharge a seaman either at a foreign or domestic port for continued disobedience or insubordination, and such discharge terminates the relation of such seamen to the vessel and his right to compensation for the unperformed part of the voyage.[4] If his offense

abroad may recover the extra wages. Bates *v.* Seabury, 1 Sprague (U. S.) 433.

Seaman of foreign birth in our vessels are within the rule. Pray *v.* U. S., 10 Ct. of Cl. 453.

1. Emerson *v.* Howland, 1 Mason (U. S.) 51; Bray *v.* The Atlanta, Bee Adm. 48; Fee *v.* Orient Guano Mfg. Co., 44 Fed. Rep. 430; The Heroe, 21 Fed. Rep. 525; Sheffield *v.* Page, 1 Sprague (U. S.) 285; Riley *v.* Allen, 23 Fed. Rep 46; Girard *v.* Ware, Pet. (C. C.) 142; Thompson *v.* Busch, 4 Wash. (U. S.) 338. See Mahoon *v.* The Glocester, 2 Pet. Adm. 403; Freeman *v.* The Jane, Crabbe (U. S.) 178; Brunent *v.* Taber, 1 Sprague (U. S.) 243; The Rovena, 1 Ware (U. S.) 309; The Nimrod, 1 Ware (U. S.) 9; Fee *v.* Orient Fertilizing Co., 36 Fed. Rep. 509.

In case of their wrongful discharge by the master, the crew of a whaleship are entitled to their full pay or share of the voyage. The Hibernia, 1 Sprague (U. S.) 78.

Where a seaman has been wrongfully discharged, and on the same day the master offers to take him back on the return voyage, thereby saving him any loss which he may sustain from the discharge, a refusal to accept such offer is a waiver of damages for the wrongful discharge. Cary *v.* The Caroline Miller, 36 Fed. Rep. 507.

2. Sherwood *v.* McIntosh, 1 Ware (U. S.) 109; Brown *v.* The Independence, Crabbe (U. S.) 58; The America, B. & H. Adm. 185; Hart *v.* Littlejohn, 1 Pet. Adm. 115; Emerson *v.* Howland, 1 Mason (U. S.) 53; Prince Edward *v.* Trevillick, 4 E. & B. 59; 28 Eng. L. & Eq. 205; Limland *v.* Stephens, 3 Esp. 269; and see U. S. Rev. Stat., § 4527.

3. Emerson *v.* Howland, 1 Mason (U. S.) 53; Ward *v.* Ames, 9 Johns. (N. Y.) 138.

4. The T. F. Oakes, 36 Fed. Rep. 445. See Hutchinson *v.* Coombs, 1 Ware (U. S.) 70; 2 Parsons Shipp. & Adm. 80.

The ordinary maritime law does not justify a discharge for single acts of negligent disobedience. Marsland *v.* The Yosemite, 18 Fed. Rep. 331.

Libellants, deck hands on an Ohio river tow-boat, were ordered by the mate during the voyage to draw ashes from the furnace; they refused on the ground that it was the fireman's work; persisting in the refusal, they were put ashore at the next port. *Held*, that the master of the boat was justified in discharging them, but that the libellants had not incurred a forfeiture of their wages for past services rendered on the trip. Russell *v.* The Twilight, 43 Fed. Rep. 320.

A woman who had shipped on a barge for the voyage from Buffalo to Bay City as cook, used insulting and impertinent language to the master; refused on one occasion to obey his orders as to the time when she should do the washing for the crew, and finally was forcibly removed from the vessel by a deputy marshal employed by the master when she reached Bay City. She refused to receive the amount tendered her for wages up to the time of her discharge, and to sign a release in full, and on her return to Buffalo filed a libel to recover wages for the whole voyage, car fare from Bay City to Buffalo, and alleged damages to her clothing. *Held*, that the master, notwithstanding her conduct, was not justified in turning her away penniless, friendless and alone in a foreign port, and that she was entitled to recover wages for the voyage and her traveling expenses, but not for any damages to her clothing. The Superior, 22 Fed. Rep. 927.

On a libel for the wrongful discharge of an engineer, neglect of duty in not attending to his engine and keeping up a high pressure of steam in an emergency is not shown where it appears that the fault was in the fuel and the

does not justify his discharge, he is entitled to indemnity in the discretion of the court[1] to his expenses of return and to wages till able to return, as a measure of damages.[2] So, where a custom exists by which hands employed in the steam-tug service at a certain rate of wages per month are authorized to leave at any time, and their employers are permitted to discharge them at any time upon the payment of wages up to the time of their leaving or discharge, a seaman thus employed may be discharged at the termination of any trip during the month on *pro rata* wages.[3] But neither the master nor the employed can terminate the employment in the midst of the trip without legal cause.[4] Where the officers of a vessel are entitled to discharge a seaman at pleasure they are bound to be ready to pay his wages at the time of his discharge.[5]

6. Forfeiture.—Wilful disobedience of lawful commands,[6]

exhaustive demands of the engine. The D. C. Fogel, 41 Fed. Rep. 154.

If the seaman repents and offers amends and offers to return to duty, the master is bound to receive him. Hutchinson *v.* Coombs, 1 Ware (U. S.) 65. *Compare* Tios *v.* Radovich, 10 La. Ann. 101; 63 Am. Dec. 592.

Drunkenness.—Where the first mate of a ship, before leaving the home port, became so intoxicated as to be disobedient, insolent to the master, and negligent in his duty—held, that the master was justified in discharging him while in the home port, for that one offense. The Garnet, 3 Sawy. (U. S.) 350.

But where a mate is intoxicated on board a vessel the master is not justified in discharging him and sending him on shore while incapable of taking care of himself. The El Dorado, 1 Low. (U. S.) 289.

1. Drysdale *v.* The Ranger, Bee Adm. 148; Cloutman *v.* Tunison, 1 Sumn. (U. S.) 384; The Cornelia Amsden, 5 Ben (U. S.) 315; Smith *v.* Treat, 2 Ware (U. S.) 266; Emerson *v.* Howland, 1 Mason (U. S.) 45.

2. The Nimrod, 1 Ware (U. S.) 9; Emerson *v.* Howland, 1 Mason (U. S.) 53; Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420; The Rovena, 1 Ware (U. S.) 309; Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262.

3. Moore *v.* Neafie, 3 Fed. Rep. 650; The City of New Orleans, 33 Fed. Rep. 683.

An engineer was employed on a steam tug used about a harbor at a certain rate per month, but without any agreement as to the duration of his service. *Held*, in the absence of proof of any certain usage, that he could be discharged at any time without previous notice, and could recover only for the time actually served. The Pacific, 18 Fed. Rep. 703.

4. Disbrow *v.* The Walsh Brothers, 36 Fed. Rep. 607.

Where shipping articles did not provide any definite voyage, but for service not exceeding six months payable monthly, held, while the vessel was in her home port and no voyage determined on, the service was terminable by either party at the end of the month on reasonable notice. Marsland *v.* The Yosemite, 18 Fed. Rep. 331.

5. Walsh *v.* Steamship Louisiana, 4 Fed. Rep. 751.

6. The Alps, 19 Fed. Rep. 139; The Mentor, 4 Mason (U. S.) 84. See Gladding *v.* Constant, 1 Sprague (U. S.) 73; The Almatia, Deady (U. S.) 473; Schooner Jefferson Borden, 6 Fed. Rep. 301; Smith *v.* Schooner J. C King, 3 Fed. Rep. 302; The Hudson, 6 Fed. Rep. 830; The Antioch, 6 Sawy. (U. S.) 628; Dixon *v.* The Cyrus, 2 Pet. Adm. 407.

Wages are not always forfeited by disobedience of orders unattended by aggravating circumstances. Drysdale *v.* The Ranger, Bee Adm. 148.

Where a seaman is privileged to leave the ship, he will not necessarily forfeit his wages because, having sprained his wrist, he refused to assist in coaling. The Pacific, 23 Fed. Rep. 154.

mutinous and rebellious conduct,[1] deserting the ship,[2] embezzling stores,[3] or smuggling goods, to the occasion of loss to the master, are offenses punishable by forfeiture of wages.[4] The forfeiture may be partial or total.[5] To justify a total forfeiture, the offense must either be an act of a very gross nature, involving serious danger or malignancy, or it must be habitual and produce such a general diminution of duty as goes to the very essence of the contract.[6]

1. Relf *v.* The Maria, 1 Pet. Adm. 186; Buck *v.* Lane, 12 S. & R. (Pa.) 266; Sprague *v.* Cain, Bee Adm. 184; The Olive Chamberlain, 1 Sprague (U. S.) 9.

An assault by a mariner upon a captain will produce a forfeiture of wages. Buck *v.* Lane, 12 S. & R. (Pa.) 266. See Sprague *v.* Cain, Bee Adm. 184.

The misconduct of an engineer on a steamboat in altering and deranging his engine, will justify a forfeiture of wages. The John Martin, Brown Adm. 149; The Magnet, Brown Adm. 547.

The misconduct must ordinarily be persistent. Relf *v.* The Maria, Pet. Adm. 186.

Strict proof of misconduct in a seaman will be required to prevent him from recovering his wages. Benton *v.* Whitney, Crabbe (U. S.) 417.

Misconduct by seamen upon one voyage does not inure to the benefit of the owner so as to forfeit wages earned upon another. And in this respect, the case of monthly hirings, although continued upon river boats, is like separate voyages at sea. The Pioneer, Deady (U. S.) 72.

The claim of the seaman for wages which have been forfeited by misconduct, may be reinstated by repentance and tender of amends. The Mentor, 4 Mason (U. S.) 84. Or the forfeiture may be waived by voluntarily discharging the seaman and promising to pay his wages. Austin *v.* Dewy, 1 Hall (N. Y.) 238.

2. See *infra*, this title, *Desertion*.

3. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Mariners *v.* The Kensington, 1 Pet. Adm. 239; Alexander *v.* Galloway, 1 Abb. Adm. 261; Lewis *v.* Davis, 3 Johns. (N. Y.) 17; Thompson *v.* Collins, 4 B. & P. 347. *Compare* Edwards *v.* Sherman, Gilp. (U. S.) 461; Joy *v.* Allen, 2 Woodb. & M. (U. S.) 303; Spurr *v.* Pearson, 1 Mason (U. S.) 104.

The theft of a portion of a cargo by a mariner works an absolute forfeiture of wages. Alexander *v.* Galloway, Abb. Adm. 261.

But trivial depredations upon the ship's property does not of itself forfeit seamen's wages. Olson *v.* Schooner Edwin Post, 6 Fed. Rep. 314.

Nor will a seaman forfeit his wages by selling part of the cargo, to procure provisions for the vessel, by order of the mate, during the absence of the captain. Anderson *v.* The Solon, Crabbe (U. S.) 17. See Parker *v.* The Calliope, 2 Pet. Adm. 272.

Presumption of Guilt.—When the guilt cannot be attached to any of the crew, the presumption is that the guilt attaches to all, and they have to contribute to make good the value of the portions of the cargo embezzled. Spurr *v.* The Pearson, 1 Mason (U. S.) 104; Sullivan *v.* Ingraham, Bee Adm. 182; Cranmer *v.* The Fair American, 1 Pet. Adm. 242.

4. Scott *v.* Russell, Abb. Adm. 258. See The Horace E. Bell, 3 Ware (U. S.) 236.

5. The Moslem, Olc. Adm. 289; The America, Bee Adm. 237.

A court of admiralty is not bound to forfeit the entire wages earned. All the circumstances may be taken into consideration, and a judicious deduction directed. Gifford *v.* Kollock, 3 Ware (U. S.) 45.

6. The Mentor, 4 Mason (U. S.) 84. See Orne *v.* Townsend, 4 Mason (U. S.) 541.

Courts of admiralty will not forfeit a seaman's wages for a single act of disobedience, however trivial or provoked. The Almatia, Deady (U. S.) 473.

Where a mate was disobedient, but his offense was held to be a very slight one, and the master discharged him on the vessel's arrival in port and offered to pay his wages up to the time of the discharge if the mate would give a receipt in full, and the mate filed a libel to recover wages up to the end of the month of his discharge—held, that his offense did not justify his discharge;

If seamen are absent from a ship without fault of their own, they are entitled to full wages.[1] They will not forfeit their wages for occasional absence from the ship if no objection is made thereto until the whole period of the service has expired.[2] But when a seaman is wrongfully absent, the expense of a substitute may be deducted from his wages.[3] If a vessel is detained in port by the wrongful absence of the seaman, a deduction from his wages may be allowed to the amount of the loss actually sustained.[4] Where a seaman is absent on leave and refuses to return to the vessel when requested by the master, he is liable to a forfeiture of wages.[5]

If the seamen leave the vessel under circumstances of distress or danger without endeavoring to save it, they forfeit wages antecedently due.[6] So if a seaman quit the vessel in the midst of a trip without legal cause or without the consent of the master, the wages of that trip will be forfeited.[7]

that he must be allowed some indemnity, to be fixed by the discretion of the court. The Cornelia Amsden, 5 Ben. (U. S.) 315.

Under U. S. Rev. Sts., § 4596, which is in general similar to § 243 of the British Merchant Shipping Act, no forfeiture of wages is incurred by quarrelsomeness or the use of foul language. The Alps, 19 Fed. Rep. 139.

An occasional act of intemperance will not work a forfeiture. The Lady Campbell, 2 Hagg. Adm. 5; The Duchess of Kent, 1 W. Rob. 283; The Malta, 2 Hagg. Adm. 158; The Atlantic, Lush Adm. 566; The New Phœnix, 1 Hagg. Adm. 198; The Ealing Grove, 2 Hagg. Adm. 15.

Where the first engineer, immediately upon his discharge, drew the fires of the engine on a cold winter's day, thus imperiling the ship, contrary to the orders of the master and owner, and abetted all the rest of the engineer's department in leaving the ship contrary to orders—held, that by these acts he forfeited all claim to the residue of the month's wages which would otherwise have been awarded him. Marsland *v.* The Yosemite, 18 Fed. Rep. 331.

1. The Fair American, Bee Adm. 134; Antone *v.* Hicks, 2 Low. (U. S.) 383; Veacock *v.* McCall, Gilp. (U. S.) 329; Nevitt *v.* Clarke, Olc. Adm. 316. See The Dolphin, 6 Ben. (U. S.) 402. *Compare* Watson *v.* Brig Rose, 1 Pet. Adm. 132.

Where there was a collision in the night time, and a cry that the vessel was sinking, and a seaman jumped from his own to the other vessel for safety, and afterwards endeavored to rejoin his own without success—held, that he had not incurred a forfeiture of wages. Wages were allowed up to the time of leaving his own vessel. Hanson *v.* Rowell, 1 Sprague (U. S.) 117.

2. The Harvest, Olc. Adm. 271.

3. Snell *v.* The Independence, Gilp. (U. S.) 140; Brower *v.* The Maiden, Gilp. (U. S.) 294; Pierce *v.* Patton, Gilp. (U. S.) 436.

4. Brown *v.* The Neptune, Gilp. (U. S.) 89; The Bulmer, 1 Hagg. Adm. 163; Snell *v.* The Independence, Gilp. (U. S.) 140.

5. The Cadmus *v.* The Matthews, 2 Paine (U. S.) 229. See The Ericson, 3 Sawy. (U. S.) 559.

6. The Two Catherines, 2 Mason (U. S.) 319; The Woodrop Sims, 2 Pet. Adm. 393.

Where the circumstances of the case did not show a justification of the crew in leaving their ship, but it appeared that their doing so was mitigated by evidence of apparent connivance on the part of the second mate in efforts by boarding-house keepers to induce them to desert—held, that their wages were not forfeited. The Lilian M. Vigus, 10 Ben. (U. S.) 385.

7. Disbrow *v.* The Walsh Brothers, 36 Fed. Rep. 607.

In a suit against a British vessel by members of her crew to recover wages for a certain voyage, which the shipping articles showed was not completed, it appeared that libelants had endured the usual hardships of a sailor life; that some offenses had been committed against them by the officers; that

7. Deductions.—If seamen perform their duty in a negligent manner,[1] or prove to be utterly incompetent and unskillful, they may be subjected to deductions from their wages.[2] Offsets are allowable on payment of wages; such as payments made on account,[3] and charges for articles furnished.[4] Where the master pays debts contracted by the crew, he is entitled to have the amount deducted from their wages.[5] A loss incurred by reason of a crime of a seaman may be set off;[6] but damages can be recovered for his misconduct only when it is the direct and immediate result of his acts and omissions, not when it is remote and contingent.[7] So charges for articles furnished must be shown to be correct,[8] and where payments are claimed as a set-off, the burden is on the master to show the payment.[9]

Where a seaman is imprisoned by the authorities of a foreign country for a violation of its laws, the costs and charges may be deducted from his wages; but not so where he is imprisoned at the instance of the master of the vessel.[10] If the imprisonment in a foreign port is unjustifiable, the expenses of it or of the employment of a person in his stead are not to be deducted from his wages.[11] No deductions are allowed on account of the insufficiency of the sum received by the owner to cover his loss in case of condemnation,[12] nor for expenses of releasing the vessel

on arrival at a certain port their demand to receive their wages was refused by the master, whereupon they refused to work; and the evidence was conflicting as to whether the captain then ordered them to leave the ship or to go to work. *Held*, that where the British vice-consul, on the facts shown by the shipping articles and the *ex parte* statements of libelants, had refused to order payment to them of their wages, the district court of the United States will dismiss the libel. Waitshoair *v.* The Craigend, 42 Fed. Rep. 175; *distinguished* Hoeh *v.* The New City, 47 Fed. Rep. 328.

1. The Baltic Merchant, Edw. Adm. 86; Thorne *v.* White, 1 Pet. Adm. 175; The Martha, B. & H. Adm. 157.

The sailing-master on a yacht brought suit to recover his wages as such, the defense being that he had performed his duties in so negligent a manner that his rate of wages should be the rate paid a common seaman. *Held* that, though he had performed some of his duties in a negligent manner, it was not such negligence as should reduce his wages to the rate claimed by the defense, and that he should recover his claim, but without costs. The Carlotta, 30 Fed. Rep. 378.

2. The Buena Vista, 3 Blatchf. (U. S.) 510.

3. Bains *v.* The James and Catharine, 1 Baldw. (U. S.) 545; The Fritheoff, 7 Sway. (U. S.) 58.

4. The Rob Roy, 30 Fed. Rep. 696.

Where a settlement is made with one of the crew, and excessive charges are made for whisky and tobacco furnished at the bar of the boat, a court of admiralty will not sanction the settlement or the charges, but will reduce the set-off to a reasonable allowance for these articles. The Rob Roy, 30 Fed. Rep. 696.

5. The Cold Stream, 4 Sawy. (U. S.) 172.

6. Thorne *v.* White, 1 Pet. Adm. 175.

7. Macomber *v.* Thompson, 1 Sumn. (U. S.) 384.

8. Magee *v.* The Moss, Gilp. (U. S.) 219; Veacock *v.* McCall, Gilp. (U. S.) 329.

9. The Fritheoff, 7 Sawy. (U. S.) 58; The Fritheoff, 14 Fed. Rep. 302.

10. Magee *v.* The Moss, Gilp. (U. S.) 219.

11. Wilson *v.* The Mary, Gilp. (U. S.) 31; Johnson *v.* Cariolanus, Crabbe (U. S.) 239.

12. Sheppard *v.* Taylor, 5 Pet. (U. S.) 675; Ardrey *v.* Karthaus, Taney Dec. (U. S.) 379.

from capture,[1] nor for an allowance for a decrease of risk upon the homeward voyage on a declaration of peace while the vessel was abroad,[2] nor for boarding seamen and transporting them home after shipwreck,[3] nor for employing a watch on board.[4]

Where a seaman engages for a certain voyage at a fixed rate, his wages are not to be diminished on account of the diminution of the risk of the voyage after it commences;[5] nor the wages of the ship's surgeon under like circumstances.[6] But where the risk is diminished before the voyage commences, it has been held that the fixed rate of seamen's wages may be reduced.[7]

8. Extra Compensation.—One cannot ordinarily claim extra compensation on the ground that, by some unexpected event, the service which he has agreed to perform becomes more laborious and dangerous than was anticipated at the time of the contract.[8] If a mariner ships by the run, he takes the risk of adverse weather and all other kindred accidents attendant upon maritime enterprise, and if the vessel be driven out of her course by stress of weather and obliged to take shelter in an intermediate port and is there detained, the seaman has no claim for additional compensation for extra services thus rendered.[9] Where a seaman's contract of service is terminated by mutual consent after part performance, a court of admiralty will neither decree payment of extra wages or damages, as in case of a wrongful discharge, nor forfeiture of the wages earned by services rendered pursuant to the contract, as in case of desertion, but will allow wages at the rate fixed by the contract for the time of actual service.[10]

9. Who Liable for Wages.—A ship is liable for the wages of seamen,[11] and a mariner is not bound to take notice of the ownership of the vessel nor to follow the estate of the owner into the probate court in order to collect his wages.[12] If the ship proves insufficient to pay them, the owners are liable for the wages.[13] An action may be maintained either against the owner or the master but not against both.[14] When a vessel is let to the master to be employed by him and he is to pay the owners a certain

1. Hart *v.* Littlejohn, 1 Pet. Adm. 115; Howland *v.* Brig Lavinia, 1 Pet. Adm. 123; Pitman *v.* Hooper, 3 Sumn. (U. S.) 50; The Saratoga, 2 Gall. (U. S.) 164.

2. M'Culloch *v.* The Lethe, Bee Adm. 423. *Compare* Brice *v.* The Nancy, Bee Adm. 429.

3. Macpherson *v.* Blytheswood, 1 Phila. (Pa.) 54.

4. Chatfield *v.* The Wolga, 3 Law Rep. N. S. 387.

5. M'Culloch *v.* The Lethe, Bee Adm. 423.

6. Shaw *v.* The Lethe, Bee Adm. 424.

7. Brice *v.* The Nancy, Bee Adm. 429.

8. The Dawn, Davies (U. S.) 121.

9. Miller *v.* Kelly, 1 Abb. Adm. 564.

10. Waitshoair *v.* The Craigend, 42 Fed. Rep. 175; The Hunter, 47 Fed. Rep. 744.

11. See MARITIME LIENS, vol. 14, p. 425.

12. The Fanny Gardener, 5 Biss. (U. S.) 209.

13. Carey *v.* The Kitty, Bee Adm. 254.

14. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81. *Compare* Sheffield *v.* Page, 1 Sprague (U. S.) 285; Mayo *v.* Harding, 6 Mass. 300; Nevitt *v.* Clarke Olc. Adm. 316.

The owner of a vessel is liable for the wages of a seaman although his name is not stated in the shipping

portion of her earnings, the owners will be liable to the seamen for their wages, though by agreement the master is to have entire control of the vessel, is to victual and man her, and furnish supplies at his own expense, unless at the time of shipping this contract is made known to the seamen and they are informed that they are to look to the master as the only owner.[1] If a vessel is chartered, the charterers, and not the general owners, are liable for seamen's wages on the voyage for which she is chartered.[2] A mortgagee of a vessel, in possession, is liable for seamen's wages.[3] After an abandonment of a vessel is accepted by the underwriters they become owners for the voyage and are liable for seamen's wages afterwards.[4]

10. Lien for Wages.—See MARITIME LIENS.[5]

11. Actions for Wages—*a.* GENERALLY.—Under the statute, as a general rule, seamen cannot sue until the lapse of ten days after the time when the wages ought to have been paid, unless there is a dispute between themselves and the master touching the wages, or unless the vessel is about to proceed to sea before the end of the ten days, after the delivery of her cargo.[6] But this does not prevent them from maintaining an action at common law for the recovery of their wages when due.[7] Wages are due ordinarily when the voyage is ended.[8] The voyage is ended when the vessel is moored at her final port of destination.[9] Whether seamen are bound to remain by the vessel after the voyage is ended and assist in discharging the cargo depends

articles. Bronde *v.* Haven, Gilp. (U. S.) 592.

The master is liable for the wages of mariners, if he admit them to serve on board the vessel, although they were originally shipped by the owner. Farrel *v.* M'Clea, 1 Dall. (U. S.) 392.

1. Skofield *v.* Patter, Davies (U. S.) 392; Flaherty *v.* Doane, 1 Low. (U. S.) 148; Sargent *v.* Wording, 46 Me. 464. See Bonnah *v.* McMorran, 64 Mich. 145. *Compare* Giles *v.* Vigoreux, 35 Me. 300; 58 Am. Dec. 704.

2. Goodridge *v.* Lord, 10 Mass. 483; Sheriffs *v.* Pugh, 22 Wis. 273; The Samuel Ober, 15 Fed. Rep. 621.

3. The Bramen, Brown Adm. 161.

4. Hammond *v.* Essex F. & M. Ins. Co., 4 Mason (U. S.) 196.

Underwriters upon freight are liable for the extra expenses of seamen's wages and provisions, during an embargo. Jones *v.* Insurance Co. of North America, 4 Dall. (U. S.) 246; Kingston *v.* Girard, 4 Dall. (U. S.) 274.

5. Vol. 14, p. 425.

6. The Eagle, Olc. Adm. 232; The Mary, 1 Ware (U. S.) 456. See Thompson *v.* Ship Philadelphia, 1 Pet. Adm. 210; Edwards *v.* The Susan, 1 Pet. Adm. 165.

7. The Shelbourne, 30 Fed. Rep. 510; The Susan, 3 Ware (U. S.) 222.

The statute which precludes a seaman from having admiralty process for his wages against the vessel, until ten days after the discharge of the cargo, does not affect his right to proceed *in personam* immediately after his discharge. Francis *v.* Bassett, 1 Sprague (U. S.) 16; The Commerce, 1 Sprague (U. S.) 34; Collins *v.* Nickerson, 1 Sprague (U. S.) 126; The William Jarvis, 1 Sprague (U. S.) 485; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; The David Faust, 1 Ben. (U. S.) 183.

8. Swift *v.* The Happy Return, 1 Pet. Adm. 255; Knagg *v.* Goldsmith, Gilp. (U. S.) 208; Leddo *v.* Hughes, 15 Ill. 41.

9. The Annie Smull, 2 Sawy. (U.S.) 226; Taber *v.* Nye, 12 Pick. (Mass.) 105.

A seaman whose wages have been paid up to the termination of a voyage, but who afterwards remains on board of the vessel moored at the wharf, has

upon the shipping articles or the custom of the port.[1] If the shipping articles are to the final port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port until the whole cargo is discharged.[2]

b. ADMIRALTY JURISDICTION.—Admiralty has jurisdiction over contracts for the hire of seamen where such contracts are maritime in their nature,[3] and the services are substantially performed on the sea or on waters within the flow and reflow of the tide,[4] or upon vessels plying between ports of adjoining States on a navigable river.[5]

To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or improvement of the vessel or rendered in aid of her navigation directly by labor on the vessel or in sustenance and relief of those who conduct her operations at sea.[6] But it is not essential, in order to give admiralty jurisdiction, that the vessel

no claim for services which a court of admiralty will enforce. Phillips *v.* The Scattergood, Gilp. (U. S.) 1.

1. U. S. *v.* Barker, 5 Mason (U. S.) 404.

Under a stipulation in shipping articles that wages are not to be paid until the cargo is delivered, there need not be in every case, an actual unloading of the cargo to constitute the delivery contemplated. In case delivery is unreasonably delayed, the seaman may be considered as having complied with his stipulation by waiting a reasonable time. Fifteen days held to be a reasonable time for that purpose, in the absence of special circumstances. The Martha, B. & H. Adm. 151.

2. The Mary, 1 Ware (U. S.) 454.

3. Cox *v.* Murray, Abb. Adm. 340; Thackery *v.* The Farmer, Gilp. (U. S.) 526.

The admiralty has not jurisdiction of accounts of moneys and traffic between the master and mate of the ship, except as they are connected with a claim for wages. Atkyns *v.* Burrows, Pet. Adm. 244.

4. Steamboat Thomas Jefferson, 10 Wheat. (U. S. 428; Peyroux *v.* Howard, 7 Pet. (U. S.) 324; L'Arina *v.* Manwaring, Bee Adm. 199; Thackery *v.* The Farmer, Gilp. (U. S.) 529.

5. Wilson *v.* The Ohio, Gilp. (U. S.) 505; Smith *v.* Pekin, Gilp. (U. S.) 203; Thackery *v.* The Farmer, Gilp. (U. S.) 526; Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 543.

A suit *in rem* against a Mississippi river steamboat for the wages of one of her crew where the contract of hire was made in the port of another State and the cause of action accrued on the river outside the territorial jurisdiction of the State where the suit is brought, is within the exclusive jurisdiction of the admiralty. Connelley *v.* Steamboat Bee, 40 Mo. 263.

When a seaman is hired to serve on a small vessel navigating the interior waters of the State, and he knows the residence and responsibility of the owner, he will be required to seek his remedy for wages in the municipal courts of the vicinage. The Bolivar, Olc. Adm. 474.

The jurisdiction over wages does not embrace services in a voyage upon a canal, not connecting navigable lakes or different States or Territories; even though a small portion of the voyage is through public, navigable waters. McCormick *v.* Ives, Abb. Adm. 418.

6. Gurney *v.* Crockett, Abb. Adm. 490.

The jurisdiction over wages does not embrace services performed by the master, as a factor, or in any other character than that of master. Willard *v.* Dorr, 3 Mason (U. S.) 161.

Nor of persons employed as musicians on a floating museum, though they occasionally assist in the work of the crew. Trainer *v.* The Superior, Gilp. (U. S.) 514.

Nor of stevedores, employed to lade cargo, while the ship is at the wharf, in possession of the owners. McDermott *v.* The S. G. Owens, 1 Wall. Jr. (C. C.) 370; S. P. The Amstel, B. & H.

should be engaged in commerce or trade. Where a vessel is engaged in navigating tide waters, carrying building stone, the whole service of the vessel is to be considered maritime; and hands employed to load the stone from a wharf and navigate the vessel and unload it may come into admiralty by a libel *in rem* for their wages.[1] The jurisdiction over wages includes all whose services are employed to preserve the ship, or those on board of her—*e. g.*, the pilot, deck-hands, engineer, and fireman of a steamboat, and the cook and steward of a vessel.[2] And every service rendered by a mariner which contributes, in contemplation of law, to the management, safety, or benefit of the vessel is so far maritime as to bring it within the admiralty jurisdiction.[3]

Admiralty takes jurisdiction of suits for wages by seamen against foreign vessels when the voyage is ended,[4] or the seamen are discharged in an American port; and will enforce the lien according to the law of the nationality of the vessel, as in the case of the master's lien for wages under the English statute, although by the maritime law of the *United States* no such lien is given to the master.[5] It is the nationality of the vessel and not of the

Adm. 215; The Circassian, 1 Ben. (U. S.) 209.

Nor of a shore laborer, employed as a watchman on a domestic vessel, moored at the wharf in a dismantled state. The Harriet, Olc. Adm. 229.

Nor of a person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps, and the like. Gurney *v.* Crockett, Abb. Adm. 490.

It does not embrace services in pressing cotton in a cotton press, for the purpose of arranging the bulk for more convenient carriage and stowage. The Joseph Cunard, Olc. Adm. 120.

Services rendered on board a ship while at the dock at Liverpool. Graham *v.* Hoskins, Olc. Adm. 224.

1. Sloop Canton, 1 Sprague (U. S.) 437.

2. Wilson *v.* The Ohio, Gilp. (U. S.) 505; The May Queen, 1 Sprague (U. S.) 588.

A master of a vessel may sue in the admiralty *in personam* for his wages, and so may a mate who succeeds to the command on the master's death. The Brig George, 1 Sumn. (U. S.) 157; Willard *v.* Dorr, 3 Mason (U. S.) 167. See Hammond *v.* Essex F. & M. Ins. Co., 4 Mason (U. S.) 196.

A hand on board a steamboat plying on tide waters may recover his wages in the admiralty. Martin *v.* Acker, B. & H. Adm. 279.

3. The Salisbury, Olc. Adm. 71.

4. The Pawashick, 2 Low. (U. S.) 142; Bucker *v.* Klorkgeter, Abb. Adm. 402; The Napoleon, Olc. Adm. 208; Gonzales *v.* Minor, 2 Wall. Jr. (C. C.) 348; The Amelia, 3 Fed. Rep. 652; Davis *v.* Leslie, Abb. Adm. 123.

Where seamen, upon the advice of the British consul, left a British vessel in the port of San Francisco for breach of the shipping articles, and it appeared that she was loaded with a cargo for Chili, which was then in a state of insurrection, that her movements were uncertain, and her probable return to England remote, and that she was under bottomry, and liable to be sold, the United States district court will take jurisdiction of a libel for wages, especially when so requested by the British consul, notwithstanding that the wages were payable only in England, and that the English Merchant Shipping Act, 1854, § 190, provides that no seaman engaged for a voyage which is to terminate in the United Kingdom shall be entitled to sue for wages in any foreign court, unless discharged with the sanctions therein prescribed, and with the master's consent, or proves such ill usage as to warrant a reasonable apprehension of danger to his life if he remain on board. Papping *v.* The Sirius, 47 Fed. Rep. 825.

5. The Enterprise, 1 Low. (U. S.)

crew which governs the exercise of the discretion of the court in taking cognizance of the cause, and all the crew are treated as of the same nationality as the vessel.[1] Mariners enlisting on board a ship of war, or vessel belonging to a sovereign State, cannot sue in admiralty.[2]

c. PLEADINGS.—To entitle the seaman to wages he must in his libel not only state that he contracted by the shipping articles to serve on board the vessel for a certain voyage, but also that he performed his contract, or if not, that he was prevented from so doing by some circumstance which amounts to a legal excuse.[3] Matters of defense must be pleaded in the answer. Where a new clause in the shipping articles is relied upon to repel a claim for wages, it must be pleaded. If not pleaded, the court must infer that the articles are in legal form.[4] So acts of misbehavior or other causes of forfeiture of wages, must be distinctly set out in the answer in order to be admissible at the hearing.[5]

d. PARTIES.—Seamen may sue jointly for their wages in admiralty but not at common law. Though they may join in admiralty in a suit for wages, a decree against one does not affect the claims of the rest.[6] Either the owner or the master may be made defendant, but they cannot be joined.[7]

VI. PROVISIONS.—A ship is bound to maintain seamen while in her service.[8] The matter of furnishing provisions is regulated by statute.[9] In case the statutory allowance is reduced during the voyage or is bad in quality and unfit for use a seaman may

455; Covert *v.* The British Brig Wexford, 3 Fed. Rep. 577; The Havana, 1 Sprague (U. S.) 402.

A claim for wages and a discharge, by a Swedish seaman, in consequence of the cruelty of the master, was sustained in the admiralty, although it appeared that Swedish mariners are not permitted, by the law of Sweden, to sue in the courts of foreign nations. Weiberg *v.* The St. Oloff, 2 Pet. Adm. 428.

1. The Amalia, 3 Fed. Rep. 652; The Montapedia, 14 Fed. Rep. 427.

2. Moitez *v.* The South Carolina, Bee Adm. 422; De Mortez *v.* The South Carolina, Hopk. Cas. 104; Packard *v.* Sloop Louisa, 2 Woodb. & M. (U. S.) 54; Ellison *v.* The Bellona, Bee Adm. 112.

3. Wilcocks *v.* Palmer, 3 Wash. (U. S.) 248.

In a libel for wages, the correct and usual course is to state the facts of hiring, the voyage, etc., in distinct articles. Orne *v.* Townsend, 4 Mason (U. S.) 541.

4. Heard *v.* Rogers, 1 Sprague (U. S.) 556.

5. Orne *v.* Townsend, 4 Mason (U. S.) 541.

6. Oliver *v.* Alexander, 6 Pet. (U. S.) 143.

7. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81.

8. Collins *v.* Wheeler, 1 Sprague (U. S.) 188. Where a seaman ships "by the run", or "by the voyage," the vessel, although detained at an intermediate port by stress of weather, is bound to maintain him while he remains attached to her, whether his services are useful to her or not. Miller *v.* Kelly, Abb. Adm. 564.

Where a mate had on board his vessel a private adventure, consisting of provisions, which were used for the necessary support of himself and of the crew — held, that he was entitled to recover, as enhanced wages, the value of the part consumed for his own support, and to be allowed, out of a surplus in court, the value of the supplies beyond his own support. The Rodney, B. & H. Adm. 226.

9. Section 4564 of U. S. Rev. St. requires that each vessel before leaving port must have on board, well secured,

recover by way of compensation for such reduction or bad quality, certain sums in addition to his wages.[1] To subject the masters or owners to the liability of the statute, the crew must be put on short allowance; there must be some order or command to that effect given, or gross negligence in the master. An accidental or unintentional deficiency in the weight will not subject the master or owner to the penalty.[2] If the crew are put upon an allowance, and there is a controversy, whether it be short or not, the navy ration is assumed as the standard of proper allowance.[3]

Where a vessel sails without the statute quantity of bread and the crew are put upon short allowance, it is no defense to their claim for extra wages that flour was furnished as a substitute;[4] nor that beef was given.[5] It is no excuse for not serving out lime juice to the crew daily, that the seamen preferred to receive coffee.[6] The owner is bound by his contract to furnish his seamen suitable subsistence. What is suitable depends upon what is usual in similar voyages.[7] If the food specified in the act cannot be obtained by reasonable exertions, the master may exercise a certain discretion in supplying wholesome and better food of such kinds as can be most economically procured.[8] The article substituted must be, however, a full equivalent both in quantity and quality for that required by law.[9] Extra wages are not given where the necessity of short allowance springs from the

under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship bread for every person on board besides such other provisions, stores, and livestock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages.

1. U. S. Rev. Sts. § 4568. See The John L. Dimmick, 3 Ware (U. S.) 196.

It is sufficient to entitle the crew to extra wages under U. S. Act of 1790, § 9, that there is a deficiency in either bread, meat or water. The Mary Paulina, 1 Sprague (U. S.) 45. For a short allowance of all three, the crew are entitled to triple extra wages. Collins *v.* Wheeler, 1 Sprague (U. S.) 188; The Mary, 1 Ware (U. S.) 454; The Hermon, 1 Low. (U. S.) 515.

Where one article of provision (bread) was less than the quantity required by the act of Congress, but there was a sufficiency of the other articles, the seamen recovered one-third additional wages on account of such deficiency. Coleman *v.* The Harriet, Bee Adm. 80.

While mariners properly remain by their vessel, if subsistence be not furnished them by the master, they may recover the amount which they have properly paid therefor. The Gazelle, 1 Sprague (U. S.) 378.

2. Ship Elizabeth *v.* Rickers, 2 Paine (U. S.) 291. See The Childe Harold, Olc. Adm. 275; The John L. Dimmick, 3 Ware (U. S.) 196; Ferrara *v.* The Talent, Crabbe (U. S.) 216.

A crew can claim nothing by reason of having been put on short allowance so as to share with a shipwrecked crew, or for a delay caused by being compelled to winter in Northern seas through no fault of the master or owners. Burdett *v.* Williams, 27 Fed. Rep. 113.

3. The Mary, 1 Ware (U. S.) 454; The Mary Paulina, 1 Sprague (U. S.) 45; Mariners *v.* The Kensington, 1 Pet. Adm. 239; Gardner *v.* The New Jersey, 1 Pet. Adm. 224.

4. Foster *v.* Sampson, 1 Sprague (U. S.) 182.

5. The Mary Paulina, 1 Sprague (U. S.) 45; Coleman *v.* The Harriet, Bee Adm. 80.

6. Anderson *v.* The Reuce, 46 Fed. Rep. 805.

7. Collins *v.* Wheeler, 1 Sprague (U. S.) 188.

8. Mariners *v.* Ship Kensington, 1 Pet. Adm. 239.

9. The Mary, 1 Ware (U. S.) 454.

perils of the sea or accident, or from the delivery of a part of the provisions to another vessel in distress.[1]

VII. SEAWORTHINESS OF SHIP.—The duty of the master to provide a seaworthy ship is implied in shipping contracts;[2] and the means of ascertaining her condition are provided by statute.[3] Under these provisions the condition of the vessel may be determined by a regular survey at home or abroad on the complaint of the mate and a majority of the seamen.[4] If they really believe, upon good reasons, that the vessel is unseaworthy, they may refuse to go to sea in her,[5] and may resist an attempt to compel them to do so, without being guilty of a revolt.[6] After the voyage has commenced, the right of survey is to be exercised under the fair and reasonable discretion of the master as to time and mode of landing, and the refusal of seamen to do duty is justifiable only when the refusal is necessary to prevent a loss of their rights;[7] and the master is liable in damages for his refusal to permit the exercise of their rights.[8] The cost of the survey cannot be charged to the seamen if there was a reasonable cause for the complaint; but if the complaint appears to be without

1. Thus, where seamen shipped on a voyage and the vessel was, on account of stress of weather and not by the negligence of the captain, detained, their supply of provisions was shared with a shipwrecked crew and provisions grew scarce, and for a time they were on short allowance and suffered greatly from the rigor of the climate, it was held that the owners of the vessel were not bound to pay extra wages during such detention or for the scarcity of provisions, the scarcity being occasioned by sharing with another crew in distress. Burdett *v.* Williams, 27 Fed. Rep. 113.

2. Dixon *v.* The Cyrus, 2 Pet. Adm. 407; Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420; The Lizzie Frank, 31 Fed. Rep. 479.

In the whaling business, the owner is bound to provide a suitable vessel to bring home the oil. Jay *v.* Allen, 1 Sprague (U. S.) 130.

3. U. S. Rev. Sts., § 4556.

4. See U. S. Act, July 20, 1790, ch. 29, § 3; U. S. Sts. at L. 132; Act July 20, 1840, ch. 48, §§ 12, 13, 14; 5 Sts. at L. 396.

5. The Shawnee, 45 Fed. Rep. 770; U. S. *v.* Nye, 2 Curt. (U. S.) 225; U. S. *v.* Givings, 1 Sprague (U. S.) 75; The Moslem, Olc. Adm. 289; The Hibernia, 1 Sprague (U. S.) 78; Bucker *v.* Klorkgeter, Abb. Adm. 402; U. S. *v.* Ashton, 2 Sumn. (U. S.) 13; U. S. *v.* Staly, 1 Woodb. & M. (U. S.) 338.

Where seamen knew that a vessel was leaking three or four inches an hour while in port; that she came in from sea in a leaking state, and they shipped on board mainly to help pump her on her home voyage, held that they were not absolved from their contract because the leak continued or even increased on the voyage if she was seaworthy when she left port. The Moslem, Olc. Adm. 289.

6. U. S. *v.* Ashton, 2 Sumn. (U. S.) 13; U. S. *v.* Givings, 1 Sprague (U. S.) 75.

If after commencing the voyage, the crew became apprehensive of great danger from the unseaworthiness of the vessel, it is not disorderly or mutinous conduct for them in a body to apply respectfully to the officers and urge that the ship be put back to port. The Moslem, Olc. Adm. 289.

On an indictment for an endeavor to commit a revolt, it is sufficient defense of the parties accused that the combination as an endeavor was to compel the master to return into port for the unseaworthiness of the vessel if they act *bona fide* and the vessel is actually unseaworthy; but if the vessel in such case be clearly seaworthy, it is no defense. U. S. *v.* Ashton, 2 Sumn. (U. S.) 13.

7. Desty on Shipp. & Adm., § 152; Jones *v.* Williams, 1 Curt. (U. S.) 69.

8. Knowlton *v.* Boss, 1 Sprague (U. S.) 163. See U. S. Rev. Sts., § 4559; Desty on Shipp. & Adm., § 152.

foundation, the cost and a reasonable sum for the detention shall be paid out of the wages of the crew.[1] If the vessel is found to be unseaworthy the crew are released, and become entitled to their full wages for the month, or for the voyage, with the allowance of a reasonable time for a return to the port of departure.[2]

VIII. Disabled Seamen.—The general maritime law imposes the obligation upon shipowners or masters to provide suitable care and medical treatment for seamen who become disabled by sickness or injuries received in the discharge of their duties, whether at home or abroad, at sea or on land.[3] Seamen taken sick or receiving injuries in the service of the ship are entitled to be treated at the expense of the ship, unless such injuries are received in consequence of their own gross carelessness.[4] This is

1. The William Harris, Ware (U. S.) 367; 2 Parsons on Shipp. & Adm. 69.

2. The Heroe, 21 Fed. Rep. 525.

3. 2 Parsons on Shipp. & Adm., 81 Laws of Wisbuy art. 19; Laws of Oleron, arts. 6, 7; Molloy, 243; Laws of the Hanse town, art. 39; L'Ord de la Mar, lib. 3, tit. 4, art. 11; Pothier on Maritime Contracts, n. 190; Cushing's Translation 115; Valin, Com. tome 1, p. 721; Walton *v.* The Neptune, 1 Pet. Adm. 142; The Forest, 1 Ware (U. S.) 420; Pothier Us et Coust. de la Mer, p. 31; Swift *v.* The Happy Return, 1 Pet. Adm. 253, 256, n.; Lamson *v.* Westcott, 1 Sumn. (U. S.) 591; Freeman *v.* Baker, B. &. H. Adm. 382; Nevitt *v.* Clarke, Olc. Adm. 316; Harden *v.* Gordon, 2 Mason (U. S.) 541; The Brig George, 1 Sumn. (U. S.) 151; Reed *v.* Canfield, 1 Sumn. (U. S.) 197; Crapo *v.* Allen, 1 Sprague (U. S.) 184; Croucher *v.* Oakman, 3 Allen (Mass.) 185. See Brown *v.* Overton, 1 Sprague (U. S.) 462; The Ben Flint, 1 Abb. (U. S.) 126; The Centennial, 4 Woods (U. S.) 50; Peterson *v.* Swan, 50 N. Y. Super. Ct. 46.

The engineer of a tug-boat was injured by an explosion on the boat at the home port of Philadelphia. The officer in charge summoned a physician, who attended him on the boat, and at his own house, whither he was carried at his own request. *Held*, that the owner was liable for the physician's services. Holt *v.* Cummings, 102 Pa. St. 212; 48 Am. Rep. 199.

The fact that the disease of the seaman is malignant and infectious will afford no justification or excuse to the master for setting him ashore, without any provision for his care, his subsistence, or his proper medication. Tomlinson *v.* Hewett, 2 Sawy. (U. S.) 278.

Fishermen on mackerel voyages in licensed and enrolled vessels, come so far within the general rule relating to hired seamen, as to be entitled to be cured at the ship's expense. Knight *v.* Parsons, 1 Sprague (U. S.) 279.

The failure of a freighting vessel to provide a physician or nurse for a sick sailor during a voyage is no neglect of the duty owed to the seaman by the shipowner. McCormack *v.* The Wensleydale, 41 Fed. Rep. 602.

4. Walton *v.* The Neptune, 1 Pet. Adm. 142; Brown *v.* The Bradish Johnson, 1 Woods (U. S.) 301; The Atlantic, Abb. Adm. 478; The Ben Flint, 1 Abb. (U. S.) 131; 1 Biss. (U. S.) 567; Ringold *v.* Crocker, Abb. Adm. 344; Hart *v.* Littlejohn, 1 Pet. Adm. 115; Freeman *v.* Baker, B. & H. Adm. 372; The Sarah Jane, B. & H. Adm. 411; Harden *v.* Gordon, 2 Mason (U. S.) 541; Myers *v.* The Lizzie Hopkins, 1 Woods (U. S.) 170; Holmes *v.* Hutchinson, Gilp. (U. S.) 450; The Nimrod, Ware (U. S.) 9; Brown *v.* The D. S. Cage, 1 Woods (U. S.) 405; Nevitt *v.* Clarke, Olc. Adm. 322; The Forest, Ware (U. S.) 421; Reed *v.* Canfield, 1 Sumn. (U. S.) 195; Brown *v.* Overton, 1 Sprague (U. S.) 462; Brig George, 1 Sumn. (U. S.) 153; Neilson *v.* The Laura, 2 Sawy. (U. S.) 244; Somerville *v.* The Francisco, 1 Sawy. (U. S.) 393; The Ocean Spray, 4 Sawy. (U. S.) 105; Johnson *v.* Huckins, 1 Sprague (U. S.) 67; Pierce *v.* Patton, Gilp. (U. S.) 435.

Where a seaman contracts disease by his own vices and faults, and in defiance of the counsel and command of his superior officers, the vessel is not

not only the law of *England* and the *United States* but apparently of every civilized nation possessing a maritime code.[1] But as to how long this obligation remains in force is not well settled. Many authorities hold that seamen who are disabled by reason of sickness or injury without fault on their own part, are entitled to be taken care of until the end of the voyage and longer if necessary to effect a cure,[2] while other cases show a tendency to limit the obligation of taking care of disabled seamen to the termination of their contracts and their return to their homes or to a marine hospital.[3]

chargeable for the expense of his cure. Pierce *v.* Patton, Gilp. (U. S.) 435.

The right of a seaman who is hurt or falls sick in the service of the vessel to be cured at the expense of the ship, is not diminished by the fact that his negligence or that of a fellow servant contributed to the injury. The City of Alexandria, 17 Fed. Rep. 390.

The fault which will exempt a vessel from such liability is not mere ordinary negligence consistent with good faith, but some positively vicious conduct; such as gross negligence or willful disobedience of orders. The Chandos, 6 Sawy. (U. S.) 544; The Ben Flint, 1 Abb. (U. S.) 126; 1 Biss. (U. S.) 562; Morgan *v.* The Ben Flint, 6 Am. L. Reg., N. S. 707; *compare* The Explorer, 20 Fed. Rep. 135.

To Whom the Rule Applies.—A mate succeeding to the command of the ship upon the death of the master, does not thereby lose his character as mate, and is entitled to be cured at the expense of the ship in the same manner as a seaman. Brig George, 1 Sumn. (U. S.) 150.

Sailors on the lakes are merchant seamen and are entitled, in a proper case, to be cured at the expense of the vessel, if taken sick or hurt without their fault while in the service of the vessel. The Ben Flint, 1 Biss. (U. S.) 562; 1 Abb. (U. S.) 131; 6 Am. L. Rep., N. S. 707.

The rule applies to fishermen employed on mackerel voyages in licensed and enrolled vessels. Knight *v.* Parsons, 1 Sprague (U. S.) 279.

Also to firemen employed on board a steamer. The North American, 5 Ben. (U. S.) 486.

A seaman was employed to come on board a steam barge and assist in changing her berth. He received personal injuries while doing this. *Held*, that he was not within the rule which entitles seamen to medical treatment at the expense of the ship, his injuries not being caused by negligence on the part of any of the officers of the barge. The John B. Lyon, 33 Fed. Rep. 184.

1. The J. F. Card, 43 Fed. Rep. 92; Reed *v.* Canfield, 1 Sumn. (U. S.) 195.

2. The Lizzie Frank, 31 Fed. Rep. 477; Peterson *v.* Chandos, 4 Fed. Rep. 645; Longstreet *v.* Steamboat Springer, 4 Fed. Rep. 671; The City of Alexandria, 17 Fed. Rep. 390; Reed *v.* Canfield, 1 Sumn. (U. S.) 195. See The Wensleydale, 41 Fed. Rep. 829.

A seaman who is injured in the service of the ship without the fault either of himself or the ship, can recover no compensation by way of damages from the ship, but is entitled to be healed at the expense of the ship even after the voyage is terminated and the seaman is discharged. The Lizzie Frank, 31 Fed. Rep. 477. See Peterson *v.* The Chandos, 4 Fed. Rep. 645.

3. The Tammerlane, 47 Fed. Rep. 822; The J. F. Card, 43 Fed. Rep. 92; The City of Carlisle, 39 Fed. Rep. 807; The City of Alexandria, 17 Fed. Rep. 390.

In The J. F. Card, 43 Fed. Rep. 92, the court, by Brown, J., said: "The real question in this case is, how long does this obligation remain in force? Does it continue indefinitely, until the seaman is cured, or does it cease upon the completion of the voyage, or of his contract of hiring? If we are to accept the authority of Reed *v.* Canfield, 1 Sumn. (U. S.) 195, as applicable to this case, we should be obliged to hold that the liability continued until the cure was complete, at least so far as the ordinary medical means extend. . . . Subsequent cases have tended to limit the doctrine of Reed *v.* Canfield, 1 Sumn. (U. S.) 195, and it is doubtful if it can any longer be

The expenses in curing sick seamen include, by the maritime law, not only medicines and medical advice, but nourishing diet and lodging if the seamen be actually ashore.[1] The statute requiring each vessel to have a medicine chest does not relieve shipowners or masters of the obligation of providing suitable care and medical treatment for seamen who become disabled, unless the medicine chest is provided with medicines and means of medical treatment which the particular case requires, and there is sufficient skill on board to make a proper use of those medicines.[2]

accepted as law. In Nevitt *v.* Clarke, Olc. Adm. 316, Judge Betts criticised this case, and held that the privilege of seamen to be cured at the expense of the ship continued no longer than the right to wages under their contract. 'It is manifest,' says he, 'that a construction of this law, which should charge owners of vessels with the support of sick crews without limitation of time, would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil.' The question was also considered by Judge Miller, of the district court of Wisconsin, in The Ben Flint, 1 Biss. (U. S.) 562, in which he held the ancient maritime rule applicable to seamen upon the lakes as well as upon the high seas; but, after a full review of American cases, came to the conclusion 'that in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for disabled or sick seamen should only be co-extensive in duration to that of the seamen to the vessel.' He denied the libelant relief for any expenses incurred after his arrival at the port of discharge. The question was again considered by Judge Betts in the case of The Atlantic, Abb. Adm. 451, and he adhered to the principle 'that a seaman has no claim upon a ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so.' The question was also considered by Judge Brown, with his usual care, in The City of Alexandria, 17 Fed. Rep. 390, in which he came to the conclusion that 'the maritime law affords no sanction for any claim to compensation beyond that already received by the libelant in due medical care and treatment, and wages to the end of the voyage.'

"Of course, if there be any negligence or misconduct on the part of the officers of the vessel, this would furnish a separate ground for action, in which the seaman would recover, not only his expenses for medical attendance, etc., but compensation for his personal injuries, as in ordinary cases of negligence. . . . To say that the obligation of the ship extends to the cure of every man of these crews who happens to be taken sick or receives an injury while upon the vessel, no matter how long the disability may continue, would be imposing a burden upon vessel owners far beyond that contemplated by law, or required in the interests of humanity."

1. Harden *v.* Gordon, 2 Mason (U. S.) 541; The Forest, 1 Ware (U. S.) 420; Brown *v.* Overton, 1 Sprague (U. S.) 462; Brurient *v.* Taber, 1 Sprague (U. S.) 243; The Nimrod, 1 Ware (U. S.) 9; The Atlantic, 1 Newb. Adm. 447; The Brandywine, 1 Newb. Adm. 5; Holmes *v.* Hutchinson, Gilp. (U. S.) 447.

A seaman shipped on board a vessel, on a voyage from Philadelphia to Port au Prince, and, while at the latter place, he fell sick of yellow fever, and was asked by the captain if he would rather remain on board, or go ashore to the "Maison de Santé." He chose the latter, and was removed to the hospital. *Held*, that the hospital bill was properly chargeable to the vessel and owner, and that the seaman was entitled to receive his whole wages without deduction. Johnson *v.* Doubty, 1 Ashm. (Pa.) 165.

2. See 2 Parsons on Shipp. & Adm. 81. See The Chandos, 6 Sawy. (U. S.) 544.

Where the master and mate, and four of the men were sick with the yellow fever at the same time—held, that

Where marine hospitals are established and supported by deductions from seamen's wages, a seaman, compelled to leave the vessel by reason of injuries received while in her service, cannot charge the owners with the expense of his medical attendance, board, and nursing, when he has an opportunity to resort to such a hospital and be treated free of expense to himself and to the owners of the ship.[1] So where a seaman has been placed in such a hospital, he cannot leave and recover from the vessel expenses thereafter incurred by him at a private hospital.[2] If the hospital is in a port other than that at which he was shipped, he is entitled to his passage home or the cost thereof.[3]

IX. RIGHT TO DAMAGES.—A seaman who has been compelled unlawfully to leave the ship may sue in admiralty for damages.[4] In estimating damages, every loss incurred by the discharge, such as wages,[5] expenses incurred in returning to the country of his departure,[6] clothes, etc., will be included.[7] If personal violence is inflicted not excessively but wantonly and without provocation or cause, he may recover damages for assault and battery.[8] If the assault is made with provocation or cause and

the owners were bound to pay the expenses of the attendance and advice of a physician, although a suitable medicine chest had been provided. The Forest, Ware (U. S.) 420.

1. The J. F. Card, 43 Fed. Rep. 93. See The Centennial, 4 Woods (U. S.) 50.

2. Raymond *v.* The Ella S. Thayer, 40 Fed. Rep. 902. See Richardson *v.* The Juillette, 2 N. Y. Leg. Obs. 23; The Centennial, 10 Fed. Rep. 397.

3. Harvey *v.* Smith, 35 Fed. Rep. 367; The Centennial, 10 Fed. Rep. 397. A seaman, being sick and unable to work, was sent to a hospital by the master, and was, without his consent and without his discharge, left there when the vessel sailed from that port. *Held*, that he was entitled to his wages up to the end of the voyage or until he could get back to his home port. Heynsohn *v.* Merriman, 1 Fed. Rep. 728.

4. Highland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222; Dary *v.* The Caroline Miller, 36 Fed. Rep. 507. See The Ben Flint, 1 Biss. (U. S.) 568; 1 Abb. (U. S.) 133; Brown *v.* The Independence, Crabbe (U. S.) 54; Croucher *v.* Oakman, 3 Allen (Mass.) 185; The Dolphin, 6 Ben. (U. S.) 402.

A master and crew wrongfully discharged by the owner of a fishing vessel from employment under a contract for the entire season, wages to be in the ratio of the quantity of fish caught, may recover damages for such discharge based on the amount they would have received as wages on the catch of the whole season, less the amount actually paid them and any wages earned by them during the season after their discharge. Fee *v.* Orient Guano Mfg. Co., 44 Fed. Rep. 430.

5. Dary *v.* The Caroline Miller, 36 Fed. Rep. 507; The Orient Guano Mfg. Co., 44 Fed. Rep. 430.

6. Emerson *v.* Howland, 1 Mason (U. S.) 51.

The clothes of a seaman who had been detained on shore by the civil authorities were without his knowledge, left with the ship-chandler when the ship sailed. *Held*, that the vessel was not liable for their value. The Lizzie M. Dun, 30 Fed. Rep. 927.

7. Highland *v.* The Harriet C. Kerlin, 41 Fed. Rep. 222.

8. Forbes *v.* Parsons, Crabbe (U. S.) 283; Desty's Shipp. & Adm., § 156. See The Philadelphia, Olc. Adm. 220; Butler *v.* M'Lellan, 1 Ware (U. S.) 229; Fuller *v.* Colby, 3 Woodb. & M. (U. S.) 10; Relf *v.* The Maria, 1 Pet. Adm. 186; Whitton *v.* Brig Commerce, 1 Pet. Adm. 160; Densman *v.* Wilkes, 12 How. (U. S.) 390.

A seaman is entitled to recover damages for an assault and battery: 1. When personal violence has been

the punishment is cruel or excessive, he will be entitled to damages.[1] If a mariner is injured by the ill-usage of officers whom the owners of the vessel have employed, the officers will be responsible.[2] They are liable in damages for loss or injury to a mariner from carelessness, negligence, and willful misconduct in the case of personal injury.[3] The statute[4] which gives any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of any of the officers of a vessel, or their refusal or neglect to obey the provisions of law, a remedy against such officers does not, however, preclude a mariner from proceeding against the vessel for damage suffered by himself in consequence of such neglect or misconduct.[5] A seaman, injured in the service of a vessel through the concurrent fault of the vessel and his own, is entitled, where his own negligence has not been gross, to be cared for, at least, to the end of the voyage; and he may recover damages for the gross neglect and maltreatment of the officers of the vessel after such injury.[6]

The right of a seaman, who is hurt or falls sick in the service of the vessel, to be cured at the expense of the ship, does not extend to a claim of money damages against the ship or owners.

inflicted, if not excessively, yet wantonly and without provocation. 2. Where there was provocation and cause, but the punishment was excessive. 3. Where the punishment was inflicted with a deadly or dangerous weapon. Forbes *v.* Parsons, Crabbe (U. S.) 283.

1. Padmore *v.* Piltz, 44 Fed. Rep. 104; Spencer *v.* Kelley, 32 Fed. Rep. 838; Forbes *v.* Parsons, Crabbe (U. S.) 283; Elwell *v.* Martin, 1 Ware (U. S.) 53.

In Hanson *v.* Fowle, 1 Sawy. (U. S.) 539, the master and mate were held liable in damages for the unjustifiable beating of a seaman which was so excessive as to break his arm.

2. Anderson *v.* Ross, 2 Sawy. (U. S.) 91; Riley *v.* Allen, 23 Fed. Rep. 46.

The officers of a steamboat are liable for injuries caused by severely beating a deck hand or roustabout. Riley *v.* Allen, 23 Fed. Rep. 46.

3. See The Lizzie Frank, 31 Fed. Rep. 477; Myers *v.* The Lizzie Hopkins, 1 Woods (U. S.) 170; The Noddleburn, 28 Fed. Rep. 855; Withcofsky *v.* Wier, 32 Fed. Rep. 301; The City of Carlisle, 39 Fed. Rep. 807.

4. U. S. Act Feb. 28, 1871, § 43; 16 Stat. at L. 453.

5. Brown *v.* The D. S. Cage, 1 Woods (U. S.) 401; Withcofsky *v.* Wier, 32 Fed. Rep. 301; The A. Heaton, 43 Fed. Rep. 592.

If a shipowner furnishes, for unloading, a defective derrick, and it falls, injuring a seaman, he is entitled in admiralty to damages on principles analogous to those applied by the common-law court in the case of injuries to a servant by the neglect of his master to furnish proper appliances. The Edith Golden, 23 Fed. Rep. 43.

Whether a court of admiralty proceeds against the owner for personal injuries inflicted by the mate upon one of the crew upon a distinctive principle of its own growing out of the relation of the crew to the owner of the vessel, or only on the common-law principle of master and servant, if the mate strike and injure the libelant while both are engaged in loading the vessel, intending to enforce obedience to his orders or to drive him to more efficient work, the owner is liable for the injury *in personam* in the admiralty. The General Rucker, 35 Fed. Rep. 152.

But in Spencer *v.* Kelley, 32 Fed. Rep. 838, the owner is held liable for an injury inflicted upon a seaman by an officer only when the act is done in the scope of the officer's duty.

6. The City of Carlisle, 39 Fed. Rep. 807; The Wanderer, 20 Fed. Rep. 140; The Chandos, 6 Sawy. (U.

beyond expenses of the cure.[1] But if the injury is aggravated and made permanent by reason of the neglect of the master to provide suitable medical aid, the master or owners may be liable to damages.[2] So where a disease makes its appearance among a crew by reason of a disregard of statutory requirements, the ship is liable for the damages caused by the disease, unless it is proved or there is reason to suspect that the seeds of the disease were contracted by the men on a previous voyage.[3]

X. PUNISHMENT—1. Generally.—The master has a right to require of seamen a prompt and ready performance of duty and habitual obedience to reasonable commands at all times.[4] The law gives him authority to inflict personal chastisement to compel obedience to his commands, but care must be taken that punishment be administered with due moderation. When a master attempts to assault a seaman, even for disobedience of orders, unless in a case of great emergency, the seaman may endeavor to escape, and, if pursued by the master or other officer and a repetition of the assault is made, the seaman may lawfully resist in such a manner as to protect himself from injury. And if the assault upon the seaman is made with a deadly weapon or other injurious weapon, he is entitled to use equivalent and necessary force in his own protection. The same rule would apply

S.) 544. *Compare* The E. B. Ward, Jr., 20 Fed. Rep. 702.

1. The City of Alexandria, 17 Fed. Rep. 390. See Brown *v.* The Bradish Johnson, 1 Woods (U. S.) 301; The Lizzie Frank, 31 Fed. Rep. 477.

2. The Scotland, 42 Fed. Rep. 925; The Vigilant, 30 Fed. Rep. 288. See Brown *v.* Overton, 1 Sprague (U. S.) 426; Scarff *v.* Metcalf, 36 Hun (N. Y.) 202; The Chandos, 6 Sawy. (U. S.) 544.

On the question of whether the master of a vessel was in fault in not putting ashore for surgical treatment a seaman who had broken his leg, all the circumstances of the case are to be considered. If the master acted in good faith, and in the exercise of a reasonable judgment, the owner may not be liable for an aggravation of the injury caused by delay in treatment. Danvir *v.* Morse, 139 Mass. 323.

The fact that the master sails the vessel on shares will not free the owners from liability. Petersen *v.* Swan, 53 N. Y. Super. Ct. 151; Scarff *v.* Metcalf, 107 N. Y. 211.

But the ship is not liable for medical assistance furnished to a seaman who has declined the master's offer to furnish it. The Ella S. Thayer, 12 Sawy. (U. S.) 409.

A seaman was accidentally injured while in the service of a steamboat. The steward examined the injury and thought the hurt was not serious and applied simple remedies. Eleven days after the accident he entered a marine hospital, and it turned out that he had sustained a partial lateral dislocation of the knee-joint and was liable to be permanently disabled. He did not ask to be sent to a marine hospital while being treated on the boat, nor for a surgeon. There was evidence that he did not receive proper attention at the hospital. *Held*, that he had no cause of action against the owners of the boat. Campbell *v.* The Frank Gilmore, 43 Fed. Rep. 318.

3. Anderson *v.* The Rence, 46 Fed. Rep. 805.

4. U. S. *v.* Freeman, 4 Mason (U. S.) 508. See Morris *v.* Cornell, 1 Sprague (U. S.) 62.

It is not a reasonable command for the master to order the mate to slush the masts, or to take in light sails, as a punishment, when no offense had been committed that would justify it, and he has a right to refuse obedience. Foye *v.* Leckie, 1 Sprague (U. S.) 210.

In order to justify the punishment of a seaman found secreted on board for refusal to obey, the master must

if the assault should be made by an officer without a deadly weapon, if the assault were of a character which would subject the seaman to serious bodily harm.[1] He not only has the right to resist such punishment, but he may receive compensation in damages on his return to port, in an action at common law.[2] So when the crew have good reason to believe, and do believe, that they will be subjected to unlawful and cruel or oppressive treatment, or that a great wrong is about to be inflicted on one of their number, they have a right to take reasonable measures for his or their own protection.[3] In every case where punishment is applied, the master is responsible both civilly and criminally if he wantonly exceeds the measure of justice.[4] But where it is apparent that the punishment of a seaman is merited, the court will not undertake to adjust very exactly, according to its own

prove that before giving the order he informed himself as to the seaman's experience and capacity, and ascertained that he was able to perform the work required of him. Allen *v.* Hallet, Abb. Adm. 573.

Salvage Service.—The master has no right to compel the mate to perform a salvage service; and if he does perform one by the order of the master, without objection, he is to be considered as a volunteer. Williamson *v.* The Alphonso, 1 Curt. (U. S.) 376.

1. U. S. *v.* Beyer, 31 Fed. Rep. 35; The Palledo, 3 Ware (U. S.) 321; U. S. *v.* Smith, 3 Wash. (U. S.) 525; Bangs *v.* Little, 1 Ware (U. S.) 506. See Benton *v.* Whitney, Crabbe (U. S.) 417.

The master of a ship has a right to use coercive measures to compel obedience to his lawful orders to suppress resistance or mutinous conduct. Fuller *v.* Colby, 3 Woodb. & M. (U. S.) 1; U. S. *v.* Alden, 1 Sprague (U. S.) 95; U. S. *v.* Wickham, 1 Wash. (U. S.) 316. See Gardner *v.* Bibbins, B. & H. Adm. 356; Sheridan *v.* Furbur, B. & H. Adm. 423; U. S. *v.* Wiltburger, 3 Ware (U. S.) 515; Cushman *v.* Ryan, 1 Story (U. S.) 91; Turner's Case, 1 Ware (U. S.) 83; Carleton *v.* Davis, Davies (U. S.) 221; Wilson *v.* The Mary, Gilp. (U. S.) 31; Michaelson *v.* Dennison, 3 Day (Conn.) 294; Brown *v.* Howard, 14 Johns. (N. Y.) 119; Sampson *v.* Smith, 15 Mass. 365; Aertsen *v.* Brady, Bee Adm. 161; Matthews *v.* Terry, 10 Conn. 455; Heming *v.* Ball, 1 Bay (S. Car.) 3.

He may use a deadly weapon when necessary in order to suppress a mutiny. Roberts *v.* Eldridge, 1 Sprague (U. S.) 54; U. S. *v.* Colby, 1 Sprague (U. S.) 119; Fuller *v.* Colby, 3 Woodb. & M. (U. S.) 1.

In case of desertion and persistent refusal to perform duty, the master may inflict punishment and use means of coercion; but they must not be such as will be permanently injurious to the health or constitution of the seaman. U. S. *v.* Alden, 1 Sprague (U. S.) 95.

The second mate being commanded by the master to desist from swearing, his retorting on the master that he had heard him swear, and stating the language, is no justification to the master for violently assaulting and inflicting a blow upon such mate. Morris *v.* Cornell, 1 Sprague (U. S.) 62.

2. Watson *v.* Christie, 2 B. &. P. 224; Forbes *v.* Parsons, Crabbe (U. S.) 283. See *supra*, this title, *Right to Damages*.

In a libel by a cook against the master of an American vessel, it was shown that the master punished the cook for willful disobedience on board of the vessel in port by assaulting and striking him upon his head with a belaying-pin, seriously injuring him. *Held*, that the libelant should recover as damages $1,500 besides the value of personal effects lost in consequence of the injury. Padwell *v.* Piltz, 44 Fed. Rep. 104.

The mate of a Mississippi river steamboat struck one of the crew with a monkey-wrench. *Held*, that a libel in the admiralty was maintainable, and that $100 should be allowed. The General Rucker, 35 Fed. Rep. 152.

3. U. S. *v.* Borden, 1 Sprague (U. S.) 374.

4. U. S. *v.* Freeman, 4 Mason (U. S.) 512.

ideas of fitness and propriety, the balance between the gravity of the offense and the quantity of punishment, and will not award damages unless the punishment is manifestly excessive.[1] The old forms of punishment, such as flogging and the use of the cat, have been abolished.[2] Forfeiture of wages,[3] irons,[4] confinement on board,[5] imprisonment on shore,[6] and hard labor, are the punishments now generally resorted to, to enforce obedience and good conduct.[7]

The master has generally the sole authority, when on board, to authorize punishment to be inflicted on any of the crew, and if he is present when punishment is inflicted by a subordinate officer and can prevent it and does not, he is personally responsible for the act, and by his acquiescence adopts it as done by his authority.[8] The master cannot delegate to a subordinate officer a general authority to inflict punishment at his own pleasure for any offense of the crew. The authority of any subordinate officer to punish exists only when it is at the moment absolutely required by the necessity of the ship's service to compel the performance of duty.[9] He is not justified

1. Butler *v.* M'Lellan, 1 Ware (U. S.) 219.

2. 2 Parsons on Shipp. & Adm. 90; Payne *v.* Allen, 1 Sprague (U. S.) 304; The General Rucker, 35 Fed. Rep. 152; U. S. *v.* Cutler, 1 Curt. (U. S.) 501.

3. Thorne *v.* White, 1 Pet. Adm. 168; Relf *v.* The Maria, 1 Pet. Adm. 186; Atkyns *v.* Burrows, 1 Pet. Adm. 244; Buck *v.* Lane, 12 S. & R. (Pa.) 266.

4. Macomber *v.* Thompson, 1 Sumn. (U. S.) 384; Turner's Case, Ware (U. S.) 83; Shorey *v.* Rennell, 1 Sprague (U. S.) 407; Sampson *v.* Smith, 15 Mass. 365.

5. U. S. *v.* Alden, 1 Sprague (U. S.) 95.

The master has no right to imprison a second mate for refusing to obey his order to take in light sails or to slush the masts as a punishment, no offense having been committed. Foye *v.* Leckie, 1 Sprague (U. S.) 210.

Where the voyage was ended so that the master might have discharged the offending seaman, but takes him on board again, he has no right to assault and imprison him without any new crime. Roberts *v.* Dallas, Bee Adm. 239.

A captain of a vessel is not justified in imprisoning a seaman merely on suspicion that he is a dangerous man, or on the request of the crew, unless some facts are shown rendering the truth of the charge probable; and if he detain him in custody until his effects on board are lost or sold, the captain is answerable for their value. Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262.

6. Relf *v.* The Maria, 1 Pet. Adm. 186; Wood *v.* The Nimrod, Gilp. (U. S.) 31; U. S. *v.* Ruggles, 5 Mason (U. S.) 192.

Though the master of a ship in a foreign port has a right in certain cases to imprison a mariner under his command on shore, yet he can exercise that right only in cases of flagrant offenses, and where there is a positive necessity of removing the offender. Buddington *v.* Smith, 13 Conn. 334.

7. 2 Parsons on Shipp. & Adm. 92.

8. U. S. *v.* Taylor, 1 Sumn. (U. S.) 588; Anderson *v.* Ross, 2 Sawy. (U. S.) 91.

It is the duty of the master to interpose and quell an affray between the mate and the crew, and to use such means, and such a degree of force as a competent master, of ordinary coolness, judging of the emergency upon the instant, might fairly deem necessary. Jones *v.* Williams, 1 Curt. (U. S.) 69.

9. U. S. *v.* Taylor, 2 Sumn. (U. S.) 588; U. S. *v.* Hunt, 2 Story (U. S.) 120; Shorey *v.* Rennell, 1 Sprague (U. S.) 407; Elwell *v.* Martin, 1 Ware (U. S.) 53.

A mate is not bound to obey the

in punishing a seaman for an offense which the master has condoned.[1]

In the absence of the master the mate is intrusted with the care of the ship and the government and management of the crew. His acts during this period are considered as constructively the acts of the master *pro hac vice*.[2] But he may forfeit his right to command by fraudulent, unfaithful, and illegal practices, by gross and repeated negligence or flagrant, willful, and unjustifiable disobedience, by incapacity induced by his own fault, or palpable want of skill in his profession.[3] If he wrongfully dismisses a seaman, the owners are liable therefor as the act of their agent.[4]

2. Revolt or Mutiny.—If any of the crew of an American vessel endeavor to make a revolt or mutiny on board, they are punishable by fine and imprisonment.[5] A revolt consists not only in attempts to usurp the command from the master or deprive him of it for any purpose by violence or to transfer it to another, but in resisting the master in the free and lawful exercise of his authority.[6] The offense of an endeavor to make a revolt may be committed in any kind of a vessel.[7] To sustain an indictment against seamen for revolt and confining the master, it is not necessary that the defendants should be proved individually to have used force and threats; it is sufficient if they joined in the general conspiracy and by their presence countenanced the acts of violence which compelled the captain to confine himself to the cabin or to resign his command.[8] To maintain an indictment for revolt on board an American vessel in a foreign port, it is not

order of the master when commanded to punish a mariner. Frost *v.* Hammatt, 11 Pick. (Mass.) 70.

1. Murray *v.* White, 9 Fed. Rep. 562.

2. Orne *v.* Townsend, 4 Mason (U. S.) 541.

3. Thompson *v.* Busch, 4 Wash. (U. S.) 338.

4. Orne *v.* Townsend, 4 Mason (U. S.) 541.

5. See U. S. Rev. Sts., § 5359.

6. U. S. *v.* Peterson, 1 Woodb. & M. (U. S.) 305. See U. S. *v.* Lynch, 2 N. Y. Leg. Obs. 51; U. S. *v.* Roberts, 2 N. Y. Leg. Obs. 99; U. S. *v.* Smith, 3 Wash. (U. S.) 78; U. S. *v.* Kelley, 4 Wash. (U. S.) 528; U. S. *v.* Cassidy, 2 Sumn. (U. S.) 582; U. S. *v.* Haines, 5 Mason (U. S.) 272; U. S. *v.* Keefe, 3 Mason (U. S.) 475; U. S. *v.* Savage, 5 Mason (U. S.) 460.

Where seamen overthrow the legal authority of the master with the intent to remove him against his will and to take possession of the vessel by assuming the command of navigation it is a revolt. U. S. *v.* Kelly, 11 Wheat. (U. S.) 417; 4 Wash. (U. S.) 528.

Or where the crew or any part thereof take possession of the vessel against the will and in defiance of the authority of the master, and control and navigate her against his will and orders. U. S. *v.* Hemmer, 4 Mason (U. S.) 107; U. S. *v.* Smith, 1 Mason (U. S.) 147; U. S. *v.* Bladen, Pet. (C. C.) 213; U. S. *v.* Sharp, Pet. (C. C.) 118; The Exeter, 2 C. Rob. 261.

A combination by the crew of the vessel to prevent her going to sea pursuant to the order of the master, is an attempt to commit a revolt under the act of March 3, 1885. U. S. *v.* Nye, 2 Curt. (U. S.) 255.

A refusal to do duty on account of a deviation from the voyage named in the shipping articles, does not amount at law to an endeavor to commit a revolt under the act of March 3, 1835. U. S. *v.* Matthews, 2 Sumn. (U. S.) 470.

7. U. S. *v.* Kelley, 4 Wash. (U. S.) 528.

8. U. S. *v.* Sharp, Pet. (C. C.) 118.

necessary to give documentary proof establishing the national character of the vessel; it is sufficient to prove orally that she is owned by American citizens.[1]

3. **Imprisonment.**—Imprisonment is sometimes resorted to as a punishment to enforce obedience and good conduct.[2] The practice of imprisoning disobedient seamen in foreign jails is of doubtful legality, and justified only by extreme necessity.[3] If the master wrongfully imprisons a seaman, it is a tort for which he will be liable.[4] To constitute a confinement, it is sufficient that there is a personal seizure or restraint of the seaman, although it may be for the purpose of inflicting chastisement.[5]

XI. DISCHARGE OF SEAMEN.—Masters cannot lawfully discharge seamen before complete fulfillment of their obligations without just and valid reasons.[6] The justification of the master in dis-

1. U. S. *v.* Seagrist, 4 Blatchf. (U. S.) 420.

2. U. S. *v.* Ruggles, 5 Mason (U. S.) 192; Wood *v.* the Nimrod, Gilp. (U. S.) 83; Relf *v.* The Maria, 1 Pet. Adm. 186.

Under the act of Congress, authorizing the commitment of a seaman until the ship proceeds on her voyage, or until the master requires his discharge, the person committed cannot be kept in imprisonment after the vessel to which he belongs has gone to sea. State *v.* Patterson, T. U. P. Charlt. (Ga.) 311.

A cook and a steward on board a seagoing vessel, who conceals persons on board, and thus causes them to be carried to sea without the knowledge of the master or owner, are guilty of a breach of discipline for which they may be arrested and confined until they can be delivered up to the proper civil authorities at the nearest port at which the vessel may sail for that purpose. Lane *v.* Powell, 1 Edm. Sel. Cas. (N. Y.) 256.

3. Wilson *v.* The Mary, Gilp. (U. S.) 31; Magee *v.* The Moss, Gilp. (U. S.) 219. *Compare* Johnson *v.* The Coriolanus, Crabbe (U. S.) 239; U. S. *v.* Ruggles, 5 Mason (U. S.) 192.

In Wilson *v.* The Mary, Gilp. (U. S.) 31, the court by Hopkins, J., said: "The practice of imprisoning disobedient and refractory seamen in foreign jails is one of doubtful legality; it is certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board or some great crime committed. When this extreme measure is resorted to, it should be used as one of safety rather than discipline and never applied as a punishment for past misconduct. The powers given by the law to the master to preserve the discipline of his ship and compel obedience to his authority are so strong and full that they can seldom fail of their effect. They should be clearly insufficient before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression and may be so terrible in its consequences."

4. Snow *v.* Wope, 2 Curt. (U. S.) 301.

Where a seaman is arrested and imprisoned by the local authorities on a charge of committing a crime not on the complaint or at the instigation of the master, the shipowner will not be liable, although the accused be innocent. Richardson *v.* Pacific Mail S. S. Co., 5 Sawy. (U. S.) 252. See *supra*, this title, *Deductions*.

5. U. S. *v.* Savage, 5 Mason (U. S.) 460; U. S. *v.* Smith, 3 Wash. (U. S.) 78.

A mere assault and battery upon the master does not amount to a confinement. U. S. *v.* Lawrence, 1 Cranch (U. S.) 94.

6. 3 Kent's Com. (9th ed.) 253; Cur. Mer. Sea. 148; Nieto *v.* Clark, 1 Cliff. (U. S.) 145; Hutchinson *v.* Combs, Ware (U. S.) 64; The Exeter, 2 Rob. Adm. 261.

Where a mariner has been improperly discharged from a vessel after shipping articles have been signed but before the commencement of the voyage, he may sue in admiralty for his agreed wages for the voyage for which

charging seamen depends entirely upon the character or aggravation of the offense and the degree and perverseness of his misconduct.[1] As a general rule a seaman may be lawfully discharged for such gross and persistent violation of his duty and the regulations of the ship as show that he is radically disqualified for his situation and unfit to be detained.[2] A premeditated and persistent shirking and slighting of duty, or a deliberate and continued attitude of insolence and defiance by a seaman is a sufficient cause for discharging, particularly when it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty.[3] So a discharge pending the voyage will be upheld where there has been mutinous and rebellious conduct persevered in; gross dishonesty, or embezzlement or theft, or habitual drunkenness; or where the seaman is habitually a stirrer-up of quarrels, to the destruction of the order of the vessel and the discipline of the crew. But lesser offenses are looked upon as venial and leniently dealt with in the admiralty courts.[4]

A consular officer of the United States may discharge a seaman on the application of the master for any cause sanctioned by the usages and principles of maritime law as recognized in the United States on the payment of the wages then earned.[5] Discharges in a foreign port without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of Congress or by the courts of the United States;[6] and in all such cases the burden of proof is upon the master to show the reasons of the discharge, and it is incumbent upon him to prove to the satisfaction of the court that they were clearly just and reasonable.[7] If any deceit or collusion has been practiced by the master in obtaining the discharge of a seaman by the United States consul, he can claim no benefit or immunity under it.[8] The master is required to receive back a seaman when he has thus discharged him if he

he was engaged, the voyage having been prosecuted. The Acorn, 32 Fed. Rep. 638. See The City of London, 1 W. Rob. 88.

1. Nieto *v.* Clark, 1 Cliff. (U. S.) 145.

2. Russell *v.* The Twilight, 43 Fed. Rep. 320.

3. The T. F. Oakes, 36 Fed. Rep. 422.

Refusing to Work on Sunday.—Seamen on a vessel not in harbor, refusing to work on Sunday, unless they are allowed double pay, which was not a part of their contract, but simply a custom of the port near which they happened to be, are guilty of disobedience, and may be discharged by the captain. The Richard Matt, 1 Biss. (U. S.) 440; Johnson *v.* The Cyane, 1 Sawy. (U. S.) 150.

4. The Superior, 22 Fed. Rep. 927.

5. The T. F. Oakes, 36 Fed. Rep. 442.

A consul is not empowered to discharge for mere disobedience. Coffin *v.* Weld, 2 Low. (U. S.) 81.

6. See The Atlantic, Abb. Adm. 451.

The certificate of a consul of the United States in a foreign port (under the Act of July, 1840), that the discharge of a seaman was granted upon the seaman's consent, is conclusive upon that fact, unless it is shown that the conduct of the consul was corrupt or fraudulent. Lamb *v.* Briard, Abb. Adm. 367.

7. Wilson *v.* Borstel, 73 Me. 273; Wilson *v.* The John Ritsen, 35 Fed. Rep. 663.

8. Tingle *v.* Tucker, Abb. Adm. 519.

repents and seasonably offers to return to his duty and make satisfaction. If, under such circumstances, he refuses to restore him, or if the seaman has been unduly discharged, he may follow the ship and recover his wages for the voyage and the expenses of his return.[1] Masters are made subject to fine and imprisonment by statute if, without justifiable cause, they maliciously force any officer or mariner on shore when aboard or leave him behind in any foreign port or place, or refuse to bring home those they carried out who are in a condition and willing to return.[2]

XII. DESERTION.—Under the general rules of the maritime law, desertion is an offense punishable by forfeiture of wages.[3] To constitute desertion, there must be an absence without leave with an intent not to return,[4] and to operate as a forfeiture of

1. Nieto *v.* Clark, 1 Cliff. (U. S.) 145. See Wilson *v.* The John Ritson, 35 Fed. Rep. 663.

2. U. S. Rev. St., § 10, Act 3d March, 1825. See Hunt *v.* Colburn, 1 Sprague (U. S.) 215; The Hermon, 1 Low. (U. S.) 515; U. S. *v.* Netcher, 1 Story (U. S.) 307.

The language of the Crimes Act of 1825, ch. 276, § 10, in reference to putting seamen on shore in foreign ports, applies to all seamen constituting a part of a crew of an American ship, whether foreigners or natives. U. S. *v.* Coffin, 1 Sumn. (U. S.) 394.

A master is not required to return to the United States foreign seamen shipped at their own home, for a particular cruise, ending where it began, and discharged there, according to the terms of their contract, though without the consent of a consul. U. S. *v.* Parsons, 1 Low. (U. S.) 107.

Subjecting the master to penalties for abandoning or leaving a seaman in a foreign port does not reinstate the shipping contract. The Philadelphia, Olc. Adm. 216.

3. The Mary C. Conery, 9 Fed. Rep. 222; The Rothemay, 34 Fed. Rep. 80; Disbrow *v.* The Walsh Brothers, 36 Fed. Rep. 607; Coffin *v.* Jenkins, 2 Story (U. S.) 108; Burton *v.* Salter, 11 Law Rep. N. S. 148; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; The Merrimac, 1 Ben. (U. S.) 490; The John Martin, 2 Abb. (U. S.) 172; The Philadelphia, Olc. Adm. 216; The Swallow, Olc. Adm. 4; Welcome *v.* The Yosemite, 18 Fed. Rep. 383.

This is the general rule of the maritime law. Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Coffin *v.* Jenkins, 2 Story (U. S.) 108; Spencer *v.* Eustis, 21 Me. 519; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; The Brig Osceola, Olc. Adm. 450; The Rovena, Ware (U. S.) 309; The Pearl, 5 Rob. Adm. 224; The Baltic Merchant, Edw. Adm. 86. The Swallow, Olc. Adm. 4; Noble *v.* Steele, 42 Me. 518; Cotel *v.* Hillard, 4 Mass. 664. The Elizabeth, 1 Pet. Adm. 128; The Philadelphia, Olc. Adm. 216.

But the court is not obliged to pronounce an entire forfeiture in all cases but may exercise its discretion and take into consideration palliating circumstances not amounting to an excuse. Gifford *v.* Kolloch, 19 Law Rep. N. S. 21; Swain *v.* Howland, 1 Sprague (U. S.) 424; Loverein *v.* Thompson, 1 Sprague (U. S.) 355.

The rule that desertion works a forfeiture of all wages antecedently earned applies to seamen engaged in the navigation of inland tide-waters. The Swallow, Olc. Adm. 4.

4. The Catawanteak, 2 Ben. (U. S.) 189; Brink *v.* Lyons, 18 Fed. Rep. 605; Brower *v.* The Maiden, Gilp. (U. S.) 294; Hart *v.* The Otis, Crabbe (U. S.) 52; The Mary C. Conery, 9 Fed. Rep. 222; The Magnet, 1 Brown Adm. 547; The Ericson, 3 Sawy. (U. S.) 559; The Balize, 1 Brown Adm. 424; Pitman *v.* Hooper, 3 Sumn. (U. S.) 50; The Swallow, Olc. Adm. 4; The Hermine, 3 Sawy. (U. S.) 80; The Philadelphia, 4 Olc. Adm. 216; The Merrimac, 1 Ben. (U. S.) 490; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; Whiteman *v.* The Neptune, 1 Pet. Adm. 180; Coffin *v.* Jenkins, 3 Story (U. S.) 108; Cotel *v.* Hilliard, 4 Mass. 664; Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Burton *v.* Salter, 11 Law Rep., N. S. 148; The John Martin, 2 Abb. (U. S.) 172; The Rovena, 1 Ware (U. S.) 316; The

wages it must occur during the voyage.[1] Going ashore without leave, but with intent to return to the vessel is not desertion, though the vessel sails before the seaman returns.[2] It is not desertion to leave the vessel by the consent of the commanding officer.[3] Nor is it desertion to leave a vessel on account of the cruelty of the master,[4] or on account of the bad provisions sup-

Almatia, Deady (U. S.) 475; Anonymous, 3 Salk. 23.

Seamen disagreeing with the master as to the amount of wages due them, were ordered to go to work or go on shore. They agreed that if he would give them orders for their wages they would go ashore and regard themselves as discharged. He gave them the orders, and they left the vessel. *Held*, that they were discharged and were not deserters. The Frank C. Barker, 19 Fed. Rep. 332.

Where a seaman goes ashore without intention to desert, and while on shore is detained by the civil authorities as a witness, and meantime his vessel leaves the port, this does not constitute a desertion. The Lizzie M. Dunn, 30 Fed. Rep. 927.

Where seamen in the engineer's department on a pleasure yacht, upon the discharge of the chief engineer, deliberately left the ship with the intention not to return, and contrary to the orders of the master and owner, and did not return—held, desertion under the maritime law, and their wages for twelve days, during which they had been on the yacht, were forfeited. Welcome *v.* The Yosemite, 18 Fed. Rep. 383.

1. Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Francis *v.* Bassett, 1 Sprague (U. S.) 16; The Martha, B. & H. Adm. 151; The Elizabeth Frith, B. & H. Adm. 195; Brown *v.* Jones, 2 Gall. (U. S.) 477.

Leaving the vessel in a place of security selected by the captain for winter quarters in order to obtain wages which had been repeatedly refused them, does not constitute desertion so as to deprive the seamen of the wages earned. Olsen *v.* Schooner Edwin Post, 6 Fed. Rep. 314.

The desertion of a seaman during a second voyage, substituted by parol agreement for a series of voyages for which a written contract has been made, now terminated by consent, cannot be made to inure to the master as a forfeiture of wages earned and due under the first one. Piehl *v.* Balchen, Olc. Adm. 24.

When Voyage Ended.—And the voyage is ended when the ship has arrived at her proper port of destination, and is moored in safety in the accustomed place, although her cargo is not delivered. Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Francis *v.* Bassett, 1 Sprague (U. S.) 16; The Martha, B. & H. Adm. 151.

2. Babbel *v.* Gardner, Bee Adm. 87.

Where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion. The Hermine, 3 Sawy. (U. S.) 80.

Where a seaman went ashore without intention to desert, and while on shore was detained by the civil authorities as a witness, and meantime his vessel left the port, held that this did not constitute a desertion. The Lizzie M. Dunn, 30 Fed. Rep. 927.

Where a seaman has gone ashore by permission and without knowing that the ship was about to sail, and his failure to rejoin her is caused by drunkenness but without any intention on his part to desert, the entire wages are not forfeited but a qualified forfeiture will be imposed. The Ericson, 3 Sawy. (U. S.) 559; Brink *v.* Lyons, 18 Fed. Rep. 605.

The temporary absence of a mariner from his ship occasioned by his imprisonment upon a charge of a trivial offense is not a total desertion. Hayes *v.* The L. J. Wickwire, 7 Phila. (Pa.) 594; Costello *v.* American Steamship Co., 1 W. N. C. (Pa.) 204.

3. The Carolina E. Kelly, 2 Abb. (U. S.) 160; Doherty *v.* The Carolina E. Kelly, 7 Phila. (Pa.) 570.

Where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion. The Hermine, 3 Sawy. (U. S.) 80.

4. McKinnon *v.* The Reed Case, 39 Fed. Rep. 624; Bush *v.* Schooner

plied,[1] or unseaworthiness of the ship,[2] or any other reasonable cause.[3] To justify seamen for leaving a vessel before the termination of a voyage on account of the cruelty of the master, it must be apparent that they could not remain without extreme danger to their personal safety.[4] If the cause for leaving is a failure to provide suitable provisions, the case must be very clear in point of fact and the provisions must be not merely not of the best but positively bad and unfit for the men's support.[5] Slight and transient causes, such as the fact that meat used on board was for a short time slightly tainted, do not constitute such an excuse as to relieve the forfeiture.[6]

A seasonable return of a seaman who has deserted will cure the forfeiture[7] even if there be a clause to the contrary in the shipping articles.[8] He must be received if he offers to return in a proper way and within a reasonable time, before any other person is engaged to take his place.[9] If he returns to the vessel with a refusal to do duty, it is not such a return as will cure a forfeiture.[10]

Alonzo, 2 Cliff. (U. S.) 548; Sherwood *v.* M'Intosh, 1 Ware (U. S.) 109; Knowlton *v.* Boss, 1 Sprague (U. S.) 163.

Repeated acts of cruelty and oppression on the part of the master will justify a seaman in deserting the vessel; but not a single act of assault and battery, although it may exceed the bounds of moderation, unless there be reasonable grounds for apprehending that such acts of oppression will be repeated. Steele *v.* Thacher, 1 Ware (U. S.) 91.

It must be apparent that they could not remain without extreme danger to their personal safety. Magee *v.* The Moss, Gilp. (U. S.) 219.

1. Ulary *v.* The Washington, Crabbe 204.

2. Savary *v.* Clements, 8 Gray (Mass.) 155. See Bucker *v.* Klorkgeter, Abb. Adm. 402; Bray *v.* ship Atlanta, Bee Adm. 48.

3. Magee *v.* The Moss, Gilp. (U. S.) 219.

If caused by an act of the master which makes the dissolution of the contract necessary and justifiable on the part of the seaman, the latter may recover his wages. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81.

4. The Alvena, 22 Fed. Rep. 861; Magee *v.* The Moss, Gilp. (U. S.) 219. See Coffin *v.* Jenkins, 2 Story (U. S.) 108; The Magnet, 1 Brown Adm. 547; The Blaize, 1 Brown Adm. 424; Relf. *v.* The Maria, 1 Pet. Adm. 186.

5. Ulary *v.* The Washington, Crabbe (U. S.) 204.

6. The Blaize, 1 Brown Adm. 424; The Magnet, 1 Brown Adm. 547.

7. Whitton *v.* The Commerce, 1 Pet. Adm. 160; Snell *v.* The Independence, Gilp. (U. S.) 140. See Brig Betsey *v.* Duncan, 2 Wash. (U. S.) 272; Ingraham *v.* Albee, B. & H. Adm. 289; Hart *v.* The Otis, Crabbe (U. S.) 52; The Elizabeth *v.* Rickers, 2 Paine (U. S.) 292; Miller *v.* Brant, 2 Camp. 590; Beale *v.* Thompson, 4 East. 546; Frain *v.* Bennett, 3 C. & P. 3; Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Austin *v.* Dewey, 1 Hall (N. Y.) 238; Whiteman *v.* The Neptune, 1 Pet. Adm. 180.

8. Freeman *v.* Baker, B. & H. Adm. 372; Lang *v.* Holbrook, Crabbe (U. S.) 179.

9. Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Coffin *v.* Jenkins, 3 Story (U. S.) 108; The Rovena, 1 Ware (U. S.) 309.

A seaman who returns to a vessel after a week's absence without leave, and continues during the rest of the voyage, is to receive his wages at the rate originally contracted for in the shipping articles, unless a new contract is explicitly made. Snell *v.* The Independence, Gilp. (U. S.) 140.

10. The Cadmus *v.* Matthews, 2 Paine (U. S.) 229.

Where an assistant engineer of a steamship, after a disagreement with the chief engineer, was ordered off duty and left, but did not leave the vessel, and afterwards the chief engineer requested him to go to work again, but he refused, and being sent for by the captain was told that he must go to

Nor is a clandestine return.[1] A seaman may be apprehended under the warrant of a justice and compelled forcibly to return.[2] If this be done the forfeiture is waived,[3] but not unless it is done within the time prescribed by statute.[4] If he does not return within the proper time he forfeits all his wages and all his property on board the ship, and he is liable to pay all damages and costs sustained by the owner in hiring another seaman in his place.[5]

If the statutory penalty for desertion is invoked it is indispensable that an entry of the desertion should have been made in the log-book[6] on the day of the desertion.[7]

SEARCHES AND SEIZURES.—See also INTERNATIONAL LAW, vol. 11, p. 467; INTOXICATING LIQUORS, vol. 11, p. 601; REVENUE LAWS, vol. 21; WARRANTS.

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work or leave the ship, whereupon he left and brought an action to recover his wages, held that his refusal to return to his duty and his leaving of the ship thereafter, make out a case of desertion and entail forfeiture of wages earned. The Galina, 6 Fed. Rep. 927.

1. The Philadelphia, Olc. Adm. 216; Ulary *v.* The Washington, Crabbe (U. S.) 204.

2. Act of 1790, ch. 29, § 7; 1 U. S. Stats. at L. 134.

A mate who has been improperly put off duty by the master, and charged by him, without sufficient reason, with incompetency and acts of impropriety, is not thereby justified in refusing to return to duty, upon the order of the master. Gladding *v.* Constant, 1 Sprague (U. S.) 73.

3. 2 Parsons on Shipp. & Adm. 100. See Brower *v.* The Maiden, Gilp. (U. S.) 294; Sherwood *v.* McIntosh, Ware (U. S.) 118; Bray *v.* Ship Atlanta, Bee Adm. 48.

4. Malone *v.* The Mary, 1 Pet. Adm. 139.

5. Act of 1790, ch. 29, § 5; 1 U. S. Stats. at L. 123.

6. Cloutman *v.* Tunison, 1 Sumn. (U. S.) 372; The Phœbe *v.* Dignum, 1 Wash. (U. S.) 48; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; The Catawanteak, 2 Ben. (U. S.) 189; Brower *v.* The Maiden, Gilp. (U. S.) 294; The Hercules, 1 Sprague (U. S.) 534; The Rovena, 1 Ware (U. S.) 309; The Lilian M. Vigus, 10 Ben. (U. S.) 385.

Where desertion is made out according to maritime law, that is, with proof of intent not to return, the entry in the log-book under U. S. Rev. Sts., § 4597, is not a condition of forfeiture of wages. Welcome *v.* The Yosemite, 18 Fed. Rep. 83.

If the log-book states a desertion, it may be repelled by proof of the falsity of the entry, or its being made by mistake. Orne *v.* Townsend, 4 Mason (U. S.) 541.

7. The Phœbe *v.* Dignum, 1 Wash. (U. S.) 48; Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; The Cadmus *v.* Matthews, 2 Paine (U. S.) 229; and in compliance with the terms of the statute, Knagg *v.* Goldsmith, Gilp. (U. S.) 207.

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I. DEFINITION—1. Search.—In criminal law a search is an examination or inspection, by authority of law, of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or some evidence of guilt, to be used in the prosecution of a criminal action, for some crime or offense with which he is charged.[1]

2. Seizure.—By seizure is meant the taking possession of property by authority of law.[2]

II. UNREASONABLE SEARCHES AND SEIZURES.—The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures is protected by the United States constitution,[3] and by the constitutions of the sev-

1. Black's Law Dict.; U. S. Rev. Stat., § 3066, authorizes searches and seizures in case of a suspected violation of laws relating to customs and duties. For a treatment of this subject, see REVENUE LAWS, vol. 21.

2. And. Law Dict. By the seizure of a thing is meant the physical taking into custody, as applied to subjects capable of manual delivery. Pelham *v.* Rose, 9 Wall. (U. S.) 103.

Seizure takes place when goods are confiscated as a punishment for smuggling or carrying contraband of war. Sweet's Law Dict. The taking possession of goods for a violation of a public law; as, for example, the taking possession of a ship for attempting an illicit trade. Church *v.* Hubbart, 2 Cranch (U. S.) 187; The Caledonian, 4 Wheat. (U. S.) 100; Schooner Bolina, 1 Gall. (U. S.) 75; Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404. For a treatment of this branch of the law of Seizures, see REVENUE LAWS, vol. 21.

Seizure in a contract of insurance is always to be understood in a restricted and limited sense, as signifying only the taking of a ship by the act of government or public authority, for the violation of the laws of trade, or some rule or regulation instituted as a matter of municipal police, or in consequence of an existing state of war. Greene *v.* Pacific Mut. Ins. Co., 9 Allen (Mass.) 222.

The words in a policy, "insured against all risks, except seizure in port," must be understood to mean any arbitrary seizure. Barney *v.* Maryland Ins. Co., 5 Har. & J. (Md.) 139.

For a treatment of seizures in this connection, see MARINE INSURANCE, vol. 14, p. 319.

3. U. S. Const., amendments art. IV. The right to be secure in one's house is not a right derived from the Constitution of the United States, but existed long prior thereto at common law, and cannot be said to come within the meaning of the words "right, privilege and immunity granted or secured by the constitution of the United States." U. S. *v.* Crosby, 1 Hughes (U. S.) 448.

Letters and sealed packages subject to letter postage in the mail can be opened and examined only under like warrant, issued upon similar oath, or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. *Ex parte* Jackson, 96 U. S. 727.

It is no infringement of the right against unreasonable searches and seizures for the government, under the act of June 22, 1874 (18 U. S. St. at L. 186), to seize any and all books and papers kept by distillers and recti-

eral States.[1] These constitutional provisions do not require actual entry upon premises and search for and seizure of papers, to constitute an unreasonable search and seizure; a compulsory production of one's private books and papers to be used against himself or his property in a criminal or penal proceeding, is within their spirit and meaning.[2]

Searches made upon the complaint or suggestion of one party, of the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of

fiers in their business—they are not such private property as to be exempt from search and seizure. U. S. *v.* Three Tons of Coal, 6 Biss. (U. S.) 379; U. S. *v.* Distillery No. 28, 6 Biss. (U. S.) 483.

In re De Giacomo, 12 Blatchf. (U. S.) 391, an extradition proceeding instituted under the Italian treaty of 1868, it was said that the restrictions in the amendments to the Federal Constitution against the violation of the right of the people to be secure in their persons against unreasonable seizures, and against depriving a person of liberty without due process of law, bore no relation to the subject of extradition for crime, as regulated by the treaty in question and the statutes of the United States passed on the subject.

The provision in the Federal Constitution is held not to apply to the State governments, but is a limitation upon federal powers. State *v.* Brennan (S. Dak. 1891), 50 N. W. Rep. 625.

1. *Massachusetts.*—A statute which provides for the issuing of warrants by judges of insolvency on the complaint of an assignee, to search for property of the debtor, is unconstitutional and void. Robinson *v.* Richardson, 13 Gray (Mass.) 454.

California.—The legislature has power to authorize the issuance of a warrant to search the person of an individual in a proper case, and neither the fourth amendment of the U. S. Constitution, nor section 19 of article 1 of the State constitution prohibits it. Collins *v.* Lean, 68 Cal. 284.

Kentucky.—The constitution prohibits "unreasonable searches and seizures." It thereby impliedly recognizes the general power of the legislature to enact laws authorizing "seizures and searches" on the conditions and subject to the restrictions provided by it. Com. *v.* Watts, 84 Ky. 537.

Illinois.—Where an officer obtains a search warrant, in strict conformity to law, to search the office of a party in prison on a charge of forgery, and certain papers bearing on the question of the party's guilt are found, they may be used in evidence against him on his trial without violating the constitutional right of the party to be secure in his papers and effects against unreasonable search and seizure. The constitution of *Illinois* does not prohibit all searches and seizures of a man's papers or other possessions, but such only as are "unreasonable." Langdon *v.* People, 133 Ill. 382.

In Gindrat *v.* People (Ill. 1891), 27 N. E. Rep. 1085, a prosecution for larceny, it appeared that evidence of the crime was obtained by an officer through the commission of a trespass, and it was held that the admission of the evidence so obtained was not violative of the constitutional guaranty against unreasonable searches and seizures.

Michigan.—Such provision in the constitution of *Michigan* does not make it unlawful for the police to invade without a warrant a room open to the public and seize material for running a policy shop prohibited by law. People *v.* Hess, 85 Mich. 128.

Missouri.—A statute which authorizes an officer of police, upon information or personal knowledge that there is any prohibited gaming table or other gaming device kept within his district, to cause the same to be seized and brought before him and publicly destroyed, and makes no provision for judicial condemnation, violates the constitutional prohibition against unreasonable seizures. Lowry *v.* Rainwater, 70 Mo. 152; 35 Am. Rep. 420.

2. Boyd *v.* U. S., 116 U. S. 616. In this case, Mr. Justice Bradley, delivering the opinion of the court, said: "The 'unreasonable searches and seizures'

penal laws, are unreasonable and unwarrantable; as, for instance, a search made on a warrant issued by a judge of insolvency on the complaint of an assignee, for property of the debtor.[1]

III. SEARCH WARRANT (AT COMMON LAW)[2]—1. Definition.—A search warrant is an authority in writing from the State, signed by a magistrate, and directed to an officer, commanding him to examine a designated place for articles alleged to be concealed there contrary to law.[3]

2. When Authorized.—A search warrant may be granted to search for property stolen or embezzled, or which has been used as the means of committing a felony, or which any person has in his possession with intent to use as a means of committing a public offense.[4] The statutes have authorized its use for the seizure of

condemned in the Fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth amendment."

1. Robinson *v.* Richardson, 13 Gray (Mass.) 454.

2. As to the search warrant under the Intoxicating Liquor Acts, which is statutory, see *infra*, this title, *Searches and Seizures Under Liquor Acts.*

3. And. L. Dict.

New York Code Crim. Proc., § 791, defines a search warrant to be "an order in writing in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate." See People *v.* Noelke, 29 Hun (N. Y.) 461.

4. People *v.* Noelke, 29 Hun (N. Y.) 461. In Boyd *v.* U. S., 116 U. S. 616, the court, by Bradley, J., said: "The laws which provided for the search and seizure of articles and things which it is unlawful for a person to have in his possession, for purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within the category of unreasonable searches and seizures."

In Cooley's Const. Lim. (6th ed.), p. 370, it is stated: "The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar and well understood in the law. Search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous material so kept as to endanger the public safety."

Illinois Crim. Code, § 2, div. 8, authorizes search warrants to be issued "to search and seize counterfeit or spurious coin, forged bank notes, and other forged instruments, or tools, machinery or materials prepared or provided for making either of them." The words "other forged instruments" are broad enough to cover a forged certificate. Langdon *v.* People, 133 Ill. 382.

In Robinson *v.* Richardson, 13 Gray (Mass.) 454, the court by Merrick, J., said: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was

lottery tickets and materials,[1] and gaming implements.[2] Its use is authorized by statute in several of the States of the Union for the seizure of intoxicating liquors kept for sale in violation of law.[3] The most frequent use of the search warrant is to search for goods alleged to have been stolen, and to such use it seems formerly to have been confined.[4]

3. Requisites—*a.* DESCRIPTION OF PLACE AND THING.—General warrants to search unnamed places are illegal by the common law,[5] and are prohibited by the Constitution of the United States,[6] as well as that of each of the several States.[7] The place to be searched,[8]

formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established, on the ground of public necessity; because, without them, felons and other malefactors would escape detection."

1. Com. *v.* Dana, 2 Met. (Mass.) 329. See generally LOTTERIES, vol. 13, p. 1164.

2. Com. *v.* Gaming Implements, 119 Mass. 332; Hastings *v.* Haug, 85 Mich. 87. See generally, GAMING, vol. 8, p. 1033.

3. See *infra*, this title, *Searches and Seizures* (*Under Liquor Acts*). See generally INTOXICATING LIQUORS, vol. 11, p. 567.

4. Entick *v.* Carrington, 19 How. St. Tr. 1029; 1 Bishop Crim. Proc., § 241; 2 Hale P. C. 149; State *v.* Mann, 5 Ired. (N. Car.) 45; Stone *v.* Dana, 5 Met. (Mass.) 98.

5. Though there are precedents of general warrants to search all suspected places for stolen goods, these are not, at common law, legal, because it would be extremely dangerous to leave it to the discretion of a common officer to arrest what persons or search what houses he thinks fit. 1 Chit. Crim. Law (5 Am. ed.) 66. See Money *v.* Leach, 1 W. Bl. 555; 3 Burr. 1766; Entick *v.* Carrington, 2 Wils. 275; 19 How. St. Tr. 1030.

6. U. S. Const., art. IV.

7. See constitutions of the several States. Stimson's Am. St. Law, § 71. A provision similar to that in the various constitutions is contained in *New York* Code Crim. Proc., § 793.

The provision of § 6, art. 1, of the Const. of *Rhode Island*, that a search warrant shall describe "as nearly as may be the place to be searched, and the person or things to be seized," requires only that the description shall be as near as the circumstances will permit, according to the nature of the property or thing. State *v.* Snow, 3 R. I. 64.

8. Sufficient Description of Place.—The house or place where lottery tickets, etc., are believed to be concealed is sufficiently designated and described in a search warrant, according to the provision of *Massachusetts* Rev. Stats., ch. 142, § 3, by denominating it "the office of D," and truly stating the number thereof, and the street in which it is situate, although A occupies the office with D. Com. *v.* Dana, 2 Met. (Mass.) 329.

A search warrant attached to a complaint directed the officer to enter "the house and premises mentioned in the above complaint." The language of the complaint was "the house and premises of E D of G in said county of H." E D was the only man of his name in G, and both owned and occupied the house searched, and owned no other house there or in the county. It was *held* that the words "the house of E D" meant the house occupied by him: that the words "and premises" referred only to the premises used and occupied in connection with the house, and that the warrant was sufficient. Wright *v.* Dressel, 140 Mass. 147.

A warrant to search the house of a particular person, and the barns, stables, outhouses and grain stacks of the same person on the same farm is not void. Meek *v.* Pierce, 19 Wis. 300.

Insufficient Description of Place.—"The houses and buildings of Hiram Ide and Henry Ide," Humes *v.* Taber, 1 R. I. 464; "the premises of Aaron Hyatt, in said Wilton, and other suspected places, houses, stores or barns in said Wilton, Grumon *v.* Raymond, 1 Conn. 39; 6 Am. Dec. 200; "the premises of John Doe, *alias*, in the town of B, or in the neighborhood thereof, in the county of S," Ashley *v.* Peterson, 25 Wis. 621; so also, "the barn, houses,

and the property to be seized,[1] must be particularly described in the warrant. It is not sufficient if the warrant commands the search of the "suspected place[2]:" and a misdescription in respect to the ownership of the building or place will render the warrant void.[3] A warrant to search the dwelling house of a person will confer an authority to search the house in which he dwells, but not a house which he owns and rents to another person.[4]

b. TO WHOM DIRECTED.—The warrant should be directed to a sheriff, constable or other proper officer, and not to a private person, though it is proper that the party complaining should be present, and assisting, as he may be able to identify the property for which search is made.[5]

or store of Parley Johnson and Richard P. Johnson, of Oaksville," Johnson *v.* Comstock, 14 Hun (N. Y.) 238; and a reference in the warrant to the property as "in the possession of Rice," without describing the place to be searched, is insufficient. Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44; 19 Am. Dec. 122.

1. Description of Property.—This description: "Three cases of misses' and women's boots, of the value of one hundred dollars; a lot of oak tanned soles, of the value of fifty dollars; and ten sides of sole leather, of the value of forty dollars," is sufficient. Dwinnels *v.* Boynton, 3 Allen (Mass.) 310.

"Goods and chattels, to wit, gaming implements, and other chattels and apparatus which complainant is unable to specify, used and kept to be used in unlawful gaming," specifying the place, etc., is a sufficient description of the property within *Michigan* constitution, art. 6, § 26. Hastings *v.* Haug, 85 Mich. 87.

If a search warrant and the complaint on which it is issued are on the same paper, and the things to be searched for be properly designated and described in the complaint, and the warrant directs the officer to search for the things "mentioned in the above complaint," the process is legal and sufficient, without any further designation or description of the things in the warrant. Com. *v.* Dana, 2 Met. (Mass.) 329.

A description as "goods, wares and merchandise," without any specification of their character, quality, number or weight, or any other circumstance tending to distinguish them, is not sufficiently particular. Sandford *v.* Nichols, 13 Mass. 286; 7 Am. Dec. 151.

2. People *v.* Holcomb, 3 Park. Cr. Rep. (N. Y.) 656.

3. If the house be described as the house of a company, such description will not authorize the search of the house of an individual member of the company. Sandford *v.* Nichols, 13 Mass. 286; 7 Am. Dec. 151. Nor will a search warrant commanding an officer to search the premises of B. P. Tuell authorize the officer to search the premises of Benjamin P. Tuell. Tuell *v.* Wrink, 6 Blackf. (Ind.) 249.

But a search warrant describing the place to be searched as "the dwelling house of Procter Dwinnels, mentioned in the above information," which is annexed, and in which the place to be searched is described as "the dwelling-house of Procter Dwinnels, of Rowley, in said county," will protect an officer who acts under it in searching the dwelling-house of Procter S. Dwinnels in Rowley, if that is the place intended to be searched, and there is no person in the town by the name of Procter Dwinnels. Dwinnels *v.* Boynton, 3 Allen (Mass.) 310.

4. Humes *v.* Taber, 1 R. I. 464.

5. 1 Chit. Cr. Law (5th Am. ed.) 65; Archbold's Cr. Law (8th ed.) 130; Cooley's Const. Lim. (6th ed.) 369. But in *Wisconsin* it is held that, at common law, a justice of the peace may direct a search warrant to any particular private person by name, and that this common law power is not taken away by *Wisconsin* Rev. Sts., ch. 173, § 3. Meek *v.* Pierce, 19 Wis. 300.

c. COMMAND.—The warrant should command the officer to search the person or premises described therein for the property therein specified, and if found, to bring it, together with the person in whose custody it is found, before some justice of the peace, to the end that, upon further examination of the facts, the property and prisoner may be disposed of as the law directs.[1]

d. TIME.—By the common law the warrant must direct that the search be made in the day-time:[2] but by statute in many of the States, the magistrate may, under certain circumstances, insert a direction in the warrant that it be served at any time of the day or night.[3]

e. SEAL.—It is a disputed question whether a seal is essential to the validity of a warrant of a justice of the peace, if the statute is silent on the subject:[4] if other warrants of a justice in criminal proceedings require a seal, it would seem to be necessary in the case of a search warrant.[5]

4. How Obtained.—To lay a foundation for the issue of a search warrant a complaint must be made on oath or affirmation[6] to an officer authorized to issue process to apprehend offenders, and

1. 1 Chit. Crim. Law (5th Am. ed.) 65; Archbold's Crim. Law (8th ed.) 130; Cooley's Const. Lim. (6th ed.) 369.

2. Com. *v.* Hinds, 145 Mass. 182. In 1 Chit. Cr. Law (5th Am. ed.) 65, it is said: "It is fit that such warrants for search do express that search be made in the day-time; and though I do not say they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretense of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance." 2 Hale, P. C. 150. Though it is said that where there is more than probable suspicion, the process may be executed in the night. 1 Chit. Cr. Law (5th Am. ed.) 65.

3. *New York* Code of Crim. Proc., § 801, contains the following provision: "The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavit be positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night." There is a similar statute in *Michigan*, Rev. Sts. *Michigan*, ch. 170, § 1; in *Illinois* a warrant may be issued by *two* justices to authorize a search in the night time. Rev. Sts. *Illinois* (1880), ch. 38, § 375.

4. See WARRANTS, and authorities there cited. In Padfield *v.* Cabell, Willes, Rep. 411, it was held that a warrant need not be under seal unless required by statute. In that case Willes, C. J., said: "A *warrant* does not, *ex vi termini*, imply an instrument under seal; it signifies no more than an *authority*. All the books in which it is said that a warrant must be under seal are founded on a case in the Year Books, where it is said that a justice of the peace is a Judge of record and *hath a seal* of office."

5. 1 Bishop on Crim. Proc. (3d ed.), § 243. In State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650, a seal was held to be unnecessary, unless expressly required by statute. *Contra*, People *v.* Holcomb, 3 Park. Cr. Rep. (N. Y.) 656.

6. In *New York* the magistrate, before issuing a warrant, must examine on oath the complainant and any witnesses he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them. And the depositions must set forth the acts tending to establish the grounds of the application or probable cause for believing that they exist. New York Code Crim. Proc., §§ 794; 795. See Bell *v.* Clapp, 10 Johns. (N. Y.) 263; 6 Am. Dec. 339.

To lay a foundation for issuing a search warrant to search for stolen goods and to arrest the person suspected of the theft, there must be an oath by the applicant that his goods have been stolen, and that he strongly

must set forth that a crime has been committed and that the complainant has probable cause to suspect that the offender, or the property which was the subject or instrument of the crime, is concealed in some specified house or place.[1]

An officer may make the complaint, though his action is founded upon the information of a third person.[2] If the statute requires the complainant to make oath or affirmation "that he believes," etc., a complaint reciting that he "has cause to suspect and does suspect" is defective, and will not authorize the magistrate to issue the warrant.[3]

One who, maliciously and without probable cause, institutes and carries forward proceedings under a search warrant, is liable to an action for malicious prosecution.[4]

suspects that they are concealed in a specified place and that they were stolen by a person distinctly pointed out. Grumon *v.* Raymond, 1 Conn. 39, 6 Am. Dec. 200. But it is not necessary for an officer, in order to justify the execution of a search warrant from a magistrate having jurisdiction over the subject, to show that it is based on a complaint under oath, if the warrant itself contains an allegation of the fact. Sandford *v.* Nichols, 13 Mass. 286; 7 Am. Dec. 151.

Summary process for the collection of debts due the government is not a search warrant, and may issue without oath or affirmation. Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272.

The provision of the *Illinois* constitution, that no search warrant shall issue except upon affidavit, does not deprive an officer, who has arrested a man for carrying concealed weapons, of the right to search him for the same. North *v.* People (Ill. 1891), 28 N. E. Rep. 966.

The *United States* Constitution provides that such warrants shall not issue except upon probable cause supported by oath or affirmation. Similar provisions are contained in the constitutions of the several States. In four States, general warrants whereby an officer may be commanded to search suspected places without evidence of the act committed, or to seize a person not named, or whose offense is not particularly described and supported by evidence, are declared to be grievous and ought not to be granted. *Maryland* Declaration of Rights 26; *Virginia* Const. 1, 12; *Tennessee* Const, 1, 7; *North Carolina* Const. 2, 12. These provisions are but an affirmance of the rights of the citizen as they existed at common law. Carey *v.* Sheets, 67 Ind. 375; 1 Chit. Crim. Law (5th Am. ed.) 65.

Probable Cause is a mixed question of law and fact. The existence of the circumstances alleged to show probable cause is a matter of fact; but when the existence is found, whether they amount to probable cause is a question of law. Miller *v.* Brown, 3 Mo. 127; 23 Am. Dec. 693.

1. 1 Chit. Crim. Law (5th Am. ed.) 65; 1 Archbold Crim. Law (8th ed.) 128; Cooley's Const. Lim. (6th ed.) 368.

2. Collins *v.* Lean, 68 Cal. 284.

3. Com. *v.* Certain Lottery Tickets, 5 Cush. (Mass.) 369; Humes *v.* Taber, 1 R. I. 464. See Johnson *v.* Comstock, 14 Hun (N. Y.) 238; State *v.* Spirituous Liquors, 37 Me. 228.

4. Whitson *v.* May, 71 Ind. 269. And it is held that such an action will lie, if a party, with malice and without probable cause, makes application for a search warrant upon the ground that goods have been stolen and are concealed within a certain person's enclosure, even though the magistrate refuses to grant the warrant. Miller *v.* Brown, 3 Mo. 127; 23 Am. Dec. 693.

In such an action the plaintiff shows *prima facie* a cause of action by proof that upon search the property was not found, that the return of the warrant so showed, and that for a long time he had borne a good reputation in the community for honesty and integrity. Olson *v.* Tvete, 46 Minn. 225.

As bearing upon the question of defendant's good faith in causing the search to be made, it is competent to show that he entertained ill-will and malice towards the plaintiff; that he

5. How Executed.—The officer, in the execution of the warrant, must observe strictly its direction; if he searches in places not designated in the warrant, or seizes persons or goods not commanded, he will not be protected by the warrant, and can only justify himself as in other cases in which he assumes to act without a warrant.[1] He may break open an outer or inner door of a building, if after

had so expressed himself, and made threats against him during a series of years. Johnson *v.* Comstock, 14 Hun (N. Y.) 238.

Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed. Beaty *v.* Perkins, 6 Wend. (N. Y.) 382. But case will lie if the party procuring the warrant has no ground for his proceedings, and is actuated by malicious motives. Elsee *v.* Smith, 1 D. & R. 97; Beaty *v.* Perkins, 6 Wend. (N. Y.) 382.

In an action for maliciously and without probable cause procuring the issue and service of a search warrant, it is error to instruct the jury trying the cause, that if the warrant was procured without probable cause, the plaintiff was entitled to a verdict; for malice must always be proved, though it may be inferred from the evidence. Carey *v.* Sheets, 67 Ind. 375.

And in an action for damages by causing plaintiff's premises to be searched for stolen property under a void warrant, it is error to charge that exemplary damages may be awarded, where it is not alleged nor proven that defendants acted maliciously. Wallace *v.* Williams (Supreme Ct.), 14 N. Y. Supp. 180.

Where the complaint alleged and the evidence showed that defendant had falsely accused plaintiff of theft, and maliciously and without probable cause procured a warrant to search plaintiff's house and person, and had caused it to be executed by a search of her house and in such manner as to grossly humiliate her, it was held that a trespass was sufficiently shown for which defendant was liable, and that it was unimportant whether the action be considered as one for libel, slander, false imprisonment, or malicious prosecution. Doane *v.* Anderson (Supreme Ct.), 15 N. Y. Supp. 459.

See generally MALICIOUS PROSECUTION, vol. 14, p. 22.

1. Larthet *v.* Forgay, 2 La. Ann. 524; 66 Am. Dec. 554.

Where the officer having a warrant to search for certain goods, alleged to have been stolen, found and took away those and others also supposed to have been stolen, but which were not mentioned in the warrant, and not likely to be of use in substantiating the charge of stealing the goods that were specified, it was held that the officer was a trespasser. Crozier *v.* Cundey, 6 B. & C. 232; 13 E. C. L. 154.

"If he be directed to seize only stolen sugar and he seizes tea, he will be a trespasser. So a warrant under the vagrant act to search all suspected houses for idle and disorderly persons, is strictly confined to persons of that description, and the officer will not be justified if he attempt to execute it in any other places than those intended by the statute." 1 Chitty's Crim. L. (5th Am. ed.), p. 66.

But when an officer seizes goods on a search warrant, which correspond with and come within the description of those for which he is commanded by the warrant to search, he is not liable to an action, though the goods so seized by him may not be the same which were lost by complainant, as the officer is not the judge in the last resort of the identity of the goods seized with those stolen; that must always be a matter of great uncertainty and difficulty, and upon the issue of which the whole question of the guilt or innocence of the party charged may turn. Stone *v.* Dana, 5 Met. (Mass.) 98.

A warrant was regularly issued by a justice of the peace and directed the officer executing it to make immediate search of the person of the plaintiff for lottery tickets, and if any were found to bring them before him. The officer, after searching the person of the plaintiff, discovered, in the room where the search was made, a package of such tickets belonging to the plaintiff and in his possession, but not on his person, and carried them away for the purpose of using them as evidence against him in a future prosecution. It was held that the action of the officer was proper and authorized by the warrant. Collins *v.* Lean, 68 Cal. 284.

proper notice of his authority and purpose he is refused admi tance.[1] If he hands the warrant to the party to read, and th latter refuses to return it, the officer may use force in order to re gain possession of it.[2] An indictment for obstructing the execu tion of a warrant must show the warrant to be legal.[3]

6. Disposition of Seized Property.—The disposition of propert seized under the warrant is ordinarily a matter of statutory regu lation. Claimants are allowed usually an opportunity to be hearc and the court orders the property to be delivered up or returnec or sold or destroyed, as circumstances require.[4]

IV. SEARCHES AND SEIZURES UNDER LIQUOR ACTS—1. In General—The Statutes—Nature of Proceeding.—Searches for and seizures of in toxicating liquor are regulated generally by local statutes, the provi sions of which, to be valid, must conform to the constitutiona principles laid down above.[5] The cases arising out of question

Where one, who has been arrested on a search warrant and carried before a magistrate and discharged, brings an action of trespass against the officer who justifies under the warrant, he may, for the purpose of showing that the officer was not justified by the warrant, give evidence that the goods seized on the warrant did not come within the description of those for which the officer was directed to search. But he cannot for such purpose give evidence that the goods so seized were not those which were in the mind of complainant when he made the complaint and obtained the warrant. Stone *v.* Dana, 5 Met. (Mass.) 98.

In Humes *v.* Taber, 1 R. I. 464, it was held that the wife had no implied authority, in the absence of her husband, to license a search of his house for stolen goods. *Compare* Grim *v.* Robinson, 31 Neb. 540.

1. Barnard *v.* Bartlett, 10 Cush. (Mass.) 501; 57 Am. Dec. 123; State *v.* Smith, 1 N. H. 346; Bell *v.* Clapp, 10 Johns. (N. Y.) 263; 6 Am. Dec. 339. And his justification does not depend upon his finding that for which search is made. Barnard *v.* Bartlett, 10 Cush. (Mass.) 501; 57 Am. Dec. 123; 1 Chitty's Crim. L. (5th Am ed.) 66.

In the leading case of Entick *v.* Carrington, 2 Wils. 275; 11 How. St. Tr. 313–316, it was asserted by counsel for defendant that on a warrant to search for stolen goods the officer might break open doors, and this power was not questioned by the other side nor by Lord Camden in the able and elaborate view which he took of the legality and effect of these warrants.

But if a precept should direct an officer to break and enter a dwelling house without stating any sufficient cause, h could not justify such an act under such a precept. Yet he will be permitted t show in mitigation of damages that n goods were taken except those whicl were proper objects of the search, an that no violence or injury was done bu what was necessary to obtain posses sion of the goods. Sandford *v.* Nichols 15 Mass. 286; 7 Am. Dec. 151.

2. Rex *v.* Mitton, 3 C. & P. 31; 1 E. C. L. 196.

3. State *v.* Tuell, 6 Blackf. (Ind.) 344

4. 1 Rev. Stat. *Missouri* (1879), ch 24, §§ 2000–2011; Com. Law *Kansa* (1885), ch. 82, §§ 298–309; Rev. Stat *Illinois* (1880), ch. 38, div. 8, p. 408 See statutes of other States for analo gous provisions.

5. Such statutes, in order to b valid, must duly observe the guar anteed rights of persons and property as, for instance, they must require no tice to the party of the seizure, an provide means by which he is to b informed when, where, or befor whom, the warrant is returned, an afford him an opportunity to defen his property. Hibbard *v.* People, Mich. 126; Fisher *v.* McGirr, 1 Gra (Mass.) 1; 61 Am. Dec. 381; Sullivai *v.* Oneida, 61 Ill. 242.

In Gray *v.* Kimball, 42 Me. 299, th court, through Tenney, C. J., speakin in reference to the foundation of th power to pass such laws and their ne cessary restrictions, said: "Certai articles which are treated as property while used for lawful purposes, ma be subjects of forfeiture and destruc tion, under proper statutory provisions if their use is deemed pernicious to th

as to the construction of these statutes, and as to the validity and regularity of proceedings had under them, are so numerous that for convenience of reference they are here dealt with by themselves. The nature of the proceedings under these statutes is criminal rather than civil,[1] and this notwithstanding that in form they may appear to assimilate more nearly to the civil action.[2] As their ultimate object is the suppression of illegal traffic and the

best interests of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, statutes authorizing searches and seizures have been held legitimate. The exercise of this power must be properly guarded, that abuses may be prevented, and that a citizen shall not be deprived of his property without having an accusation against him, setting out the nature and charge thereof, and but by judgment of his peers, or the law of the land; and he shall be secure in his person, houses, papers, and possessions from unreasonable searches and seizures. It is not perceived that the statute under which the suit in this case is attempted to be defended violates any of the provisions of the constitution which have been adverted to."

In Santo *v.* State, 2 Iowa 165; 63 Am. Dec. 487, it was held that no search warrant was unreasonable in the legal sense when it was for a thing obnoxious to the law, and of a person and place particularly described, and was issued on oath of probable cause.

In Jones *v.* Root, 6 Gray (Mass.) 435, followed in Mason *v.* Lothrop, 7 Gray (Mass.) 354, it was held that the *Massachusetts* statute of 1855, which authorized officers, without a warrant, to arrest any person found in the act of illegally selling or transporting intoxicating liquors, and seize the liquors, vessels and implements of sale in the possession of such person, and detain them in some place of safe keeping until warrants could be procured for the trial of the person and the seizure of the liquors, was constitutional.

It was held in State *v.* O'Neil, 58 Vt. 140; 56 Am. Rep. 556, that the section of the *Vermont* act of 1882, by which an officer might seize intoxicating liquors, under certain conditions, without a warrant, but which did not purport to confer the power of search, was constitutional.

1. State *v.* Bryan, 4 Iowa 349; State *v.* Certain Intoxicating Liquors, 40 Iowa 95; Weir *v.* Allen, 47 Iowa 482; Fries *v.* Porch, 49 Iowa 351; State *v.* Arlen, 71 Iowa 216; disapproving Sullivan *v.* Oneida, 61 Ill. 242; Hibbard *v.* People, 4 Mich. 126. See also State *v.* Intoxicating Liquors, 80 Me. 91; State *v.* Intoxicating Liquors, 80 Me. 57.

The gravamen of the charge is that the liquors were intended for unlawful sale. State *v.* Robinson, 49 Me. 285.

"The proceeding in question was created by statute for the purpose of condemning property that is dangerous to the public safety and disposing of it so that it can do no harm. It is not a suit between one party and another according to the course of the common law, and would not, either in ordinary or technical language, be classed among civil actions." Wheeler, J., in State *v.* One Bottle of Brandy, 43 Vt. 297.

Massachusetts. — The proceedings held to be criminal in their nature—as to jurisdiction of courts, in Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 561; challenge to jurors, Com. *v.* Certain Intoxicating Liquors, 107 Mass. 216; burden of proving license, authority or appointment, Com. *v.* Certain Intoxicating Liquors, 122 Mass. 8; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36; proof of averments in complaint, notwithstanding default, Com. *v.* Intoxicating Liquors, 113 Mass. 23; burden of proving offense, Com. *v.* Certain Intoxicating Liquors, 105 Mass. 595; in the matter of costs, Com. *v.* Certain Intoxicating Liquors, 14 Gray (Mass.) 375.

But in *New Hampshire* it is held that a proceeding under *New Hampshire* law of 1855, for the forfeiture of liquors, is not a criminal proceeding and cannot be commenced by indictment, and that the issues are to be tried by the rules applied in the trial of civil causes. State *v.* Barrels of Liquor, 47 N. H. 369.

2. Hibbard *v.* People, 4 Mich. 126.

condemnation of liquor kept for unlawful use, the proceedings are rather *in rem* than *in personam*, and the complaint, ordinarily, is rather of the nature of a libel than of the complaint which is the foundation of a personal action.[1] The proceedings under such complaint are generally separate and distinct from the prosecution of the offense of selling or keeping for sale unlawfully.[2]

2. Liability to Seizure.—Liquor brought into the State, and held by the carrier as agent for the consignee, to be delivered to the consignee on payment of the price, may be liable to seizure and forfeiture in the carrier's hands;[3] so it may be seized in the hands

1. State *v.* Barrels of Liquor, 47 N. H. 369; State *v.* Brennan's Liquors, 25 Conn. 278; Hine *v.* Belden, 27 Conn. 384. And being proceedings *in rem* they fix the *status* of the property as to all the world, and notice to the keeper of the liquor when seized is all the notice required, and the owner is bound by the proceedings whether he has notice or not. Johnson *v.* Williams, 48 Vt. 566.

2. When an officer seizes intoxicating liquors upon a warrant issued therefor, he is required also to arrest the person in whose custody they are alleged in the complaint to be, and to have both the person and the liquors before the magistrate who issued the warrant. At this point the proceedings are divided and constitute thenceforth two distinct cases. The *person* is put on trial for having had such liquor in his possession, with intent to sell the same, in violation of law. And the *liquors* are libelled, as intended for illegal sale; whether by one person or another, it is immaterial. So that the acquittal of the *person* does not entitle him to a restoration of the *liquors;* nor does a condemnation of the *liquors* necessarily result in a conviction of the *person*. The two cases are entirely distinct. State *v.* Miller, 48 Me. 576; State *v.* Intoxicating Liquors, 50 Me. 506; State *v.* McCann, 61 Me. 116.

The prosecution and conviction of the owner of intoxicating liquors for an illegal sale thereof will not constitute a bar to a proceeding for the condemnation of the liquors. Sanders *v.* State, 2 Iowa 230. In this case, the court, by Woodward, J., said: "Let us look at the meaning of the act. *First*, it makes the keeping of liquors for sale in the State an offense. This is personal. *Second*, it makes liquors kept for sale in the State a nuisance. Such a nuisance is to be abated by the forfeiture and destruction of the article. His conviction for keeping does not answer the whole end and object of the law. To fine him for keeping for sale, and then leave the thing still to be sold, would be an evasion of the intent of the law. That intent is to remove the occasion of the evil. These two objects might perhaps be united in one proceeding; and if they were, it would not be pretended that his conviction for keeping with intent to sell would prevent the destruction of the thing. Why, then, should it be a bar when the two objects are sought in separate proceedings? The act does not seem to contemplate that the liquors *must* be seized in a proceeding against one for keeping it for sale, but evidently permits it to be pursued separately. We will not say that it *requires* it. This being correct, the conviction of the defendant for keeping with intent to sell is not a bar to a prosecution against the liquors themselves as a nuisance, and for the abatement of the nuisance."

If both cases, that against the liquor seized and that against the individual, are appealed, they are entered and tried in the appellate court as two cases, not as one. State *v.* Miller, 48 Me. 576.

3. State *v.* U. S. Express Co., 70 Iowa 271; State *v.* O'Neil, 58 Vt. 140, 56 Am. Rep. 556.

And in a proceeding against the liquors, it is wholly immaterial whether the carrier knew the character of the property, or the uses to which it was to be put. And where the carrier voluntarily appears in the proceeding and claims the liquors, the costs may properly be taxed against it. State *v.* U. S. Express Co., 70 Iowa 271.

Under *Massachusetts* Stat. 1855, ch. 215, §§ 13, 25, a warrant may be issued to search for and seize spirituous liquors already taken by an officer from a person engaged in illegally

of a warehouseman,[1] or, speaking generally, in the hands of anyone whose intention it is to sell it in violation of law.[2]

3. The Complaint.—While the statutes require the complaint or information to allege the illegality of the keeping of the liquors, or the intention to sell the same in violation of law, yet such allegation need not be in the very language of the statute; it is sufficient if the fact is clearly and substantially set forth. Thus, the

transporting them and still held by the officer. Allen *v.* Staples, 6 Gray (Mass.) 491.

But intoxicating liquors found in a freight railroad station in Portland, Maine, in transit from Portsmouth, New Hampshire, to the National Soldiers' Home at Togus, Maine, located on territory ceded to the United States, and over which the State court had no jurisdiction, at which place alone they were intended for sale by the home storekeeper, were held not liable to seizure under the *Maine* Rev. Sts., ch. 27, §§ 39 *et seq.* State *v.* Intoxicating Liquors, 78 Me. 401.

And where a locked and sealed box freight-car containing, besides other goods, a quantity of intoxicating liquors, in possession of a railroad company as a common carrier, was *in transit* from Massachusetts through New Hampshire to Maine, and before its arrival in Maine, proceedings were instituted under the laws of that State for the seizure of the liquors, and under a warrant issued therein, the car, after its arrival, was broken open and the liquor seized, it was held that the transportation of the liquors being commerce between the States, the process for their seizure while they were in the possession of the carrier, and before the package was broken or delivered to the consignee, was void. State *v.* Intoxicating Liquors, 83 Me. 158. See also Leisy *v.* Hardin, 135 U. S. 100; State *v.* Burns, 82 Me. 558.

But where a railroad company having transported liquors consigned by a person without to a person within the State, holds the same from six to fifteen days after reaching its destination, it ceases to be a carrier, and becomes a warehouseman, and the liquor, if intended for sale in violation of law, may be seized in the freight depot and confiscated. And if the railroad, with intent to aid the consignee in evading the law, keeps the liquor without attempting to collect freight charges, amounting to a very small sum, and permits him to carry the packages away separately, when the charge on each is collected, as has been done in former shipments, it will not be allowed to set up its lien for unpaid charges to defeat the seizure and condemnation of the liquor. State *v.* Creeden, 78 Iowa 556.

1. State *v.* Intoxicating Liquors, 50 Me. 506. In this case it was held that it did not matter that the warehouseman did not intend the violation of the law, or that he claimed a warehouseman's lien on the liquor.

2. In Com. *v.* Certain Intoxicating Liquors, 107 Mass. 396, it was held that intoxicating liquor kept for sale in the State in violation of law might be seized and forfeited as a nuisance under the statute of 1869, even though it was so kept by a bailee in fraud of its owner, who was innocent of the illegal purpose of the bailee. But in State *v.* Intoxicating Liquors, 63 Me. 121, the court used language scarcely reconcilable with the foregoing decision.

Liquors purchased by municipal officers without authority, and in contravention of the statute, may be seized, and the officer so purchasing indicted. State *v.* Intoxicating Liquors, 68 Me. 187.

And intoxicating liquors, though belonging to a town, are not protected against seizure and forfeiture under the *Maine* statute, March 31, 1853, unless the casks and vessels in which they are contained are plainly and conspicuously marked with the name of the town and of its agent. Androscoggin R. Co. *v.* Richards, 41 Me. 233; State *v.* Intoxicating Liquors, 68 Me. 187.

It was held in State *v.* Grames, 68 Me. 418, that under the *Maine* statute, requiring the allegation in the complaint of "a place in the State" where liquor was "unlawfully kept and deposited," a traveling rum-seller carrying liquor on his person could not be searched and the liquor seized. See also State *v.* Roach, 74 Me. 562.

words "for the purpose of sale" in an information are equivalent to "with intent to sell;"[1] and an allegation that the liquors were kept "for sale within the State, in violation of law, upon said date,"[2] or "were kept for the purpose of sale, without authority, within this State, against the statute,"[3] will suffice. If the statute authorizes the seizure to be made previously to the issuing of the warrant, it is immaterial whether the complaint be made before or after seizure,[4] but the officer who makes the seizure and apprehends the seller is exclusively authorized to make such complaint.[5] The complaint must designate with particularity the

1. State *v.* Mohr, 53 Iowa 261.

2. *In re* Liquors of Hoxsie, 15 R. I. 241.

A complaint which avers that certain intoxicating liquors are kept and deposited by A and B in a certain building occupied by them, "which liquors are intended by the said A and B for sale in this commonwealth, said A and B not being authorized to sell the same in this commonwealth," sufficiently alleges an intent to sell the same in violation of law. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

And a complaint alleging that the defendant "did keep intoxicating liquors with intent to sell the same in this commonwealth," he not being authorized to sell the same, is sufficient. Com. *v.* Sprague, 128 Mass. 75.

3. *In re* Liquors of Young, 15 R. I. 243.

A complaint alleging that intoxicating liquors are kept and deposited at a certain place for unlawful sale, is sufficient to justify proceedings *in rem* against the liquors. State *v.* Learned, 47 Me. 426.

But to authorize the conviction of the person having them in his keeping, there must be an allegation that they were intended *by him* for sale in the State, in violation of law, or deposited and kept by him to be sold by some other person, or with intent to aid or assist some person in the unlawful sale thereof. State *v.* Learned, 47 Me. 426; State *v.* Miller, 48 Me. 576.

But it is held that an averment of prior conviction in search and seizure process, that "defendant has been before convicted . . . of unlawfully keeping and depositing in this State . . . intoxicating liquors, with intent that the same should be sold in this State, in violation of law," is sufficient, when accompanied with particular averments of the time and place and court in which the conviction was had. State *v.* Longley, 79 Me. 52; State *v.* Howley (Me. 1887), 9 Atl. Rep. 620.

An information for a search warrant for the seizure of liquors owned or kept with unlawful intent, under *Iowa* Code, § 1544, must charge some specific person, as the owner or keeper of the liquors, with the illegal intent. State *v.* Intoxicating Liquors, 64 Iowa 300.

And though Code of *Iowa*, § 1544, requires the information to be made by a resident of the county, yet it is not necessary that the information should show that the informant is a resident of such county; the fact may be established by independent proof. State *v.* Thompson, 44 Iowa 399; Weir *v.* Allen, 47 Iowa 482; State *v.* Blair, 72 Iowa 591.

The objection that a complaint for unlawfully selling intoxicating liquors avers sale "to . . . " is formal, for the fact of selling, which is alleged, implies that there was a purchaser, and the offense is committed by selling the liquor, and it is not material to whom it was sold. Green *v.* Com., 111 Mass. 417.

4. State *v.* Intoxicating Liquors, 58 Vt. 594.

Where an officer on the 30th of April, in accordance with the *Maine* Rev. Stats., ch. 27, § 34, seized intoxicating liquors without a warrant, and kept them until May 2d following, and then made a complaint, therein alleging that on the 30th of April the liquors were unlawfully deposited and kept, etc., it was held that the complaint was for a past offense which was consummated on the 30th of April, and was rightly described, and that the complaint should not allege that the liquors were still kept and deposited, etc. State *v.* McCann, 59 Me. 383. See State *v.* Dunphy, 79 Me. 104.

5. Fenner *v.* State, 3 R. I. 107.

location of the liquors to be searched for.[1] It must be on oath[2] or affirmation,[3] and generally must be subscribed by the party making it.[4] A statutory provision that the warrant "shall be supported by the oath of the complainant" is complied with by the complainant's making oath to the complaint upon which the warrant is issued.[5]

4. The Search Warrant—*a.* GENERALLY.—The statutes of the several States, in prescribing the requisites of the warrant, may vary in some minor particulars, yet in the main they are quite similar. Whatever formalities are required must be strictly complied with: Thus, the warrant must show that it was founded upon the oath required by law,[6] and it must set out the names of

1. See *infra*, this title, *Description of Place.*

Where a complaint under *Vermont* Gen. Stats., ch. 94, § 22, providing for seizure, forfeiture, etc., of intoxicating liquors, specified "the American Hotel, and the barns, sheds and other outbuildings adjacent thereto, in Burlington, and forming a part of the premises of said hotel," as the place where the liquors were believed to be kept, etc., it was held to be sufficiently specific, being regarded as the designation of a single establishment. State *v.* Twenty-five Packages of Liquor, 38 Vt. 387. In this case the court said: "The word 'place' must receive a reasonable interpretation, not so broad as to encourage a looseness of procedure, nor so narrow as to prevent the search of the entire premises occupied and used by a person in the ordinary course of his business as an innkeeper."

2. But as the oath, though incorporated in the complaint, does not form a part thereof, at the trial to determine whether the liquor seized shall be forfeited, it is not incumbent upon the government to prove all the facts set forth in the oath. Com. *v.* Certain Intoxicating Liquors, 142 Mass. 470.

A complaint for a search warrant to search a dwelling-house for intoxicating liquors illegally kept therein, may be supported, although the oath of one of the complainants required by *Massachusetts* Gen. Stats., ch. 86, § 43, is in the alternative in this form: "That intoxicating liquor has been sold in the house above mentioned by the occupant of said house, *or* with the consent and permission of the occupant of said house, contrary to law, within one month," the oath being in other respects sufficient. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52.

3. One conscientiously scrupulous of taking an oath may affirm. State *v.* Welch, 79 Me. 99; State *v.* Devine (Me. 1888), 13 Atl. Rep. 128. And the certificate of the magistrate to whom such complaint is made, which recites the fact that the complainant made solemn affirmation to the complaint, is conclusive, not only that the complainant was "conscientiously scrupulous of taking an oath," but that he formally "affirmed under the pains and penalty of perjury." State *v.* Welch, 79 Me. 99; State *v.* Devine (Me. 1888), 13 Atl. Rep. 128.

4. Where an information against the defendant charging him with the unlawful selling of intoxicating liquors was not signed at its close, but was followed by an affidavit in due form, properly signed, and contained the certificate of the proper officer that it was sworn to, it was held that since the affidavit constitutes a part of the information, when the complaining party affixes his signature to it, he subscribes to the information within the full meaning of the law. State *v.* Devine, 4 Iowa 443. A complaint made by "Freewaldau C. Thayer" signed "F. C. Thayer, complainant," and certified by the clerk of the court to which it is addressed to have been "received and sworn to before said court," sufficiently appears to be signed and sworn to by the complainant. Com. *v.* Certain Intoxicating Liquors, 142 Mass. 470. Under *Vermont* act of 1855, § 5, the complaint is required to be reduced to writing by the magistrate, though it need not be signed by the complainant. Gill *v.* Parker, 31 Vt. 610.

5. Allen *v.* Staples, 6 Gray (Mass.) 491; Downing *v.* Porter, 8 Gray (Mass.) 539.

6. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599.

the complainants,[1] though it need not direct that they be summoned as witnesses at the hearing and trial of the complaint.[2] If the statute require the warrant to contain an allegation of probable cause, a failure in this particular will be fatal to its validity:[3] and if it ordain that the warrant shall direct the officer to make an inventory of the liquor seized, a warrant omitting such command is defective, and the fact that the officer did make the inventory will not cure the defect.[4]

b. DESCRIPTION OF PLACE.—It has been said that the description in the warrant of the place to be searched should be as certain and specific as would be necessary in a deed of conveyance.[5]

1. Guenther *v.* Day, 6 Gray (Mass.) 490.

2. Downing *v.* Porter, 8 Gray (Mass.) 539; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 62.

3. Com. *v.* Certain Intoxicating Liquors, 105 Mass. 178.

In *Maine*, a magistrate has no authority to issue a warrant to search a *dwelling-house* for intoxicating liquors alleged to be kept for sale, on the complaint of three persons competent to be witnesses, unless it shall *first* be shown to him by the testimony of witnesses reduced to writing and verified by oath, that they have reasonable ground for believing that such liquors are there kept for illegal sale; *and unless the warrant shows this preliminary proceeding, it is void.* State *v.* Spirituous Liquors, 37 Me. 228; McGlinchy *v.* Barrows, 41 Me. 74. See also State *v.* Spencer, 38 Me. 30.

This clause, "probable cause having been shown for the issuing of this warrant," inserted at the close of the sentence directing the officer to enter and search a building, contained in a warrant to search for and seize intoxicating liquors, issued under *Massachusetts* Stats., 1869, ch. 415, sufficiently shows that the court made an adjudication that there was probable cause to believe that the complaint upon which the warrant issued was true, and supplies the place of an allegation to that effect in the *jurat* of the complaint. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

4. Hussey *v.* Davis, 58 N. H. 317.

Other Requirements. — Under the *Maine* Act of 1853, ch. 48, the warrant must require the officer to *arrest* the person by whom the liquors are alleged to be deposited, and have him forthwith before the justice issuing it. If in such case the warrant only require the respondent to be *summoned*, the proceedings are unauthorized and insufficient; and where such warrant, by leave of the justice, was amended so that the officer was commanded by the warrant to arrest the respondent and have him before the justice, the warrant was held to be illegal and void. State *v.* Leach, 38 Me. 432.

Under *Massachusetts* Gen. Stats., c. 86, § 42, a direction in a search warrant for the officer to "make due return of the warrant" will suffice. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 62.

5. State *v.* Certain Spirituous, etc., Liquors, 33 Me. 564; Jones *v.* Fletcher, 41 Me. 254; State *v.* Bartlett, 47 Me. 388.

The description of the place as "the dwelling of R. H., of Shrewsbury" is sufficiently certain. Lincoln *v.* Smith, 27 Vt. 328.

A description as "a certain grocery store, the cellar under the same, and the premises there situate, to wit, on the easterly side of Main street, and numbered 375 on said street, in the city of Worcester, in said county, and occupied by A, is sufficient under *Massachusetts* Stat. of 1869, ch. 415, § 44, although the grocery store and cellar, which only are occupied by A, are in a block of four stories, and two other rooms in the first story bearing other numbers are occupied as stores by other parties. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

But a search warrant under *Massachusetts* Gen. Stat., ch. 86, § 42, which avers that "at W. certain intoxicating liquors are kept and deposited by R. of H. in a certain distillery there situate, about one and one-half miles northeasterly from H. Furnace," is insufficient, as not designating the place to be searched with the particularity required by *Massachusetts* Gen. Stat., ch. 86, § 44. Com. *v.* Certain Intoxicating

It is no objection to the warrant that it directs the search of several different places.[1] A command to search the dwelling house of a person will authorize the search of the house in which such person lives, but not of a house owned by him and rented and occupied by another;[2] nor will it authorize the search of a barn.[3] If a building is known by two numbers, and is as well known by the one as the other, it may be described by either.[4] The warrant is not invalidated by so misnaming one street in the description of the place to be searched, as to make the application of the whole description impossible, if, in other respects, the place is

Liquors, 97 Mass. 334. And to describe the building as "a certain building situate in Plum street, called a shed," is insufficient. State *v.* Certain Spirituous, etc., Liquors, 33 Me. 564.

A complaint under the *Massachusetts* Pub. Stat., ch. 100, § 30, averred that intoxicating liquors were kept by a certain person in a "hotel and barn," on the north side of a street in H, "known as the Valley House and barn in the rear thereof, next east of the bakery building, occupied in part by" a third person. The search warrant recited in substance the averment of the complaint. It was held that the complaint and warrant sufficiently described the building to be searched so as to identify it. Com. *v.* Certain Intoxicating Liquors, 146 Mass. 509.

A warrant commanding the officer to search a building described as occupied by A, but in fact occupied by A and B, in separate tenements, will not authorize him to search a closet which is a part of B's tenement and is not used by A. Com. *v.* Newton, 123 Mass. 420.

A warrant directing the search of a dwelling-house sufficiently describes the premises by an averment that the house is occupied by the defendant and situate on the east side of Blake street, —the house being in fact so occupied and situate east of Blake street, but not adjoining it,—although there is another house between that of the defendant and the street, and access to defendant's house is by an alley running from the street past the other tenement. State *v.* Minnehan, 83 Me. 310. And to describe the place as "a certain tenement situate on E street, and numbered 136 on said street," will suffice. Com. *v.* Intoxicating Liquors, 150 Mass. 164.

In a complaint under *Massachusetts* St. 1869, ch. 415, § 44, this description, "A certain small wooden shed in rear of another shed or storehouse in rear of Washington Hotel, so called, occupied by said White, on north side of Westminster street in said Taunton, and occupied by said White as a storehouse," is, in the absence of evidence of difficulty in identifying it, a sufficient designation of the place to be searched. Com. *v.* Certain Intoxicating Liquors, 113 Mass. 208.

An averment in a complaint and warrant for the search of a dwelling house that "the same is a place of common resort," is insufficient to describe that "a place of common resort is kept therein." Com. *v.* Certain Intoxicating Liquors, 97 Mass. 332. But an averment that the house was occupied by the defendant "as a place of common resort kept therein" is sufficient. Com. *v.* Leddy, 105 Mass. 381.

It is unnecessary to illustrate further. In the following cases the question of the sufficiency of the description of the place has been before the court: Com. *v.* Leddy, 105 Mass. 381; Lowrey *v.* Gridley, 30 Conn. 450; State *v.* Thompson, 44 Iowa 399; Flaherty *v.* Longley, 62 Me. 420; State *v.* Burke, 66 Me. 127; State *v.* Woods, 68 Me. 409; State *v.* Knowlton, 70 Me. 200.

1. Gray *v.* Davis, 27 Conn. 447.

2. McGlinchy *v.* Barrows, 41 Me. 74.

3. Jones *v.* Fletcher, 41 Me. 254. Nor will a warrant under *Massachusetts* Pub. Stats., ch. 100, § 30, to search a certain building "and the outbuildings within the curtilage thereof," authorize a search of another building not in the same enclosure with the one specifically mentioned in the warrant, but separated from it by a narrow passageway, the top of which is covered with rough boards, each building and the passageway having a separate entrance from the street. Com. *v.* Certain Intoxicating Liquors, 140 Mass. 287.

4. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

described truly, and so as to identify it with the place described in the complaint.[1] A material variance between the description in the complaint and that in the warrant will render the process void.[2]

c. DESCRIPTION OF LIQUORS.—The liquors to be searched for and seized must be described in the warrant with such particularity and definiteness as the circumstances will permit, and if the officer seizes liquors not described therein, he will be liable to an action by the owner thereof.[3] The form ordinarily used is, "a certain quantity of whiskey" or other designated kind or kinds of liquors "being about or not exceeding" a specified quantity, and such form will suffice.[4] A designation by the generic term "in-

1. Downing *v.* Porter, 8 Gray (Mass.) 539.

2. A complaint averred that intoxicating liquor was kept in a certain building, "and the first floor and cellar of said building and the back room over the rear part of the store in said building," and prayed for a warrant to search "said building described as aforesaid." The warrant recited the averment of the complaint and directed the entry and search "of the building above described." The warrant was held to be void. Com. *v.* Certain Intoxicating Liquors, 109 Mass. 371.

And where the complaint averred that intoxicating liquors were kept in a certain three story brick building with basement, situated, etc., and prayed for a warrant to search "said three story brick building with basement, and all sheds and outbuildings belonging to said building," and the warrant directed the entry and search of the "three story brick building and all outhouses and sheds belonging to said building," the warrant was held to be void. Com. *v.* Certain Intoxicating Liquors, 115 Mass. 145.

But where the complaint recited that the liquors were kept "in a certain building situate on B street and numbered 152, on said street, in said Boston, and the first floor of said building occupied by said J. C., as a place of common resort kept therein," and prayed for a warrant to search "said first floor of said building," and the warrant contained the same description and directed "the first floor of said building" to be searched, it was held that there was no variance. Com. *v.* Certain Intoxicating Liquors. 107 Mass. 216.

Where a complaint described the premises as "a certain building situated in Wendell, at Wendell depot so called, kept as a store by William Putnam," and the warrant described them as "a certain building situated in said Wendell, at Wendell depot (so called) kept in a store by William Putnam," it was held that this variance did not vitiate the warrant. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 63.

In State *v.* Robinson, 49 Me. 285, the complaint described the place as "the store occupied by said R, situated on the northerly side of F street in said P, being numbered 197 on said street," and in the warrant the description was the same, except that the number was stated to be 179. It was held that the warrant justified the search of number 197, it appearing in evidence that R occupied only that store which was situated on the northerly side of F street. And in State *v.* Bartlett, 47 Me. 388, the place to be searched was described in the complaint as "formerly owned by *Arno Bittues*," and in the warrant the name of *Arno A Bittues* was substituted therefor; it was held that the other part of the description was sufficiently clear to designate the place, independent of the repugnant words, and therefore the latter might be rejected.

In trespass *q. c.*, where a defendant, a deputy sheriff, justifies under a warrant commanding him to "search the premises occupied by P M," evidence that P M was commonly reputed to be the occupant of the premises, is admissible, though they were in fact owned and occupied by his wife, the plaintiff. Metcalf *v.* Weed (N. H. 1890), 19 Atl. Rep. 1091.

3. Arthur *v.* Flanders, 10 Gray (Mass.) 107.

4. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52; Downing *v.* Porter, 8 Gray (Mass.) 539; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 63; Com. *v.* Intoxicating Liquors, 113

toxicating liquors" is valid,[1] yet where this is followed by a *videlicet*, under which are specified certain kinds, only the kinds thus specified may be seized:[2] but as to the *quantity* of the liquors, it has been held that the specification thereof under a *videlicet* was intended merely as a description, and not to limit the quantities to be seized, and that the authority of the officer was not restricted to the quantity specified.[3] The fact that the quantity seized is less than that described,[4] or that some of the kinds described are not found at all,[5] will not affect the seizure of that which is found.

d. SERVICE.—The warrant under these statutes generally may authorize a search in the night-time.[6] If necessary the officer may make a forcible entry.[7] Generally he may seize not only the

Mass. 13; State *v.* Fitzgerald (R. I. 1887), 11 Atl. Rep. 773; In *re* Liquors of Hogan, 16 R. I. 542. See also State *v.* Whiskey, 54 N. H. 164. And where a warrant, after describing the place to be searched and the liquors to be seized, used the following language with regard to the latter: "and are owned or kept by the said G and are intended by him to be sold in violation of the act"—it was held that this language was merely that of averment and not of description, and that it was, therefore, not essential to the justification of the officer serving the warrant that the liquor seized should have been owned or kept by G. Gray *v.* Davis, 27 Conn. 447.

1. State *v.* Certain Spirituous, etc., Liquors, 33 Me. 568; Lincoln *v.* Smith, 27 Vt. 328. See also Com. *v.* Conant, 6 Gray (Mass.) 482.

2. Mallett *v.* Stevenson, 26 Conn. 428. In this case the court, by Sandford, J., said: "Intoxicating liquors is the name of a genus, of which brandy, gin, etc., are species, and although we agree with the judge who tried the cause, that the particular species of liquor, when the species is unknown, need not be stated in the complaint or warrant; yet the objection in this case is, not that all the liquors seized were not designated by their specific names, but that the generic name 'intoxicating liquors' was by the *videlicet* restricted to the species particularly described under it, so that no intoxicating liquors besides those designated by their specific names were complained of, or proceeded against, under any name general or specific."

3. State *v.* Brennan's Liquors, 25 Conn. 277.

4. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 63. In this latter case the complaint and warrant described the liquors as certain quantities of rum, gin, brandy, whiskey, strong beer, ale and wine, "being about and not exceeding 500 gallons" each. The officer in his return certified that by virtue of the warrant he had seized "the liquors described therein; to wit, about 125 gallons of whiskey, about 49 gallons of gin, about 57 gallons of rum, and about 12 gallons of wine." It was held that the variation between the quantities set forth in the complaint and warrant and those seized was not a sufficient cause for dismissal of the complaint.

5. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52. Nor will the seizure be rendered void by the fact that some liquor is seized that is not intoxicating. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

6. Com. *v.* Hinds, 145 Mass. 182.

It was held in State *v.* Brennan's Liquors, 25 Conn. 278, that a warrant issued under the *Connecticut* Act of 1854 was not rendered invalid by the absence of a direction therein that the search should be limited to the daytime, the presumption being that the officer would execute the precept at a proper time and in a proper manner, although it contained no especial direction to that effect.

7. Androscoggin R. Co. *v.* Richards, 41 Me. 233. In this case it was held that an officer, acting under a warrant for the search of intoxicating liquors, is justified in forcibly breaking and opening the depot of a railroad in which the liquors are stored, after the usual time for receiving and delivering the goods at

liquor but the vessels containing it,[1] and may arrest the person keeping it and intending to sell it.[2] That the warrant issued upon the complaint of a constable and another person does not preclude the constable from serving the warrant.[3]

e. RETURN.—It must appear from the officer's return that the place searched, and the liquor seized, were those designated in the warrant. If the place is described adequately in the warrant, a return by the officer that he has searched "the within described premises" is sufficient.[4] And a return that "by virtue of the within warrant, I have seized the following described liquors," describing them as in the warrant, is equivalent to saying that the liquors seized were those described in the warrant, and is, therefore, valid.[5] In some States, if the officer is prevented from seizing the liquors by their being destroyed, he may arrest the keeper; in which case, he must make return of the fact and manner of the destruction and, as near as may be, the quantity destroyed.[6]

the depot, if such forcible entry is necessary to the execution of the warrant; and in such a case it is not necessary that the officer should first ask permission of the person having charge of the depot to enter and search it.

1. Perkins *v.* Gibbs, 29 Vt. 343. In this case the court said: "In regard to the cask, we think a sufficient justification for taking the contents must also include the vessel, of necessity. The owner by putting it to this prohibited use must be satisfied to have it share the fate of its contents. The statute could never have been intended to receive any other construction. The idea that an officer going to seize spirits kept for sale must go provided with casks would certainly be attended with serious embarrassment and is one which the statute does not seem to countenance."

See also Allen *v.* Staples, 6 Gray (Mass.) 491. But under the *Maine* statute it is held that if the officer, under such circumstances, seize the vessels, he is liable therefor, though an action cannot be maintained against him for the liquors seized. Black *v.* McGilvery, 38 Me. 287.

2. State *v.* Dunphy, 79 Me. 104. And an officer who arrests, under *Massachusetts* Stat. 1855, ch. 215, § 13, a person in the act of illegally transporting intoxicating liquors in a wagon, may detain the wagon and horses for such time as is reasonably necessary to remove the liquors from the wagon; and is not bound to seek out the owner of the horses and wagon and restore them to him, even if not privy to such transportation; and may remove them from the travelled part of the highway to prevent an obstruction thereof, and take them into his own barn, for the purpose of saving the horses from suffering, until called for by the owner. Jones *v.* Root, 6 Gray (Mass.) 435.

3. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596. And the warrant may be executed by a constable legally authorized to serve such process, although it contain no direction to him, and an amendment inserting such direction being but matter of form, is within the power as well as the discretion of the court, until final judgment. State *v.* Hall, 78 Me. 37.

The delivery by an officer of a part of the liquors seized to a third person claiming to own them, the delivery being made with the assent of the alleged keeper, who appears in court as claimant under proceedings for forfeiture, will not render the seizure of the remaining liquors illegal or void. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

4. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

5. State *v.* Hall, 81 Me. 34; State *v.* McCann, 59 Me. 383; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

6. But, before the magistrate, these facts are to be proved by evidence under oath and not by the officer's return. And the person who, by violence, prevents the officer from seizing the liquor and ascertaining its quality and quantity, cannot object that his return is not sufficiently certain. State *v.* Stevens, 47 Me. 357.

5. Seizure Without Warrant.—An officer cannot, in the absence of statutory authority, seize intoxicating liquors without a warrant.[1] But this power in many of the States is conferred, the statutes providing that in all cases where the officer may seize liquors by virtue of a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure a warrant.[2] Should he neglect to obtain the warrant within such time, he will be liable as a trespasser.[3] And

Officer's Return as Evidence.—The officer's return upon the warrant should be read before the jury as exhibiting what is to be proved, but not as any part of the proof itself to sustain the prosecution. State *v.* Howley, 65 Me. 100. And in State *v.* Lang, 63 Me. 215, it was held that the returns upon the warrants are admissible in evidence as a part of the records of judgments; and under a conviction, the presumption is that the respondent had in his possession all the liquors described in the return, when nothing to the contrary appears.

1. Kennedy *v.* Favor, 14 Gray (Mass.), 200; Reed *v.* Adams, 2 Allen (Mass.) 413.

2. Jones *v.* Root, 6 Gray (Mass.) 435; Kent *v.* Willey, 11 Gray (Mass.) 368; State *v.* Dunphy, 79 Me. 104; State *v.* O'Neil, 58 Vt. 140; 56 Am. Rep. 556; State *v.* Intoxicating Liquors, 58 Vt. 594.

In Weston *v.* Carr, 71 Me. 356, the court, by Libbey, J., said: "The power given by this statute to an officer to seize property at pleasure without a warrant, is an extraordinary one, and can only be justified on the ground that the public good and the prevention of crime require it. The statute should be construed strictly. The words of the statute imply that the officer cannot keep the liquors longer than is necessary, in the use of due diligence for the procurement of the warrant. The language is 'for a reasonable time *until he can procure such warrant.*' Here 'reasonable time' is defined and limited by what follows; and the officer must use due diligence, if he would protect himself in the discharge of his duty. What is a reasonable time to enable an officer to procure a warrant must be determined by the facts of the case; but when no sufficient reason is given for a longer delay, we think it should not exceed twenty-four hours from the time of seizure."

Under *Maine* Rev. Sts., ch. 27, § 34, providing for seizure of liquors and the vessels containing them, without a warrant, and for keeping them until a warrant can be procured, the liquors and vessels containing them were destroyed in a scuffle between the officer and the respondent. It was held that the word "keep" should be construed strictly, and the liquors not having been kept, the officer had no right to procure the warrant—the wrongful act of the defendant preventing him from keeping them not giving him that right. State *v.* Howley, 65 Me. 100. Nor is a conviction before a justice of the peace, upon a complaint for illegally transporting liquors, from which an appeal has been taken, sufficient evidence of probable cause to believe that the defendant was so transporting the liquors to justify the previous arrest of the defendant and seizure of the liquors, by an officer without a warrant, under *Massachusetts* Sts. 1855, ch. 215, § 13. Mason *v.* Lothrop, 7 Gray (Mass.) 354. But when the officer has taken the liquors into his possession for safe keeping without a warrant, and then proceeds to make the necessary complaint to procure a warrant, the allegations must be changed to the past tense—that they were unlawfully kept and deposited in the place when and where the officer found them when he took them, and that they were then and there intended for sale within the State in violation of law; for after being taken by the officer, even for safe keeping only, it could no longer be consistently alleged that they still "are kept" and "are intended for unlawful sale." When the warrant is thus obtained with the proper allegations in the complaint, the liquors are taken thereupon and due proceedings had thereunder. State *v.* Dunphy, 79 Me. 104.

3. Kent *v.* Willey, 11 Gray (Mass.) 368. Pub. St. Rhode Island, ch. 87, § 39, provides that the officer seizing liquors "shall forthwith proceed to prosecute for the forfeiture of the same in the manner provided by law." It is held that the foregoing provision is

it has been adjudged, that where no sufficient reason is assigned for a longer delay, the time intervening the seizure and the issuance of the warrant should not exceed twenty-four hours.[1] If the officer arrests a person for illegally transporting intoxicating liquors, it is not necessary, in order to justify the act, to prove that a warrant was afterwards procured against the liquors seized at the same time.[2]

6. Notice to Claimants.—After the service and return of the warrant, notice of the seizure and trial should be given to the claimants of the liquors.[3] A misrecital in the notice as to the source from which the warrant issued, will not invalidate the proceedings; as, for instance, that the seizure was made under a warrant issued by a district court, when in fact the warrant was issued by a special justice thereof.[4] And if it appears from various original documents in the case that notice was issued within the prescribed time, an error in the record of the court by which a later date is inserted as the time of giving the notice, is immaterial.[5] One who appears as claimant of the liquors cannot object that no notice has been given to others;[6] nor can one who has appeared and been admitted to prosecute his claim object, after a verdict of forfeiture, to defects in the service of the notice to him.[7] The

directory merely, and intended to bring the question of forfeiture to a speedy trial and to impose responsibility upon the official for unnecessary delay; but that his neglect to prosecute speedily does not exempt liquors from forfeiture which are kept for sale in violation of law, as the forfeiture depends upon the breach of the law, and not upon the officer's diligence. *In re* Liquors of Hoxie, 15 R. I. 241.

1. Weston *v.* Carr, 71 Me. 356; State *v.* Dunphy, 79 Me. 104.

2. Kennedy *v.* Favor, 14 Gray (Mass.) 200. And in an action against an officer for arresting a person without a warrant, on the ground that he was unlawfully transporting intoxicating liquors, declarations of the plaintiff made the day before the arrest tending to show that he was at the time of the arrest actually transporting said liquors, are admissible in evidence for the defendant although not known to him at the time of the arrest. So also are the warrant obtained the day afterwards and the complaint on which it was issued. Mason *v.* Lothrop, 7 Gray (Mass.) 355.

3. The twenty-four hours within which, by Massachusetts Gen. Stats., c. 86, §§ 46, 54, notice must issue to the alleged keeper of intoxicating liquors, are hours exclusive of the Lord's Day. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 601.

A notice describing liquors as contained in wooden casks, and reciting that the liquors, with the vessels containing them, exceed, in the judgment of the magistrate, twenty dollars in value, is sufficient notice to persons claiming an interest in the vessels. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599. And if the complaint and warrant describe the place to be searched as "occupied by A. B. as a barn, shed and dwelling-house," a notice is sufficient which describes the place as "the building occupied by said A. B. as a house, barn and shed." Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599.

But notice to a person complained against as keeper of intoxicating liquors seized at H, which describes the place of seizure as "at W., in a certain distillery there situate about one and one-half miles northeasterly from H. Furnace," is insufficient. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 334.

4. Com. *v.* Certain Intoxicating Liquors, 128 Mass. 72.

5. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

6. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

7. Com. *v.* Certain Intoxicating Liq-

subsequent neglect of the magistrate to issue notice to persons interested will not make the prior act of seizure a trespass.[1]

7. Status of Liquors After Seizure.—Intoxicating liquors seized and held by an officer under a valid process, legally served, are *in custodia legis*, and the owner cannot maintain replevin against him therefor,[2] nor is it competent for the officer, if such an action be instituted, to consent that judgment be entered for the plaintiff upon payment of costs.[3] When the jurisdiction of the State court has attached to liquors seized by its officer, he cannot be attached by a federal court for contempt, for refusing to obey the command of a writ of replevin issuing out of that court.[4]

8. Trial—*a.* JURISDICTION.—As the proceedings partake of a criminal nature, the jurisdiction of the magistrate is not affected by the value of the liquors.[5] Only those liquors are brought within the jurisdiction of the court for condemnation which were originally seized in a lawful manner.[6] The magistrate has juris-

uors, 13 Allen (Mass.) 561; Com. *v.* Intoxicating Liquors, 110 Mass. 182; State *v.* Brennan's Liquors, 25 Conn. 277; State *v.* Miller, 48 Me. 576.

1. Voetsch *v.* Phelps, 112 Mass. 407. See also Guptill *v.* Richardson, 62 Me. 257.

2. Musgrave *v.* Hall, 40 Me. 498; Allen *v.* Staples, 6 Gray (Mass.) 491; State *v.* Harris, 38 Iowa 242; Fries *v.* Porch, 49 Iowa 351.

Where a car load of beer was shipped into *Iowa* by a non-resident, and there seized by virtue of a warrant duly issued, and charging that it belonged to certain residents, it was held to be rightfully in the possession of the officer pending the justice's determination upon the question of forfeiture, and could not be replevied from him. Lemp *v.* Fullerton (Iowa 1891), 48 N. W. Rep. 1034; Anheuser-Busch Brewing Assoc. *v.* Fullerton (Iowa 1891), 50 N. W. Rep. 56.

In Funk *v.* Israel, 5 Iowa 438, the court, by Stockton, J., said: "To suffer a party in an action of replevin to take the liquors out of the hands of the officer seizing them would be an interference with the administration of justice in criminal proceedings, and would defeat the whole object and intention of the prohibitory liquor law. By that law the keeping of intoxicating liquors for sale is prohibited; the liquors so kept are declared a nuisance, and must be forfeited and destroyed. It is easy to perceive that if they may be replevied out of the hands of the officer seizing them there will be very few instances in which the object of the statute will be attained by the destruction of the liquors kept for sale contrary to law. . . . The liquors were in the custody of the law, by virtue of process issued in a criminal proceeding, and were awaiting the action of the court under the law, by which it was to be ascertained whether or not they were liable to be forfeited, and to a judgment that they be destroyed. While such proceedings are in progress the liquors are not the subject of an action of replevin. An attempt of the owners to regain their possession by a writ of replevin would, at common law, be deemed a contempt of the jurisdiction of the court issuing the warrant."

In *Vermont* it is held that intoxicating liquors seized and condemned according to law, are outlawed; are without rights, and a claimant of such liquors is not entitled to a jury trial. State *v.* Intoxicating Liquors, 55 Vt. 82.

3. Fries *v.* Porch, 49 Iowa 351.

4. Senior *v.* Pierce, 31 Fed. Rep. 625.

Duty of Officer in Keeping Liquors.—An officer seizing intoxicating liquor under the search and seizure provisions of the *Vermont* law of 1852, is only bound in keeping it to use that care and diligence which prudent men use in the care of their own goods; and the exercise of such care is sufficiently alleged by an averment that they were kept in a safe, suitable, and proper place. Perkins *v.* Gibbs, 29 Vt. 343.

5. State *v.* Arlen, 71 Iowa 216; *disapproving* Sullivan *v.* Oneida, 61 Ill. 242.

6. Guptill *v.* Richardson, 62 Me. 257.

diction if the liquors seized correspond in kind to those described in the complaint, and are within the quantities therein named.[1] The jurisdiction is not affected by an omission to summon the complainants as witnesses.[2]

b. EVIDENCE.—To support a judgment of forfeiture of liquor seized, the allegations of the complaint must be proved.[3] As the proceeding is of a criminal rather than of a civil nature, the allegations must be proved beyond a reasonable doubt, and not by a mere preponderance of evidence.[4] Questions of evidence that have arisen in this class of cases present merely applications of well recognized principles to particular circumstances, and call for no especial discussion.[5]

1. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 561.

2. Com. *v.* Certain Intoxicating Liquors, 108 Mass. 290.

Massachusetts.—The warrant to an officer to serve a notice to the person complained against, directed him to return the warrant "before the superior court, to be holden at Worcester, in our county of Worcester, on the second Monday in August;" the copy of the magistrate's record certified to the superior court recited that notice had been issued to the person complained against "to appear before the superior court of Worcester, in said county, on the second Monday of August next;" but the notice itself required him "to appear before the superior court to be holden at Fitchburg in said county of Worcester, on the second Monday of August next." The term of the superior court was held at that time, as required by law, at Fitchburg and not at Worcester. It was held that the superior court held at Fitchburg had jurisdiction of the case. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

3. It was held in Com. *v.* Intoxicating Liquors, 113 Mass. 23, that where the claimant made default it was discretionary with the court to permit him to offer evidence.

4. Com. *v.* Certain Intoxicating Liquors, 105 Mass. 595; Com. *v.* Certain Intoxicating Liquors, 115 Mass. 142.

In *Vermont* there is a statute, the effect of which was held in State *v.* Intoxicating Liquors, 58 Vt. 594, to throw upon the State the burden merely of making out a *prima facie* case. See also Lincoln *v.* Smith, 27 Vt. 328.

5. **Allegation of Place.**—The allegation of the place in the complaint where liquors are alleged to be kept is a material traversable allegation, and the claimant has the right to require proof of it and to have the issue submitted to the jury. Com. *v.* Certain Intoxicating Liquors, 117 Mass. 427.

When a street is designated in the complaint by a name other than that given it by the municipal authorities, evidence is competent that it is known by the one name as well as by the other; and evidence of persons living in the neighborhood, and using the street for years, that they never heard it called by another name than that given in the complaint is sufficient. Com. *v.* Certain Intoxicating Liquors, 113 Mass. 208.

Complainant's Belief.—The statement of the complainant's belief contained in the affidavit which is made a condition precedent to the issuing of the search warrant is not a traversable fact. State *v.* Plunkett, 64 Me. 534.

Former Proceedings.—A complaint may be maintained although founded upon evidence obtained by means of former proceedings instituted for the purpose of gaining possession of the building in which the liquors were kept, and without any knowledge on the part of the complainants in the former proceedings as to the liquors or the vessels containing them. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

While it is sufficient to authorize the forfeiture of the liquors, if it be proved that they were kept and deposited for unlawful sale, yet in order to warrant the conviction of the person, it must be proved that they were by him unlawfully deposited, or intended for sale in violation of law. State *v.* Learned, 47 Me. 426. See also State *v.* Certain Spirituous, etc., Liquors, 33 Me. 564.

c. VERDICT AND JUDGMENT.—The verdict may be general, special findings not being necessary.[1] A complaint which alleges that the liquors were kept in a certain place will not support a

Statements of the person in whose possession the liquors were seized as to the ownership of such liquors, is admissible in evidence. *In re* Liquors of Horgan, 16 R. I. 542.

To obtain a forfeiture under the *Maine* act of 1851 for the suppression of drinking houses, etc., it must be proved on the trial that the liquors were intended for sale in the city and town in which they were kept or deposited. State *v.* Gurney, 33 Me. 527; State *v.* Certain Spirituous, etc., Liquors, 33 Me. 564. But it is not necessary to prove that they were intended for sale in the shop or other building wherein they were kept or deposited. State *v.* Spirituous, etc., Liquors, 33 Me. 564.

Declaration of Wife.—A declaration by a wife, speaking of a bottle of whiskey on her person, "We will sell liquor in spite of all the officers of station 1," uttered in the presence of her husband, who was not then under arrest or duress, is competent on a complaint against him, as an implied admission and assertion that both of them were engaged in selling liquor, and that the sale was illegal. Com. *v.* Funai, 146 Mass. 570.

Upon the question of intent, evidence of sales made prior and subsequently to the seizure is admissible, and it is immaterial that the liquors sold are different in kind from those seized. State *v.* Mead's Liquors, 46 Conn. 22. In this case it was further held that evidence was admissible that packages, apparently of liquors, were received at the railroad station of the town, consigned to the person charged with keeping the liquors for sale, although there was no proof that they were actually delivered to him; and that the failure to prove that the packages in fact contained intoxicating liquors went to the weight of the evidence but did not render it inadmissible.

See also Com. *v.* Stoehr, 109 Mass. 365; Com. *v.* Dearborn, 109 Mass. 368.

In Com. *v.* Purdy, 146 Mass. 138, the complaint was dated August 23, 1887, and alleged the keeping for sale of intoxicating liquors on April 1, 1887, "and on divers days and times" between that date and November 1, 1886; it was held that the evidence of such keeping prior to November 1, 1886, but within two years of the making of the complaint, was inadmissible.

The original complaint and warrant are admissible in evidence, and the officer who makes the seizure may testify as to the identity of the liquors. State *v.* Bartlett, 47 Me. 396.

"Unlawful Keeping and Exposing"—Surplusage.—A complaint for unlawfully exposing and keeping for sale intoxicating liquors, is supported by proof of such keeping for sale merely, and the averment of exposure may be rejected as surplusage. Com. *v.* Atkins, 136 Mass. 160; Com. *v.* Tay, 146 Mass. 146.

Character of Liquors as Intoxicating.—Where a statute provided that the word "intoxicating" should include any liquor or mixture of liquors containing more than 2 per cent. by weight of alcohol, and prohibited the sale of intoxicating liquors, and the evidence showed the liquors seized to be wine, ale containing 4.94 per cent. by weight of alcohol, and beer containing 2.89 per cent. by weight, of alcohol, it was held that a request to charge the jury that there was no evidence that the liquors were intoxicating was properly refused. State *v.* Gravelin, 16 R. I. 407. And where the witnesses testified that the liquor seized was put up in jugs, bottles, demijohns, and barrels, and marked "Old Bourbon," "Rye Whiskey," etc.; that it smelled like liquor; that the place was furnished with tumblers, sugar, toddy-sticks, etc.; that there was a counter, men on either side of the counter, and those on one side were drinking; it was held that the evidence of these facts tended to show that the liquors were intoxicating and kept for sale, and was properly submitted as such to the jury. State *v.* Twenty-five Packages of Liquor, 38 Vt. 387. It is competent for the jury to find ale intoxicating on testimony of a witness who saw and smelled but did not taste it. Haines *v.* Hanrahan, 105 Mass. 480.

1. State *v.* McCann, 61 Me. 116; State *v.* Nowlan, 64 Me. 531.

Vermont.—The officer may seize liquor for either of the alternative causes named in his precept and the

verdict in the alternative that they were owned or kept there.[1] If the statute provides for the return of liquors in the event of a failure to prove that they were kept for sale contrary to law, they may be returned where the proceedings are quashed because of formal defects.[2]

d. APPEAL.—The statutes generally authorize summary proceedings, in the first instance, before a justice of the peace or other inferior court, but provide for an appeal to a court where a trial by jury may be had. And the conditions of the appeal must not be unreasonable or oppressive; as, for instance, if a recognizance be required, it should not be excessive in amount.[3] One who has not appeared to claim the liquors until after the superior court has adjudged them forfeited and ordered them destroyed, cannot appeal from the order.[4]

complaint it follows, as the case may present itself to him upon appearance —*i. e.*, may seize it if found under circumstances warranting his belief that it was intended either for sale or distribution, and may certify for which of the alternative causes it was seized; and the court may condemn for either, as the case presents itself to it upon proof. State *v.* Twenty-five Packages of Liquor, 38 Vt. 387.

1. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599. When the complaint names no person as the owner, keeper or claimant of the liquors, the swearing of the jury in the form as of a criminal trial is irregular, as a finding that the defendant is guilty would be void, there being no issue upon which it could rest. State *v.* Certain Spirituous, etc., Liquors, 33 Me. 564.

Where the verdict finds that the liquors described in the complaint, and seized on the warrant, were owned and kept in the premises as alleged in the warrant for the purpose of being sold in violation of *Massachusetts* Stat. 1869, ch. 415, they are sufficiently identified as certain intoxicating liquors owned and kept for sale contrary to law, for the court under § 51 of that statute to render a judgment of forfeiture. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

If the liquors are described in the same way in the complaint, warrant and officer's return upon the warrant, it is immaterial whether the issue to the jury is, whether the whole or any part of the liquors described in the complaint were unlawfully kept for sale, or whether the whole or any part of the liquors actually seized where so kept. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596. And unless a final judgment of forfeiture has been rendered in the superior court it is immaterial whether a bill of exceptions to rulings at the trial shows that the liquors seized were those described in the complaint. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

2. Com. *v.* Certain Intoxicating Liquors, 103 Mass. 454. But in such a case the claimant is not entitled to costs. Com. *v.* Certain Intoxicating Liquors, 14 Gray (Mass.) 375.

It is not necessary that the claimant of liquors seized should set forth in his claim the person of whom, the place where, or the time when, such liquors were purchased; the fact of ownership constitutes the foundation of his claim; the right to possession rests in such ownership, with no intention to keep or sell the same in violation of law. State *v.* Intoxicating Liquors, 69 Me. 524.

Officer's Fees.—Under Code *Iowa*, § 1546, providing that when intoxicating liquor is taken on a search warrant, and no person is made defendant, or judgment is for the defendant, the costs shall be paid as in criminal prosecutions, where the prosecution fails, a justice issuing such warrant may recover fees therefor against the county, though no liquors were found. Garrett *v.* Polk Co., 78 Iowa 108. And under § 1307, providing for a fee for the officer serving the warrant, such officer, by making the search, is entitled to his fee, though the search prove fruitless. Byram *v.* Polk Co., 76 Iowa 75.

3. *In re* Liquors of McSoley, 15 R. I. 608. See also Saco *v.* Wentworth, 37 Me. 165; 58 Am. Dec. 786.

4. Com. *v.* Intoxicating Liquors, 110 Mass. 188.

SEASHORE.—See SHORE.

SEATED.—See note 1.

SEAT IN STOCK EXCHANGE.—See STOCK EXCHANGE.

SEAWEED.—(See also FISH AND FISHERIES, vol. 8, p. 23; NAVIGABLE WATERS, vol. 16, p. 236; PROFIT À PRENDRE, vol. 19, p. 259; WATERS AND WATERCOURSES.)

I. In General, 981.
II. Above High Water Mark, 982.
III. Below High Water Mark, 982.
IV. Below Low Water Mark, 983.

I. **IN GENERAL.**—Title to the seashore between high and low water mark was, at common law, vested in the crown.[2] Nevertheless there was not a general right in the public to enter on the seashore for the purpose of taking seaweed.[3]

If on a complaint for the forfeiture of intoxicating liquors the person complained against does not appear as a claimant, but consents, on the record, that the liquors may be destroyed without publication of notice, a writ of error brought by him to reverse the judgment will be dismissed on motion. Leslie *v.* Com., 107 Mass. 215.

In *Iowa*, after a trial in the district court on appeal, it is error to sustain a motion by the State for a new trial. State *v.* Certain Intoxicating Liquors, 40 Iowa 95.

1. "**Seated lands**," a term used in *Pennsylvania* tax laws, are lands which are actually resided upon, cultivated or occupied. Residence without cultivation or cultivation without residence, or both together, constitute "seated lands." Kennedy *v.* Daily, 6 Watts (Pa.) 269; Wilson *v.* Watterson, 4 Pa. St. 214; Lackawanna Iron Co. *v.* Fales, 55 Pa. St. 98; George *v.* Messinger, 73 Pa. St. 418.

2. Benest *v.* Pipon, 1 Knapp 68. In Howe *v.* Stowell, 1 Alcock & Knapp 348, Judge Jebb said: "That the king has the soil of the shore from high to low water mark, as well as beyond that mark, is clear from the authority of Hale, as also from the charter of the Admiral of England."

3. Howe *v.* Stowell, 1 Alcock & Knapp 348, was an action of trespass for breaking and entering plaintiff's close: the defendant's plea of justification, that the close in question was the seashore and that the defendant, as the king's subject, was entitled to enter thereon for the purpose of getting seaweed left by the tide, was held to be bad.

In Healy *v.* Thorne, Ir. Rep., 4 C. L. 495, the court said: "With respect to the contention by defendant that the verdict was against the weight of evidence, it is to be construed that in this action of trespass the plaintiff was in possession; the defendant is a mere trespasser. The public in such cases have no right to go on the seashore between high and low water mark to take seaweed." See also Queen *v.* Clinton, Ir. Rep., 11 C. L. 198; Ir. Rep., 9 C. L. 29.

In Brew *v.* Haren, Ir. R., 11 C. L. 205, Fitzgerald, J., says: "There seems also to be an absence of any claim to the property in such weed before appropriation on behalf of the grantee of the crown until very recent times. The grantee of the crown usually asserted his rights, whatever they were, by excluding the public from going on or over his lands to the seashore; or by excluding them from the seashore when he was in a position to assert his exclusive title to the soil of the seashore." See also Wyse *v.* Leahy, Ir. R., 9 C. L. 384; Hamilton *v.* Attorney for Ireland, L. R., 5 Ir. 555; 9 L. R. Ir. 271; 7 L. R. Ir. 223; Daly *v.* Murray, 17 L. R. Ir. 185, 196.

In Mulholland *v.* Killen, 9 Ir. Rep. Eq. 471, the plaintiffs had exercised exclusive acts of ownership over the adjoining foreshore for about sixty years, although there was no positive evidence of a grant from the crown. Certain persons who were adjacent tenants having entered thereon in assertion of an alleged public right to carry off the seaweed, the plaintiffs filed a bill praying that they might be declared entitled to the foreshore and

The right to gather seaweed is a right to a profit in the soil.[1] It may be granted to one whose estate does not border upon the seashore, and when thus granted becomes an estate appurtenant to the land of the grantee.[2]

II. **Above High Water Mark.**—Seaweed cast upon the shore of the sea, or of a navigable river above high water mark, belongs to the owner of the shore.[3]

III. **Below High Water Mark.**—The proprietor of the land to low water mark has the exclusive right to seaweed between high water mark and low water mark.[4]

seaweed, and be quieted in the exclusive possession and enjoyment thereof. The court held that the plaintiffs were entitled to the relief sought.

1. Hill *v.* Lord, 48 Me. 83.

2. In Phillips *v.* Rhodes, 7 Met. (Mass.) 322, in the division of an estate bounded by the seashore, one of the heirs took a parcel not adjoining the beach. In the deed conveying such parcel to this grantee was reserved the privilege of getting seaweed on the beach below. The court held that the right thus granted to gather the seaweed was a right appurtenant and could not be severed from the estate. Therefore it could not be sold to a stranger who would take nothing by such purchase, but that the use of the seaweed itself was not confined to this particular estate, but the grantee, after having taken the seaweed from the beach, might use it upon the estate, or might dispose of it to others.

In Hall *v.* Lawrence, 2 R. I. 218; 57 Am. Dec. 715, the right granted was held to be a common appurtenant and limited in its use to the requirements of the dominant estate.

A right to take sea-weed from the soil of another cannot be gained by custom, but can by prescription. Kenyon *v.* Nichols, 1 R. I. 106; Nudd *v.* Hobbs, 17 N. H. 524.

In Bailey *v.* Sisson, 1 R. I. 233, the right to pass over the land and seashore of another, and take seaweed from any part of such shore, had been reserved to several owners of lands adjacent thereto. The court decreed partition of the right thus jointly held, in proportions corresponding to the respective interests of the parties, in the lands to which such right was appurtenant.

In Cohasset Flats *v.* Tower, 24 Law Rep. 734, it was held that a statute, granting to a person other than the owner the right to enter upon land and take seaweed, was unconstitutional.

In Baird *v.* Fortune, 7 Jur. N. S. 926, it was held that the right to take seaweed from the shore did not pass by the conveyance of an estate two miles distant therefrom, there being no express words of conveyance of such an easement except the words "together with the appurtenances."

See also Parsons *v.* Miller, 15 Wend. (N. Y.) 561; Cushing *v.* Warrick, 9 Gray (Mass.) 382; Ripley *v.* Knight, 123 Mass. 515, which cases, however, relate to particular and complicated facts, and throw no especial light upon the principle of the matter.

3. Emans *v.* Turnbull, 2 Johns. (N. Y.) 313; 3 Am. Dec. 427; East Hampton *v.* Kirk, 68 N. Y. 459; 6 Hun (N. Y.) 257; 84 N. Y. 215; Church *v.* Meeker, 34 Conn. 421; Mather *v.* Chapman, 40 Conn. 382; 16 Am. Rep. 46.

Seaweed cast by extraordinary tides belongs to the riparian proprietor upon whose land it is thrown, even though the land below high water mark has been appropriated by parliament. Lowe *v.* Govett, 3 B. & Ad. 863; 23 E. C. L. 203. See also Phillips *v.* Rhodes, 7 Met. (Mass.) 322; Hall *v.* Lawrence, 2 R. I. 218.

4. Cooley on Torts (1st ed.), p. 366; Healy *v.* Thorne, Ir. Rep., 4 C. L. 495; State *v.* Pratt, 19 Pick. (Mass.) 191. See also Moore *v.* Griffin, 22 Me. 350; Clement *v.* Burns, 43 N. H. 609.

At common law the title to the shore below high water mark remained in the sovereign. By colonial ordinances in *Massachusetts*, the right of the proprietor was extended to low water mark. Barker *v.* Bates, 13 Pick. (Mass.) 255; 23 Am. Dec. 678; Boston *v.* Richardson, 105 Mass. 351; Hathaway *v.* Wilson, 123 Mass. 359.

But in Anthony *v.* Gifford, 2 Allen (Mass.) 549, the court held that sea-

IV. Below Low-Water Mark.—The right to take seaweed growing or accumulating below low-water mark is in the public.[1]

SEAWORTHY.—See Charter Party, vol. 3, p. 146; Marine Insurance, vol. 14, pp. 366–372; Seamen; Ships and Shipping.

SECONDARY.—See note 2.

SECONDARY CONVEYANCES are conveyances which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore or transfer the interest granted by such original conveyance.[3] They are first, releases,[4] second, confirmations,[5] third, surrenders,[6] fourth, assignments,[7] and

weed, kelp, or other marine plants did not belong to the owner of the shore so long as they were floating and moved about by the tide. Bigelow, C. J., said: "And this is true, whether they are wholly afloat so that they do not come in contact with the bottom, or only partially so, or to such an extent that they occasionally, by the motion of the tides or the rise of the tide, touch or rest on the beach."

In Hill *v.* Lord, 48 Me. 83, an action of trespass was brought to recover the value of a quantity of seaweed taken by defendant from the shore of the plaintiff's island below-high water mark. By colonial law the plaintiff's title extended to low-water mark, and his right to the seaweed cast up by the tide was affirmed. It was established by the decision of the court that seaweed belongs to the owner of the soil upon which it grows or is deposited, unless some other person has acquired the right to take it; that it was such a right as might be the subject of a grant and consequently might be claimed by prescription, but that in order to prove such a prescriptive right in a town, some evidence of corporate acts under a claim of such right must be shown; that individual acts would not support the presumption of a grant to the corporation nor show a prescriptive right in the inhabitants themselves, "for an inhabitant cannot purchase to himself and his successors;" nor could such a right be acquired by custom, for while custom may support a claim for an easement nothing less than prescription can sustain a claim for *a profit à prendre in alieno solo*, and the right to take seaweed is such a right to a profit in the soil. But in Knowles *v.* Dow, 22 N. H. 387, a custom in the inhabitants of a town to temporarily deposit seaweed upon the plaintiff's shore was held good.

In *Connecticut*, where the title of the adjoining proprietor extends only to high-water mark, it is held that the seaweed cast upon the shore between ordinary high and low-water mark belongs to the public, and may lawfully be appropriated by the first occupant. Mather *v.* Chapman, 40 Conn. 382; Church *v.* Meeker, 34 Conn. 421. See also Peek *v.* Lockwood, 5 Day (Conn.) 22.

1. Chapman *v.* Kimball, 9 Conn. 38; 21 Am. Dec. 707.

The lord of the manor cannot acquire an exclusive right to cut seaweed below low-water mark unless by grant from the crown, or such long and undisturbed enjoyment as to give him title by prescription. Benest *v.* Pipon, 1 Knapp 68. As to a prescriptive right see Strange *v.* Rowe, 4 F. & F. 1048.

2. **In Accident Insurance Policy.**—"'Secondary' is the technical medical word for a disease which is not the primary cause of death. If a man falls through the ice and is drowned, that is death by accident; but if he walks home in wet clothes, and catches a cold which settles on his lungs, and he dies, that is death from a 'secondary cause.'" Smith *v.* Accident Ins. Co., L. R., 5 Ex. 302. And for a statement of that case see Accident Insurance, vol. 1, p. 90. See also Proximate and Remote Cause, vol. 19, p. 300.

3. 3 Bl. Com. 324.

4. See Release.

5. See Confirmation, vol. 3, p. 498.

6. See Surrender.

7. **An assignment**, in a general sense, is a transfer or making over to another of the right one has in any estate; but it is usually applied to an estate for life or years. It differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in an assignment he parts with the whole

fifth, defeasances.[1] Several of these conveyances have received specific treatment in this work, see notes.

SECONDARY EVIDENCE.—See BOOKS AS EVIDENCE, vol. 2, pp. 467–468; DECLARATIONS, vol. 5, pp. 364–368; EVIDENCE, vol. 7, pp. 85, 87–88; HANDWRITING, vol. 9, p. 263; JUDGMENTS, vol. 12, pp. 449g–449h; LOST PAPERS, vol. 13, pp. 1119–1121; NOTICE TO PRODUCE PAPERS, vol. 16, pp. 843–857; PHOTOGRAPHS, vol. 18, p. 424; PRODUCTION OF DOCUMENTS, vol. 19, p. 227; PUBLIC OFFICERS, vol. 19, p. 436; RECORDS, vol. 20, p. 518; TELEGRAPH COMPANIES; WRITTEN INSTRUMENTS; VERDICT.

I. **Definition**, 984.
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VI. **Degrees of Secondary Evidence**,

I. DEFINITION.—Secondary evidence is that species of evidence which becomes admissible as being the next best when the primary or best evidence of the fact in question is lost or inaccessible; as when a witness details orally the contents of an instrument which is lost or destroyed.[2]

II. PRIVATE WRITINGS.—Secondary evidence of a private document can be received only when an excuse such as the law deems sufficient is given for the non-production of the original.[3] The

property, and the assignee stands for many purposes in the place of the assignor. 2 Minor's Inst. 718.

Assignment, as a specific mode of conveyance, is properly applicable only to the transfer of the lessee's whole estate, when such estate is for life or years. It is often used, however, in a more general sense to signify the transfer of any estate or interest whatever in real property. 2 Minor's Inst. 719. And as the general principles which regulate the transaction in its more comprehensive signification are the same as those which govern it in its more limited and proper sense, it will be only necessary here to refer to the article ASSIGNMENTS, vol. 1, p. 826.

1. See DEFEASANCE, vol. 5, p. 510.

2. Black's L. Dict., p. 1071.

3. Alabama, etc., R. Co. *v.* Coskry, 92 Ala. 254; Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1; Terpening *v.* Holton, 9 Colo. 306; Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699; Solomon *v.* Creech, 82 Ga. 446; Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776; 12 Am. St. Rep. 282; Wolff *v.* Matthews, 39 Mo. App. 376; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219; Wiswall *v.* Knevals, 18 Ala. 65; Bouldin *v.* Massie, 7 Wheat. (U. S.) 122; Bigelow *v.* Young, 30 Ga. 121; Durham *v.* Holeman, 30 Ga. 619; Dumont *v.* McCracken, 6 Blackf. (Ind.) 356; Perkins *v.* Bard, 16 La. Ann. 443; Marks *v.* Winter, 19 La. Ann. 445; Young *v.* Mackoll, 3 Md. Ch. 398; Doe *v.* M'Caleb, 2 How. (Miss.) 756; Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Sterling *v.* Potts, 5 N. J. L. 891; Cary *v.* Campbell, 10 Johns. (N. Y.) 363; Dumas *v.* Powell, 3 Dev. (N. Car.) 103; Thompson *v.* Applewhite, 1 Dev. Eq. (N. Car.) 460; Caufman *v.* Presbyterian Congregation, 6 Binn. (Pa.) 59; Dawson *v.* Graves, 4 Call (Va.) 127; Brackett *v.* Evans, 1 Cush. (Mass.) 79; Manson *v.* Blair, 15 Ind. 242; Ohio Ins. Co. *v.* Nunemacher, 10 Ind. 234; Perkins *v.* Ermel, 2 Kan. 325; Hughes *v.* Easten, 4 J. J. Marsh. (Ky.) 572; 20 Am. Dec. 230; Marshall *v.* Haney, 9 Gill (Md.) 251; Dunnock *v.* Dunnock, 3 Md. Ch. 140; Boynton *v.* Rees, 8 Pick. (Mass.) 329; Benton *v.* Craig, 2 Mo. 198; Morrill *v.* Foster, 32

excuses which the law allows for dispensing with primary evidence are that the document has been destroyed or lost,[1] or that it is in the possession of the adverse party, who refuses to produce it

N. H. 358; Bozorth *v.* Davidson, 3 N. J. L. 200; Chambers *v.* Hunt, 22 N. J. L. 552; Redman *v.* Green, 3 Ired. Eq. (N. Car.) 54; Bowman *v.* Smith, 1 Strobh. (S. Car.) 246; Mowry *v.* Schroder, 4 Strobh. (S. Car.) 69; Creed *v.* White, 11 Humph. (Tenn.) 549; Lunsford *v.* Smith, 12 Gratt. (Va.) 554. Brown *v.* Griffith, 70 Cal. 14; Marriner *v.* Dennison, 78 Cal. 202; Simpson *v.* Waldby, 63 Mich. 439; Guadalupe, etc., Stock Assoc. *v.* West, 76 Tex. 461.

1. Kilgore *v.* Stanley, 90 Ala. 523; Rush *v.* French, 1 Arizona 99; Terpening *v.* Holton, 9 Colo. 306; Fresno Canal, etc., Co. *v.* Dunbar, 80 Cal. 531; Conway *v.* John, 14 Colo. 30; Livingston *v.* Hudson, 85 Ga. 835; Rea *v.* Jaffray (Iowa, 1891), 48 N. W. Rep. 78; Western Union Tel. Co. *v.* Collins, 45 Kan. 38; Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384; McClure *v.* Campbell, 25 Neb. 57; Roehl *v.* Haumesser, 114 Ind. 311; Woods *v.* Burke, 67 Mich. 674; McNutt *v.* McNutt, 116 Ind. 545; Coffing *v.* Carnahan, 122 Ind. 427; Smith *v.* Brown, 151 Mass. 338; Lyons *v.* Van Gorder, 77 Iowa 600; Woods *v.* Burke, 67 Mich. 674; Harvey *v.* Edens, 69 Tex. 420; Abel *v.* Brewster, 58 Hun (N. Y.) 605; Cook *v.* Bertram, 86 Mich. 356; Gunther *v.* Bennett, 72 Ind. 384; Martin *v.* Williams, 42 Miss. 210; 97 Am. Dec. 456; Kuhn *v.* Schwatz, 33 Mo. App. 610; Wells *v.* Pressy, 105 Mo. 164; Smith *v.* Lindsey, 89 Mo. 76; Meyers *v.* Bealer, 30 Neb. 280; *In re* Smith's Will, 61 Hun (N. Y.) 101; *In re* Warfield, 22 Cal. 51; 83 Am. Dec. 49; Higgins *v.* Reed, 74 Am. Dec. 305; 8 Iowa 298; Chamberlain *v.* Boon, 74 Tex. 659; Hill *v.* Taylor, 77 Tex. 295; Colorado Nat. Bank *v.* Scott (Tex. 1891), 16 S. W. Rep. 997; Jackson *v.* Lewis, 32 S. Car. 593; Timberlake *v.* Jennings (Va. 1891), 13 S. E. Rep. 28; Childrey *v.* Huntington, 34 W. Va. 457; Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483; Dowrey *v.* Logan, 12 B. Mon. (Ky.) 236; People *v.* Dennis, 4 Mich. 609; 69 Am. Dec. 338; Bell *v.* Byerson, 11 Iowa 233; 77 Am. Dec. 142; Adams *v.* Guice, 30 Miss. 397; Orne *v.* Cook, 21 Ill. 238; Fowler *v.* Moore, 4 Ark. 570; Derrett *v.* Alexander, 25 Ala. 265; James *v.* Biscoe, 10 Ark. 184; Allen *v.* State, 21 Ga. 217; 68 Am. Dec. 457; Com. *v.* Roark, 8 Cush. (Mass.) 210; Brown *v.* Richmond, 28 Vt. 583; Bartlett *v.* Hunt, 17 Wis. 214; Thayer *v.* Stearns, 1 Pick. (Mass.) 109; Taunton, etc., Turnpike Co. *v.* Whiting, 10 Mass. 327; 6 Am. Dec. 124; Cady *v.* Eggleston, 11 Mass. 282; Jones *v.* Fales, 5 Mass. 101; Storer *v.* Batson, 8 Mass. 437; Meyer *v.* Barker, 6 Binn. (Pa.) 228; Blevins *v.* Pope, 7 Ala. 371; Ransdale *v.* Grove, 4 McLean (U. S.) 282; Lewis *v.* Baird, 3 McLean (U. S.) 56; Reynolds *v.* Quattlebaune, 2 Rich (S. Car.) 140; Hussey *v.* Roquemore, 27 Ala. 281; Thalick *v.* Presley, 29 Ala. 427; Griffith *v.* Huston, 7 J. J. Marsh. (Ky.) 385; Spence *v.* Spence, 2 Brev. (S. Car.) 466; Gillaspie *v.* Tucker, 2 Brev. (S. Car.) 433.

The admission in evidence of a copy of a deed certified by the recorder is error unless a proper foundation therefor be first laid by showing that the "instrument is lost or not within the power of the party wishing to use the same," as required by Rev. Stat. *Missouri* 1879, § 697; Pierce *v.* Georger, 103 Mo. 540.

Before a copy of a letter can be received in evidence over the objection of the opposite party, it should be made to appear that the original is lost or destroyed. Watson *v.* Roode, 30 Neb. 264; Mugge *v.* Adams, 76 Tex. 448.

The testimony of a witness, who had been a clerk in the general land office, that he had seen certain transfers of a land-warrant on file there as late as 1877, and that shortly after they were missed from the file, is not sufficient proof of their loss to admit parol evidence as to such transfers. Rhodus *v.* Sansom (Tex. 1887), 6 S. W. Rep. 849.

A deed is not shown to have been lost so as to admit secondary evidence of its contents by merely showing by one witness that it once existed, that he last saw it in his desk at home. Echols *v.* Hubbard, 90 Ala. 309.

Loss Presumed from Lapse of Time.—In an action to recover money received by a defendant on an order given twelve years before, parol evidence of its contents was properly admitted, the order being collateral and the presumption from lapse of time being that it was lost. Daniels *v.* Smith (Supreme Ct.), 8 N. Y. Supp. 128.

after due notice,[1] or in that of a party privileged to withhold it, who insists on his privilege,[2] or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it.[3] It must also appear to the court that the document is genuine,[4]

1. Jones *v.* Robinson, 11 Ark. 504; 54 Am. Dec. 212; Johnson *v.* Johnson, 70 Mich. 66; Gafford *v.* American Mortgage, etc., Co., 77 Iowa 736; First Nat. Bank *v.* Turner (Tex. 1891), 15 S. W. Rep. 710; Wood *v.* Lawrence, 59 Hun (N. Y.) 618; Orr *v.* Clark, 62 Vt. 136.

2. Stratton *v.* Hawks, 43 Kan. 538; Kreuger *v.* Walker, 80 Iowa 733. See Crawford *v.* Hodge, 81 Ga. 728; State *v.* Stirling, 41 La. Ann. 679.

3. Manning *v.* Maroney, 87 Ala. 563; 13 Am. St. Rep. 67; Young *v.* East Alabama R. Co., 80 Ala. 100; Gordon *v.* Tweedy, 74 Ala. 232; 49 Am. Rep. 813; Holthausen *v.* Pondir, 55 N. Y. Super. Ct. 73; Smith *v.* Traders' Nat. Bank, 82 Tex. 368; First Nat. Bank *v.* Willis (Tex. 1891), 18 S. W. Rep. 205; Harvey *v.* Edens, 69 Tex. 420; Burton *v.* Driggs, 20 Wall. (U. S.) 125; Brown *v.* Wood, 19 Mo. 475; Boone *v.* Dyke, 3 T. B. Mon. (Ky.) 532; Schaefer *v.* Georgia R. Co., 66 Ga. 39; Elwell *v.* Mersick, 50 Conn. 272; Knickerbocker *v.* Wilcox, 83 Mich. 200; 21 Am. St. Rep. 595; Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214; Bell *v.* Kendrick, 25 Fla. 778; Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214; Holthausen *v.* Pondir, 55 N. Y. Super. Ct. 73; Shorter *v.* Sheppard, 33 Ala. 648; Lunday *v.* Thomas, 26 Ga. 537; Waller *v.* Cralle, 8 B. Mon. (Ky.) 11; Burnham *v.* Wood, 8 N. H. 334; Ralph *v.* Brown, 3 W. & S. (Pa.) 395; Underwood *v.* Lane, 1 Dev. (N. Car.) 173; Forrest *v.* Forrest, 6 Duer (N. Y.) 102; Veck *v.* Holt, 71 Tex. 715; Memphis etc., R. Co. *v.* Humbree, 84 Ala. 182; Roll *v.* Rea, 50 N. J. L. 264.

Where a bond, never having been in plaintiff's possession, had been sued on in Indiana, it was presumably out of the jurisdiction of the courts of Michigan, and, therefore, in a suit in the latter State secondary proof of its execution was admissible. Knickerbocker *v.* Wilcox, 83 Mich. 200; 21 Am. St. Rep. 595.

Papers in Foreign Country.—Secondary evidence of the existence and contents of papers in a foreign country is admissible. Quilter *v.* Jorss, 14 C. B. N. S. 747; 108 E. C. L. 746; Hyam *v.* Edwards, 1 Dall. (U. S.) 2; 1 Tayl. Ev. (Text Book Series), § 438; 1 Whart. Ev. (3d ed.), § 82; LOST PAPERS, vol. 13, p. 1096; EVIDENCE, vol. 7, p. 85.

4. Oliver *v.* Persons, 30 Ga. 391; 76 Am. Dec. 657; Calhoun *v.* Calhoun, 81 Ga. 91; Stocking *v.* St. Paul Trust Co., 39 Minn. 410; Gunther *v.* Bennett, 72 Md. 385; Harvey *v.* Edens, 69 Tex. 420.

Letterpress copies of letters cannot be received unaccompanied by proof of the mailing of the originals or their receipt by the persons to whom addressed. Huckestein *v.* Kelly, 139 Pa. St. 201; See Obermann Brewing Co. *v.* Adams, 35 Ill. App. 540; Ford *v.* Cunningham, 87 Cal. 209; Nowlen *v.* Lyon, 73 Mich. 434; Flint *v.* Kennedy, 33 Fed. Rep. 820.

Evidence of the contents of a certain lost letter is inadmissible where the witness is not shown to have any knowledge of the handwriting of the alleged author. Bone *v.* State, 86 Ga. 108.

Plaintiff was properly allowed to give in evidence a letterpress copy of a letter to defendant which defendant failed to produce on notice, on proving that it was the custom in plaintiff's office to keep a letterpress copy of all letters sent; that the copy offered was taken from the letterpress book, where it was found in its proper order as to date; and that in a letter written by defendant on the day when by the regular course of mail he would have received plaintiff's letter if it had been duly mailed, he acknowledged the receipt of a letter from plaintiff on that day, but without identifying it. Whitney Wagon Works *v.* Moore, 61 Vt. 230.

A copy of a note executed by two deceased persons is admissible in evidence where the payee testifies that he has lost the original note, and another witness familiar with the handwriting of the deceased makers, testifies that he had seen the note in the payee's possession, that the signature was in the handwriting of the makers, and that the copy offered in evidence was a true copy. Mandell *v.* Fulcher, 86 Ga. 166.

and that the party who offers secondary evidence of its contents has used due diligence to procure it.[1] Whether sufficient search has been made for the document depends much on its nature and the circumstances of the case, as a comparatively useless document may be presumed to have been lost or destroyed on proof of a much less search and after a much shorter time than an important one.[2]

There are statutes in some States making certified copies of private writings registered or recorded in public records admissible in lieu of the originals.[3] There are, also, statutes in other States making such copies competent evidence on proof, by affidavit or otherwise, that the originals are not in the possession or control of the party introducing the copies.[4] Under such statutes it is

Proof that an attesting witness to a note, when last seen, was engaged in business out of the State, coupled with a return *non est inventus* on a subpœna by a constable of the city in which the attesting witness lived before going out of the State, is sufficient to let in secondary evidence of the genuineness of the signature. Troeder *v.* Hyams, 153 Mass. 536.

1. Foster *v.* State, 88 Ala. 182; Burks *v.* Bragg, 89 Ala. 204; Tanner *v.* Hall, 89 Ala. 628; Burns *v.* Clase, 9 Colo. 225; Coffing *v.* Carnahan, 122 Ind. 427; Kreuger *v.* Walker, 80 Iowa 733; Stocking *v.* St. Paul Trust Co., 39 Minn. 410; Jackson *v.* Lewis, 29 S. Car. 193; Crafts *v.* Daugherty, 69 Tex. 477; Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384; Com. *v.* Jeffries, 7 Allen (Mass.) 548; 83 Am. Dec. 712; Henry *v.* Diviney, 101 Mo. 378; Shouler *v.* Bonander, 80 Mich. 531; see also Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776; 12 Am. St. Rep. 282 and note; Howe *v.* Fleming, 123 Ind. 262; Powell *v.* Wallace, 44 Kan. 656; Abel *v.* Strimple, 31 Mo. App. 86; Meier *v.* Meier, 105 Mo. 411; Delamater *v.* Prudential Ins. Co., 52 Hun (N. Y.) 615; Wiseman *v.* Northern Pac. R. Co., 20 Oregon 425; 23 Am. St. Rep. 138; Bowick *v.* Miller (Oregon, 1891), 26 Pac. Rep. 861; Hill *v.* Taylor, 77 Tex. 295; Ramsey *v.* Hurley, 72 Tex. 194; Foot *v.* Silliman, 77 Tex. 268; McKesson *v.* Smart, 108 N. Car. 17; Bounds *v.* Little, 79 Tex. 128; Niland *v.* Murphy, 73 Wis. 326.

Secondary evidence of the contents of a written instrument is inadmissible in the absence of proper diligence to secure the original. Low *v.* Tandy, 70 Tex. 746.

Secondary evidence offered by the defendant as to the contents of a written instrument will not be allowed where he testifies that the writing has been misplaced and that he has made diligent search for it and thinks it is lost or destroyed, but admits that it is probably among certain private papers carefully packed away for safe keeping which he has neglected to examine. Burks *v.* Bragg, 89 Ala. 204.

Where a seller of machinery indorsed the purchaser's notes, and delivered the contract of purchase to the indorsee, evidence that he afterwards wrote to the indorsee for such contract, without obtaining it, does not show sufficient effort to obtain the original to admit secondary evidence of its contents. Low *v.* Tandy, 70 Tex. 746.

Where a witness testifies that he has vainly endeavored to find a certain lease among his papers, and that it was his custom to destroy such leases to get rid of them, secondary evidence of its contents is admissible in an action between third parties. Kane *v.* Metropolitan El. R. Co., 6 N. Y. Supp. 526.

2. See Gillis *v.* Wilmington, etc., R. Co., 108 N. Car. 441.

3. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436; Chenowith *v.* County Ct., 32 W. Va. 638. See RECORD, vol. 20, p. 513.

The copy of any paper and document lawfully deposited in the office of the register or receiver of any land-office of the *United States* within this State, when duly certified by the register or receiver having the custody of such paper or document, may be received in evidence in the same manner and with like effect as the original. Stinson *v.* Geer, 42 Kan. 520.

4. Glover *v.* Hill, 85 Ala. 41; Parker *v.* Edwards, 85 Ala. 246; Buck *v.* Gage,

not necessary to prove the loss of the original before introducing a certified copy.[1] Nor is it necessary under such statutes to prove the execution of the original.[2] So under a statute providing that if a party offer in evidence a transcript of a certified and recorded deed has not the custody or control of the original, the court must receive the transcript: a third person who is not supposed to have control of the deed may, without accounting for the original, offer a certified copy in evidence.[3] In the absence of a statute making certified copies of writings filed of record evidence, the absence of the original must be accounted for and its execution proved to admit a copy of the record.[4] Where a

27 Neb. 306; Eltzroth *v.* Ryan, 91 Cal. 584; Gethin *v.* Walker, 59 Cal. 506; Canfield *v.* Thompson, 49 Cal. 210; Nichols *v.* Wilson, 42 Iowa 385; Pennington *v.* Schwartz, 70 Tex. 211; Pfefferle *v.* State, 39 Kan. 128.

1. Eltzroth *v.* Ryan, 91 Cal. 584; Gethin *v.* Walker, 59 Cal. 506; Canfield *v.* Thompson, 49 Cal. 210; McNichols *v.* Wilson, 42 Iowa 385; Kenosha Stove Co. *v.* Shedd (Iowa, 1891), 48 N. W. Rep. 933; Buck *v.* Gage, 27 Neb. 306. See Stanley *v.* Smith, 15 Oregon 505; Hammond *v.* Johnston, 93 Mo. 198; Hammond *v.* Gordon, 93 Mo. 223; Hammond *v.* Horton (Mo. 1887), 6 S. W. Rep. 94.

In *Alabama* a certified copy by a commissioner of the general land-office is admissible in evidence without attempting to account for the absence of the original. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436; Ross *v.* Goodwin, 88 Ala. 390; Allison *v.* Little, 85 Ala. 512.

Under Rev. St. Tex., art. 2257, providing that certified copies of recorded instruments may be admitted on affidavit that the original has been lost, or cannot be procured, an affidavit that defendants "cannot procure the original" is sufficient, and need not show a search for the original. Nye *v.* Gribble, 70 Tex. 458.

Code Civil Proc. Cal., § 1951, provides that every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the civil code, may, together with the certificate of acknowledgment or proof, be read in evidence in any action or proceeding; and a certified copy of the record of such instrument, thus acknowledged or proved, may also be read in evidence with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy. Plaintiff sued on a contract in writing, which purported to be a lien on the land of defendant, and alleged that the instrument had been duly acknowledged and recorded. Held, that an instrument purporting to be the one sued on or a duplicate, but which had not been acknowledged, was not admissible; and that the record of the instrument, with the acknowledgment added, was inadmissible without accounting for the original. Fresno Canal, etc., Co. *v.* Dunbar, 80 Cal. 530.

2. Eltzroth *v.* Ryan, 91 Cal. 584; Webster *v.* Calden, 55 Me. 165; Chamberlain *v.* Bradley, 101 Mass. 188; 3 Am. Rep. 331; Ward *v.* Fuller, 15 Pick. (Mass.) 185; Hammond *v.* Johnston, 93 Mo. 198; Hammond *v.* Horton (Mo. 1887), 6 S. W. Rep. 94.

Copies of the record imperfectly acknowledged cannot be received in evidence without satisfactory proof of the execution of the original and the truth of the copy. Musick *v.* Barney, 49 Mo. 458.

An exemplified copy of a deed is admissible under Code Civ. Proc. N. Y., §§ 935, 936; 1 Rev. Sts. N. Y., § 16, as presumptive evidence of the truth of the record itself and of the conveyance of the title, although the execution and acknowledgment of the deed is in dispute. Sudlow *v.* Warshing, 108 N. Y. 520.

3. Florence Land, etc., Co. *v.* Warren (Ala. 1891), 9 So. Rep. 384; McLean *v.* Webster, 45 Kan. 644.

4. New York Dry Dock *v.* Hicks, 5 McLean (U. S.) 111; Rollins *v.* Henry, 78 N. Car. 342; White *v.* Dwinel, 33 Me. 320; Wendell *v.* Abbott, 45 N. H. 349; West *v.* Cameron, 39 Kan. 736. *Compare* Curry *v.* Raymond, 28 Pa. St. 144.

In *Missouri*, neither the record of

certified copy of a record is evidence in the State in which it is made, it may be competent evidence in another State when it appears that the registry was in conformity with the laws of the registering State,[1] and authenticated according to the act of Congress.[2]

The above rules, in so far as they apply to each particular case, are to be observed in laying the foundation for the introduction of secondary evidence. Evidence of the contents of a written instrument is inadmissible until this is done.[3] Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge, and if this depends on a disputed question of fact, he must decide it.[4]

1. When in Possession of Adverse Party.—Where the document is in the possession of the adverse party the practice is to give him or his attorney a regular notice to produce the original;[5] not that on proof of such notice he is compelled to give evidence against himself, but to lay the foundation for the introduction of secondary evidence of the contents of the document or writing by showing that the party has done all in his power to produce the original.[6] When a party fails to comply with a notice to produce a document in his possession, evidence of its contents is admissible.[7] But the notice must not be too indefinite,[8] and it

the deed nor a certified copy thereof is admissible in evidence without first accounting for the non-production of the original under *Missouri* Rev. Sts., 1879, § 697; Pierce *v.* Georger, 103 Mo. 540; Russell *v.* Glasser, 93 Mo. 353.

In *Michigan*, the contents of court files to be proved by secondary evidence must be shown to have been lost. Cook *v.* Bertram, 86 Mich. 356; Cilley *v.* Van Patten, 68 Mich. 80.

1. Dunlap *v.* Daugherty, 20 Ill. 397; Davis *v.* Rhodes, 39 Miss. 152; Stevens *v.* Bomar, 9 Humph. (Tenn.) 546.

Where the clerk of a court of record of another State certifies that the acknowledgment to a copy of a record deed was, when it was taken to the original, in conformity with the laws of such State, and that the person who took it was then a justice of the peace, it will be sufficient although the certificate of conformity bears date of 7th day of August, 1855, and the acknowledgment of 14th of July, 1821. Dunlap *v.* Daugherty, 20 Ill. 398.

2. Watrous *v.* McGrew, 16 Tex. 506; Garrigus *v.* Harris, 17 Pa. St. 344; Secrist *v.* Green, 3 Wall. (U. S.) 744.

A certified copy of a deed to lands in *Georgia*, though authenticated as required by act of Congress, is not admissible in *Alabama* without proof of the loss or destruction of the original, as under the statutes of *Georgia* providing that, if a recorded deed be lost, a copy is admissible if the court be satisfied of the loss, it would not be admissible in that State without such proof. Whaun *v.* Atkinson, 84 Ala. 592.

3. State *v.* Davis, 117 Ind. 307; Pierce *v.* Georger, 103 Mo. 540.

4. Smith *v.* Brown, 151 Mass. 338; Bell *v.* Kendrick, 25 Fla. 778; Bonds *v.* Smith, 106 N. Car. 553. See also Harvey *v.* Mitchell, 2 M. & R. 366; Elmas *v.* Ogle, 15 Jur. 180.

5. See NOTICE TO PRODUCE PAPERS, vol. 16, pp. 843–857; J. Obermann Brewing Co. *v.* Adams, 35 Ill. App. 540; Mortlock *v.* Williams, 76 Mich. 568.

6. 1 Greenl. Ev., § 560.

7. Union Ins. Co. *v.* Smith, 124 U. S. 405; Johnson *v.* Johnson, 70 Mich. 65; Dole *v.* Belden (Supreme Ct.); 1 N. Y. Supp. 667.

Defendant railroad having been notified to produce an alleged libelous "black list," and it being shown to have last been in the possession of the road leased and operated by defendant, secondary evidence of its contents was held admissible. Behee *v.* Missouri Pac. R. Co., 71 Tex. 424.

8. Julius King Optical Co. *v.* Treat, 72 Mich. 599.

must allow the opposite party sufficient time to produce the writings.[1] Where a party after due notice refuses to produce a writing in his possession and secondary evidence to establish the contents is introduced by the latter, every reasonable intendment and presumption will be against the party who withholds the writing. He cannot afterwards be permitted to introduce it as evidence in his own behalf on his side of the case.[2]

2. When in Another Jurisdiction.—If the paper is without the jurisdiction of the court it is not necessary to show that it is lost or destroyed in order to admit secondary evidence of its contents.[3] The true rule appears to be that if the paper is one over which the party has control, some explanation of his failure to produce it, besides the mere fact that it is without the State, would, perhaps, be necessary in order to lay a foundation upon which to introduce secondary evidence. But if it does not appear that it is such a paper, it will be sufficient for him to show that it was not within the jurisdiction of the court without any evidence of efforts on his part to obtain it.[4]

3. Errors in Admitting Secondary Evidence.—Errors in admitting in evidence a copy of a writing where the original has not been properly accounted for is cured when the other party produces and puts in evidence the original itself.[5] So where the wrongful admission of secondary evidence is without injury to the party complaining, it is harmless error.[6] Where a witness has been allowed without objection to testify as to a certain entry in his account books, his further testimony as to his purpose in making the charge and his knowledge of the person himself to whom it is made, is not objectionable on the ground that the book is the best evidence.[7]

A notice to produce all letters and papers relative to the matter in controversy for a period of five years previous to the trial, not stating the date or subject or referring to any particular transaction, is too vague and general to render secondary evidence admissible. Arnstine *v.* Treat, 71 Mich. 561.

1. Julius King Optical Co. *v.* Treat, 72 Mich. 599.

2. McGuiness *v.* School Dist. No. 10, 39 Minn. 499. See also NOTICE TO PRODUCE PAPERS, Vol. 16, p. 860.

3. Gordon *v.* Searing, 8 Cal. 49; Manning *v.* Marony, 87 Ala. 563; 13 Am. St. Rep. 67; Gordon *v.* Tweedy, 74 Ala. 232; 49 Am. Rep. 813; Young *v.* East Alabama R. Co., 80 Ala. 100.

4. Deitz *v.* Regnier, 27 Kan. 107; Gordon *v.* Searing, 8 Cal. 50; Shepard *v.* Giddings, 22 Conn. 283.

5. Stewart *v.* De Loach, 86 Ga. 729; Glover *v.* Thomas, 75 Tex. 506; Odom *v.* Woodward, 74 Tex. 41.

In an action by the general assignee of an insolvent partnership to recover the value of the firm accounts transferred in payment of the individual debts of the partners, it is error to admit oral testimony that there was such a transfer, based on the appearance of the transferee's books of a list of the accounts, or a copy of such list, as the books themselves are the best evidence; and the error in admitting such evidence is not cured by the testimony of the transferee's executor to the effect that he has tried to collect the accounts specified in the list transcribed from the books, and has found some of them worthless, since such admission does not prove the assignment of the accounts. Brayton *v.* Sherman, 119 N. Y. 623.

6. Kendrick *v.* Latham, 25 Fla. 819; see Odom *v.* Woodward, 74 Tex. 41.

7. State *v.* Row, 81 Iowa 138; see Brown *v.* Lessing, 70 Tex. 544.

It is not error to admit in evidence

III. PUBLIC DOCUMENTS.—In the case of public documents, judicial records and entries in other public books or registers, the law deems the inconvenience of producing them sufficient excuse for their non-production, and allows them to be proved by authenticated copies.[1] Copies of messages and other official communications from the President of the United States to one or both houses of Congress,[2] American State papers, so called, and the documents therein contained, come under this head and are provable by printed copies.[3] Legislative journals and enactments,[4] and official registers kept in obedience to legal requirements, are also provable by duly attested copies of the same.[5]

IV. INSCRIPTIONS.—Where the production of the best evidence is highly inconvenient or physically impossible, as in the case of inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, and the like, they may be proved by secondary evidence.[6]

V. VOLUMINOUS WRITINGS.—When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by secondary evidence.[7]

a copy of a deed without producing the original, where only a general objection is made to its admissibility. Eversdon *v.* Mayhew (Cal. 1889), 21 Pac. Rep. 431.

1. Best Ev., § 485; 1 Greenl. Ev., §§ 91–94. See also BOOKS AS EVIDENCE, vol. 2, p. 4671; JUDGMENTS, vol. 12, p. 149e; PRODUCTION OF DOCUMENTS, vol. 19, p. 227; RECORD, vol. 20, p. 518; VERDICT.

When a deed or other instrument is required by law to be recorded, a certified copy is competent evidence. New York Dry Dock *v.* Hicks, 5 McLean (U. S.) 111.

Where there was evidence that the assessment roll for 1856, filed in the county treasurer's office, had been destroyed by fire, and that the copy thereof filed in the town clerk's office had been lost, a verified copy of the copy in the town clerk's office was admissible in evidence. Distinguishing People *v.* Chapin, 38 Hun (N. Y.) 272.

2. Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Radcliff *v.* United Ins. Co., 7 Johns. (N. Y.) 38.

3. Dutillet *v.* Blanchard, 14 La. Ann. 97; Nixon *v.* Porter, 34 Miss. 697; 69 Am. Dec. 408; Bryan *v.* Forsyth, 19 How. (U. S.) 334; see Gilman *v.* Riopelle, 18 Mich. 145.

4. Young *v.* Bank of Alexandria, 4 Cranch (U. S.) 384; Post *v.* Kendall Co., 105 U. S. 667; Watkins *v.* Holman, 16 Pet. (U. S.) 25; Root *v.* King, 7 Cow. (N. Y.) 613; Smith *v.* Potter, 27 Vt. 304; 65 Am. Dec. 198.

The records of town meetings or transactions of any municipal body are provable by copy of the original minutes or records duly certified by the clerk or other proper officer. Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259; Com. *v.* Chase, 6 Cush. (Mass.) 248; Hickok *v.* Shelburne, 41 Vt. 409.

5. U. S. *v.* Johns, 4 Dall. (U. S.) 412; Bryan *v.* Wear, 4 Mo. 106; American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; State *v.* Dooris, 40 Conn. 145; Niles *v.* Sprague, 13 Iowa 198; Stetson *v.* Gulliver, 2 Cush. (Mass.) 499.

6. Tracy Peerage Case, 10 Cl. & F. 154. 1 Taylor's Ev. (Text Book Series), § 438; 1 Greenl. Ev. (14th ed.), § 94; 1 Whart. Ev. (3d ed.), § 82; Best's Pr. Ev., § 484; Mortimer *v.* M'Callan, 6 M. & W. 58; Sayer *v.* Glossop, 2 Exch. 411; Bruce *v.* Nicolopulo, 11 Exch. 129; Jones *v.* Tarleton, 9 M. & W. 675; Rex *v.* Fursey, 6 C. & P. 84; 25 E. C. L. 293; Doe *v.* Cole, 6 C. & P. 360; 25 E. C. L. 438; Shrewsbury Peerage, 7 H. of L. Cas. 1.

It must clearly appear, however, that the writing is so affixed as to be not readily detached, in order to introduce secondary evidence of its contents. Jones *v.* Tarleton, 9 M. & W. 675. See also EVIDENCE, vol. 7, pp. 88.

7. Burton *v.* Driggs, 20 Wall. (U. S.) 125; 1 Whart. Ev. (3d ed.), § 80; 1

VI. DEGREES OF SECONDARY EVIDENCE.—The principle which postpones secondary evidence until the absence of the primary is accounted for has been extended by some courts to the different kinds of secondary evidence. Thus, if a deed is lost it must be proved by the best evidence obtainable. If the counterpart is not obtainable, it must be proved by a copy; if a copy is not obtainable, then by the abstract, etc., and the last of all, by the memory of a witness.[1] This rule is followed in some of the States,[2] while in others the English rule of not recognizing any

Greenl. Ev. (14th ed.) 93; 1 Taylor's Ev. (Text Book Series), § 462; EVIDENCE, vol. 7, p. 88; WRITTEN INSTRUMENTS.

The secretary of a railroad company cannot be permitted to testify to the result of his examination of its books. If it is impossible or very inconvenient to produce the books, their contents must be proved by an authenticated copy. Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466.

1. Nash *v.* Williams, 20 Wall. (U. S.) 226; Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 582; Den *v.* McAllister, 7 N. J. L. 46; Blade *v.* Noland, 12 Wend. (N. Y.) 173; 27 Am. Dec. 126; Kello *v.* Maget, 1 Dev. & B. (N. Car.) 414.

In U. S. *v.* Britton, 2 Mason (U. S.) 468, Story, J., said: "If, therefore, an instrument is to be proved the original, if in the possession or control of the party, is to be produced. If the original be lost or destroyed or in the possession of the opposite party, who refuses to produce it, an examined copy, if any such exist, and can be found, is the next best evidence and must be produced. If no such copy exist, then the contents may be proved by parol evidence by witnesses who have seen and read it and can speak pointedly and clearly to its tenor and contents."

2. In *Alabama* the best kind of secondary evidence which appears to be within the power of the party to produce must be offered. Harvey *v.* Thorpe, 28 Ala. 250; 65 Am. Dec. 344. See Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1.

Georgia.—In Williams *v.* Waters, 36 Ga. 458, it is said by Walker, J., that "there are degrees in secondary evidence, and the best should always be produced. *Georgia* Code, § 3691. A sworn copy should be received in preference to verbal testimony, to prove the contents of a written contract." Graham *v.* Campbell, 56 Ga. 258.

Illinois.—Where a will and the record thereof were burned, and the proof showed that a copy of the will before its destruction had been sent by mail to the party desiring to use it as evidence, it was held that parol proof of the contents of the will was not admissible in behalf of such party, in the absence of any evidence accounting for the non-production of the copy, or showing its non-receipt. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

In *Louisiana*, the best evidence must be produced. A copy of a copy is not admissible in evidence unless the original is alleged and proven to be lost and that a copy thereof cannot be obtained. Civ. Code, art. 2268–2270, 2279, 5280; Mercier *v.* Harnan, 39 La. Ann. 94; Donaldson *v.* Winter, 1 Miller (La.) 145. See also Coleman *v.* Breaud, 6 Martin N. S. (La.) 208; Roebuck *v.* Curry, 2 La. Ann. 998; Duplessis *v.* Miller, 6 La. Ann. 683; Tate *v.* Penne, 7 Martin N. S. (La.) 550; Louisiana State Bank *v.* Morgan, 4 Martin N. S. (La.) 344; Johnston *v.* Cox, 13 La. 536.

In *North Carolina*, the rule of excluding inferior evidence where superior evidence may be obtained is also recognized. Kello *v.* Maget, 1 Dev. & B. (N. Car.) 423.

Pennsylvania.—Evidence of the contents of a letter written by the plaintiffs to the defendants is not admissible where it appears that the plaintiffs had in their possession a fac-simile of the original which they failed to produce. Stevenson *v.* Hoy, 43 Pa. St. 191.

A copy of a lost deed cannot be received if there be a counterpart. Kerns *v.* Swope, 2 Watts (Pa.) 75.

Vermont.—An exemplified copy of the judgment is the legal and proper evidence to prove the same. Neither the records themselves nor the minutes should ever be received when copies can be obtained, unless there is some strong reason for dispensing with

degrees of secondary evidence prevails. According to the latter rule, one entitled to resort to secondary evidence may use any form of it.[1]

the usual and appropriate evidence. Lowry *v.* Cady, 4 Vt. 506; 24 Am. Dec. 628.

United States Courts.—The United States courts have not yet gone to the length of the English adjudications which hold without qualification that there are no degrees in secondary evidence. Nash *v.* Williams, 20 Wall. (U. S.) 226; U. S. *v.* Britton, 2 Mason (U. S.) 468.

A copy of a copy is not evidence where it is taken from a copy, the original being still in existence and capable of being compared with it. Winn *v.* Patterson, 9 Pet. (U. S.) 663.

Where an instrument purporting to be a letter or power of attorney to take possession of a sale of lands granted by the government of Coahuila and Texas if offered in evidence as an ancient instrument, a copy from a certified copy of the instrument, the latter having been lost, is admissible as tending to show that such instrument as the original was in existence at the time in question. Williams *v.* Conger, 125 U. S. 397.

1. In *England*, no degrees of secondary evidence are recognized. Doe *v.* Wainwright, 1 N. & P. 598; Brown *v.* Woodman, 6 C. & P. 206; 25 E. C. L. 358; Rex *v.* Hunt, 3 B. & Ald. 566; 5 E. C. L. 377; Doe *v.* Cole, 6 C. & P. 359; 25 E. C. L. 438.

Connecticut.—In a suit for the price of wall paper furnished in accordance with the plan of the house for which it was to be used left with the plaintiffs by defendant, where the question arose whether plaintiff sent more paper than was ordered, the fact that the amount needed was marked on the plan did not prevent plaintiffs from proving by other evidence than the plan that the amount furnished had been ordered. Platt *v.* Hubinger, 58 Conn. 153.

In *Indiana*, there are no degrees of secondary evidence. Carpenter *v.* Dame, 10 Ind. 125, overruling as to this point, Coman *v.* State, 4 Blackf. (Ind.) 241; Jackson *v.* Cullum, 2 Blackf. (Ind.) 228; 18 Am. Dec. 158.

In *Massachusetts* there are no degrees in secondary evidence so that a party authorized to resort to it is compelled to choose one class of such evidence rather than another. Com. *v.* Smith, 151 Mass. 491; Smith *v.* Brown, 151 Mass. 338; Goodrich *v.* Weston, 102 Mass. 362; 3 Am. Rep. 469.

New York.—Where on cross-examination of the fireman on the engine causing an accident, plaintiff called out the fact that several persons were allowed to get on the engine shortly before the accident and in order to ascertain whether the fireman's attention had been diverted from his duties was allowed to ask whether this was not forbidden by defendant's rules, though the rules themselves were the best evidence. Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Supp. 419.

At a meeting of creditors of three copartners, of whom two were present, their financial condition was stated orally from a written statement, but the writing was not presented to or circulated among the creditors. *Held* that, in a subsequent action against them, one who was present at the meeting might testify, from his notes made at the time, to what was said, no objection being made on the part of the partner not present at the meeting. Schroeder *v.* Frey, 60 Hun (N. Y.) 58.

It is competent to permit witnesses to refer to photographs copied from an original photograph, and to testify whether or not they recognize in such photographs the likeness of a person whom they had seen on a certain occasion. Wilcox *v.* Wilcox, 46 Hun (N. Y.) 32.

A copy of a letter which the witness swore was a true copy of the original copy in the plaintiff's letter book, made by him at the time, from the original letter put by him in the post office, is admissible, after notice had been given to the defendant to produce the original letter. Robertson *v.* Lynch, 18 Johns. (N. Y.) 451.

North Carolina.—In an action for the price of goods, the amount of credits being matter of defense, it was held no error in permitting plaintiffs to give parol evidence thereof, without producing their books. Hodges *v.* Tarrant, 31 S. Car. 608.

West Virginia.—In an action against a county for balance due on a contract to construct a bridge, a witness was allowed to testify that the court had accepted the bridge without reading the order from the order-book. Chenowith *v.* County Ct., 32 W. Va. 628.

SECRET.—See note 1.

SECRETE.—See note 2.

SECRET PARTNERSHIP.—See PARTNERSHIP, vol. 17, p. 929.

SECRET SOCIETIES.—See SOCIETIES AND CLUBS.

1. **Secret Disposition.**—The *English* statute (24 & 25 Vict., ch., 100, § 60) against concealment of birth provides that, if any woman be delivered of a child, every person who shall by any "secret disposition" of the body of the said child, endeavor to conceal its birth, shall be guilty of a misdemeanor, etc. Where it was proved on the trial that the defendant was a servant, and was pregnant of a child, "which, if born alive, would, by law, be a bastard;" that she had informed her mother and her paramour of her pregnancy, and her mother had made preparations to take the defendant to her own home to be confined; that one night, when the child was about eight months old, the defendant went out to the privy to answer a call of nature, and while there upon the seat was attacked so violently with labor pains, and became so weak that she was unable to rise, and was delivered of the child, which dropped down into the privy, the mother swearing that she had not felt the child move for several days prior to her delivery, and, supposing it was dead, said nothing about it. *Held*, that the mother could not be convicted, as there must be positive proof, not only of concealment of the pregnancy and probable evidence of birth of the issue alive, but also that defendant "willingly and of purpose was delivered in secret by herself." State *v.* Conover, 4 Crim. Law Mag. 233.

If proof of the fact by the defendant that the child was born alive would entitle her to an acquittal "it would be a strange anomaly of the law if the same proof introduced by the prosecution did not produce the same result." State *v.* Kirby, 57 Me. 30.

For many cases construing secret disposition as used in the statute, see CONCEALMENT OF BIRTH, vol. 3, p. 416.

2. By a *Maine* statute it is made an offense to maliciously "secrete" any goods or valuable papers of another. It was held that, where one knowingly has an article of another in his possession and denies all knowledge of it, this is competent evidence for the jury to sustain the charge of secreting the article; and that his keeping the article openly with his own property would not necessarily determine that it was not secreted from its owners. State *v.* Williams, 30 Me. 484.

"'Secreting' does not mean hiding alone, but any making away with property which shall put it unlawfully out of the reach of the creditor." Thus one may secrete or make away with property by putting legal impediments in the way of the creditor. Gault *v.* Dussault, 4 Can. Leg. News 321.

In Postal Laws—(See generally POSTAL LAWS, vol. 18, p. 860; EMBEZZLEMENT, vol. 6, p. 493).—U. S. Rev. Sts., § 5467, provided that "any person employed in any department of the postal service who shall 'secrete,' embezzle, or destroy any letter," etc., shall be guilty of an offense. "For cases expounding this word 'secrete,' see State *v.* Willims, 30 Me. 484; Reg. *v.* Wynn, 1 Den. C. C. 365; T. & M. 32; 2 C. & K. 859; 3 New Sess. Cas. 414; 13 Jur. 107. There is an English statute not dissimilar to ours; and, under it, a stamper at the post-office who purloins a letter merely to deliver it as a missorted letter, and thus obtains the postage of it, does not 'secrete' it, although containing money. The reason once given is, 'that, as the statute extends to such letters only as contain valuable documents, the security of the documents was the object contemplated by the legislature; and, as the prisoner had no intention to put those documents in hazard, or to prevent the person for whom they were intended from receiving them, the case, though within the letter, was not within the spirit of the act, and the conviction was therefore wrong.' Rex *v.* Sharpe, 1 Moody 125; Car. Crim. Law (3d ed.) 147. In harmony with this doctrine, it is also held, that, if a carrier takes from the post-office a letter, intending to deliver it to the owner, and, at the same time, to embezzle the postage, he does not commit larceny of the letter. Rex *v.* Howatt, 2 East P. C. 604; 1 Leach (4th ed.) 83, note." 2 Bishop Cr. Law, § 904 note.

SECRET TRUST.—See TRUSTS.

SECRET VOTING.[1]—(See also ELECTIONS, vol. 6, p. 255.)

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I. DEFINITION.—The secret voting system, known as Australian,[2] is one by which all ballots are supplied at public expense, and all those used at the same voting place are precisely alike, a voter's choice of candidates being indicated by marks secretly made at a screened shelf,[3] he being forbidden to show the marks to any one,[4] to take his ballot out of the room, or to use any other ballot than that received by him from the proper officer at the polls.[5]

1. The object of this article is to supplement that on ELECTIONS, by giving a statement of the law—American, English, and Colonial—in regard to the Australian system of secret voting, which did not exist in the United States at the time that article was written, and by the introduction of which "the mode of selecting candidates for public trusts at the hands of the people, which has generally prevailed in the United States during the past century, has been revolutionized." See Price *v.* Lush, 10 Mont. 68.

2. It is called Australian because first adopted in South Australia and Victoria in 1857, since which time it has spread to the other Australian colonies, Great Britain (1872), and Canada. It was first adopted in the United States in the Louisville (Ky.) act of Feb. 24, 1888, and is now established by law in perfect or substantially perfect form in *Arizona Territory*, *Arkansas*, *California*, *Colorado*, *Delaware*, *Idaho*, *Illinois*, *Indiana*, *Iowa*, *Kentucky*, *Maine*, *Maryland*, *Massachusetts*, *Michigan*, *Minnesota*, *Missouri*, *Montana*, *Nebraska*, *Nevada*, *New Hampshire*, *North Dakota*, *Ohio*, *Oregon*, *Pennsylvania*, *Rhode Island*, *South Dakota*, *Tennessee*, *Vermont*, *Virginia*, *Washington*, *West Virginia*, *Wisconsin*, and *Wyoming*. Some features of the system have been adopted in *New York* and *New Jersey*, and a very few in *Connecticut*.

As the use of the ballot implies secrecy (ELECTIONS, vol. 6, p. 343), it follows that laws to establish secret voting belong to that class of laws which "are simply declaratory of a constitutional principle that inheres in the system of voting by ballot, and which ought to be inviolable whether declared or not." See Cooley's Const. Lim. (6th ed.) 761.

A law to establish a system of voting by secret ballot is within the constitutional power of the legislature to regulate elections, provided it does not deny the franchise, nor render "its exercise so difficult and inconvenient as to amount to a denial." DeWalt *v.* Bartley (Pa. 1892), 24 Atl. R. 185. See also State *v.* McMillan (Mo. 1891), 18 S. W. Rep. 784.

3. Known as a "voting shelf," "voting compartment," or "booth," though the latter word is sometimes used for a temporary room in which the voting takes place.

4. The requirement of secrecy does not prevent a voter from declaring how he intends to vote, and his right to vote is not prevented by such declaration. What is required is that he furnish no evidence in support of such declaration. Bernard *v.* Brillon, 1 Montreal L. R. 121.

Though the policy of the law requires secrecy, this does not prevent voters who are improperly kept from voting, by the election officers, from declaring at the time how they had intended to vote, nor from subsequently testifying to such declaration, so as to rebut the presumption that they might have intended to vote differently. North Victoria Election, 37 U. C. Q. B. 234.

But it does not follow from this that such declarations should be treated as votes, and counted. Lincoln Case, Hodg. El. Cas. (Ont.) 500, 517.

5. In *Rhode Island* if no official ballots are supplied at a voting place, the

II. NOMINATIONS.—Legal nominations[1] are made by filing the necessary documents,[2] signed by the requisite number of voters,[3] or else (in *America*) by the officers of the conventions or other nominating bodies of political parties,[4] and properly verified or

voters can use any others. *In re* Ballot Provision (R. I. 1891), 21 Atl. Rep. 791.

1. Every voter has the right to announce himself as a candidate or to name other persons as fitted to hold office; but the legal nomination, which is made in order to entitle a candidate to have his name printed on the ballots and to appear as the representative of a particular party or principle, ought to represent the wishes of a respectable portion of the electors. Chateau *v.* Board of Election Comrs. (Mich. 1891), 50 N. W. Rep. 102.

Reasonable provisions, requiring legal nominations to be made by political parties of a certain size, or a certain number of voters, do not infringe the constitutional equality of citizens as to the manner of voting. "The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations in order to ascertain what names shall be printed on the ballot. . . . The right to nominate . . . can only be exercised by a number of voters acting together. . . . If an official ballot is to be used, nominations must be regulated in some way, otherwise the scheme would be impracticable." DeWalt *v.* Bartley (Pa. 1892), 24 Atl. R. 185.

2. In the American statutes these documents are usually called "certificates of nomination" when filed by the officers of party conventions, etc., and "nomination papers" when filed by independent aggregations of citizens.

3. Where the nomination must be made by qualified voters, it is invalid if made by persons qualified at the last election, but who have since failed to qualify by payment of taxes. *Ex parte* Drew, 9 Sup. Ct. R. (N. S. Wales) 169.

It is usually provided that no voter shall sign more than one nomination paper for candidates for the same office, but no papers which a voter has lawfully signed can be invalidated by his subsequent unlawful signature of other papers. Burgoyne *v.* Collins, 30 Weekly R. 923.

In some States the number of signatures required is unreasonably great, and adopted without much regard to the needs of the public. See People *v.* Rice, 25 Abb. N. Cas. (N. Y.) 460.

4. Outside of the United States, and also in *Kentucky* (Louisville act), all nominations are made in one way by the written request of (usually a very few) citizens. In *Delaware* (Laws of 1891, p. 85) and *Michigan* (Pub. Acts 1891, p. 256), all nominations must be made by party organizations, but such organizations can be very easily formed so as to come within the acts.

All the other American laws provide both methods of making nominations—*i. e.*, by political parties and by independent aggregations of voters, the privilege of nomination by party certificate being restricted to those parties that have polled a certain percentage (usually three per cent. or less) of the largest total vote cast for any office at the preceding election, except in *Arkansas* (Acts, 1891, p. 42), *Idaho* (Laws, 1891, p. 57), *Montana* (Laws, 1889, p. 135), *North Dakota* (Laws, 1891, p. 171), *Ohio* (Laws, 1891, p. 449), *South Dakota* (Laws, 1891, p. 152), *Tennessee* (Acts, 1889, p. 364), and *Washington* (Gen. Stats., § 364), where the certificate may be filed by a convention or other meeting representing any political party or principle, without regard to its numbers.

In *Pennsylvania*, the requirement of three per cent., above referred to, is held to be only a reasonable regulation in regard to the printing of tickets, and not to violate the rights of any voter whose party's vote is below the percentage. De Walt *v.* Bartley (Pa. 1892), 24 Atl. R. 185.

What Constitutes a "Political Party."—At a Republican caucus to nominate candidates for town officers, it was voted to adjourn and organize a citizens' caucus. Thereupon some Democrats came in and joined with the Republicans present in nominating a citizens' ticket. A collection was taken to defray the cost of printing tickets (the elections being in Connecticut, where official ballots are not used), but no committees were appointed, nor any steps taken for a permanent organization. The chairman of the Republican

acknowledged,[1] in the proper office,[2] a certain time before the

town committee had the tickets printed (with the name "Citizens' Ticket") and placed in the booths, no Republican tickets being issued. It was held that for the time being and for the purposes of that election a Citizens' party existed in that town within the meaning of the act, and that the ballots must be regarded as issued by it. Fields *v.* Osborne, 60 Conn. 544.

"Regular" and "Irregular" Conventions.—Nominations made at a convention held pursuant to "a call for a meeting of Republicans," and duly certified and filed, must be printed on the official ballots, and it cannot be objected that the nominations were made by an irregular body, and not by the regular Republican party. "No matter what the body of voters may have called themselves, if a ticket was nominated and filed according to law, the clerk should print the ticket for popular vote." People *v.* Ryan, 60 Hun (N. Y.) 398.

But where a convention was irregularly packed, and the majority of the duly elected delegates excluded, whereupon they convened elsewhere and made nominations, it was held that they were "delegates representing" the Republican party within the meaning of Laws of *New York* 1890, ch. 262, § 2, and that the names of their candidates must be printed on the ballots as the regular Republican nominees. *In re* Woodworth (Supreme Ct.), 16 N. Y. Supp. 147.

It has been held in *Michigan* that where there was a split in a nominating convention, and each faction made nominations, both were entitled to have their candidates' names printed on the ballots. The Supreme Court said: "We do not consider that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party; but that it is the duty of said board to print and place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed." Shields *v.* Jacob (Mich. 1891), 50 N. W. Rep. 105.

How Far Convention Methods May be Inquired Into.—A court will decide whether a convention constitutes "an assemblage of voters or delegates representing" the party it claims to represent or not. *In re* Woodworth, (Supreme Ct.), 16 N. Y. Supp. 147. In this case, the court, by Adams, J., said: "It is insisted that a political convention is a law unto itself, and that whatever methods it adopts for its own government are conclusive, and cannot be made the subject of judicial inquiry. To a certain extent this convention may be, and doubtless is, true. . . . But where the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned, and no court or judge would be justified in sustaining them when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business."

"The same considerations which should induce courts of justice to maintain the purity of the ballot box, when the final vote is taken, should equally operate with them to promote honesty and prevent and condemn fraud when a preliminary vote is taken or a nominating convention held. There can be no difference in principle in its application to the various situations mentioned. And though it is said that 'the decalogue has no place in politics,' yet when the tribunals of the country are appealed to in matters having political complexion and bearing; when once they acquire jurisdiction in a proper way in such matters, they will administer justice, promote honest dealing and condemn fraud precisely as they do when administering the law in cases sounding in damages or sounding in contract." State *v.* Lesueur, 103 Mo. 263.

1. See State *v.* Lesueur, 103 Mo. 253.

2. A nomination paper must be filed in the office. Delivering it to the proper officer at his residence is not a legal filing, and invalidates the paper. Reg. *v.* O'Dwyer, 4 Austr. Jur. (Vict.) 151.

In *England*, a nomination paper must be delivered by the candidate himself, his proposer, or seconder. If delivered by his agent, it is void. Monck *v.* Jackson, L. R., 1 C. P. Div. 683; 35 L. T. N. S. 95.

election.[1] The regulations must be strictly complied with.[2] Substitutions can be made in case of the death or withdrawal of candidates.[3] The official posting and publication of candidates' names is usually required.[4] Nomination certificates or papers are open to public inspection, and may be objected to for formal or substantial defects up to a certain time before the election,[5]

1. Where a nomination was received after the time, this was held to invalidate the election, though there was no other nomination. Reg. *v.* Miller, 1 Austr. Jur. R. (Vict.) 156.

Where the statute fixes the time, the officer to receive nomination, cannot require a longer time even by one day. Reg. *v.* Glover, 15 L. T. N. S. 289.

"Seven days at least" before election has been held to mean seven entire days, Sundays excepted, between the last day for nomination and the day of election. Howes *v.* Turner, L. R., 1 C. P. Div. 670; *Ex parte* Hurst, 9 Sup. Ct. R. (N. S. Wales) 177.

2. State *v.* Lesueur, 103 Mo. 253; Price *v.* Lush, 10 Mont. 61. The duties of the officer with whom nomination certificates or papers are filed are ministerial, but he is vested with sufficient discretion to pass on the sufficiency of such certificates or papers. State *v.* Lesueur, 103 Mo. 253.

3. Where a certificate of nomination, purporting to be intended to fill a vacancy, did not set forth the cause of the vacancy, nor that the committee was authorized to fill the vacancy, and was otherwise defective, the election of the candidate for whom such certificate was filed, was held to be void. Price *v.* Lush, 10 Mont. 61.

4. Publication in a supplemental advertising sheet, distinct from the ordinary news portion of a paper, and sent only to special subscribers, is valid. Reg. *v.* Miller, 1 Austr. Jur. R. (Vict.) 156.

Publication in a daily paper circulating in, but not published in, the electoral district, is a sufficient compliance with the act, there being only a weekly of small circulation published in the district. Reg. *v.* Hartmann, 2 N. S. Wales L. 87.

A slight delay in the posting of nominations does not affect an election. Reg. *v.* Mitchell, 4 Ont. Prac. 218.

The official publication of the name of a candidate, whose nomination has not been duly made and certified, gives him an unfair advantage over other citizens whose names have not been published, and avoids the election. Price *v.* Lush, 10 Mont. 61.

The object of publication is not only to inform the voters as to who the candidates are, but also to allow errors in the names to be seen and corrected before the ballots are finally printed. Hence where the law provides for the correction of errors by application to a judge, a candidate who fails to make timely objection cannot afterwards object that the ballots contained names of persons not legally nominated. Bowers *v.* Smith (Mo. 1891), 17 S. W. Rep. 761.

5. If no objection as to the character of the nominating body be made within the time limited, the candidate must be regarded as the regular nominee of the party. *In re* Cowie, 25 Abb. N. Cas. (N. Y.) 455.

Under a law requiring all nomination papers to contain the registration numbers of the voters nominating, an error in a number, not corrected before the election, was held to be fatal, and to invalidate the election, although it was found that no person was or could have been misled by the error. Gothard *v.* Clarke, 42 L. T., N. S. 776. See Criticism in 24 Jour. Jurisp. 293.

In a nomination paper for a ward of a city, it is immaterial that the ward is not stated to be in that city. *Ex parte* Lenehan, Browning (Vict.) 170.

The use of the word "district" instead of "subdivision," in a nomination paper, has been held immaterial, the statute directing all papers to be in the form prescribed "or to the like effect." Reg. *v.* Munday, 5 W. W. & A'B. (Vict. L.) 143.

Acceptance.— Under a statute requiring all candidates to sign their nomination papers by way of acceptance, a paper subscribed "and I, the above-named James Greig, hereby consent to such nomination," without signature, was held to be valid, the question being treated as one of in-

and corrected.[a] Should the officer with whom the documents must be filed, unwarrantably refuse to receive them, he may be compelled to do so by mandamus;[2] or, under the English and Colonial practice, by *quo warranto*.[3]

III. Ballots and Means of Marking.—Ballots[4] must contain the names (and usually the residences and party or political appellations)[5] of all[6] candidates nominated, who are to be voted for

tention to sign. Reg. *v.* Oddie, 6 W. W. & A'B. (Vict. L.) 221.

Under such a statute a nomination paper without acceptance should not be rejected, but should be given back to have the omission supplied. Reg. *v.* Jones, 5 Vict. L. 334.

If the officer with whom a nomination paper is filed decides that it is not sufficiently full, he should return it for amendment, and not reject it. Reg. *v.* Munday, 5 W. W. & A'B. (Vict. L.) 143.

Under the Ontario Elections Act an election cannot be held void for defect in a nomination paper which has been allowed, but it has been held that the improper rejection of a nomination paper for a formal defect will invalidate the election. South Renfrew Case, Hodg. El. Cas. (Ont.) 705.

1. A defective nomination paper, taken away, corrected, and filed again, is to be taken as of the date of the second filing. A valid paper, taken away to correct a supposed error, and returned after the date for filing nominations, is to be taken as of the date of its original filing; but otherwise, if taken away for the purpose of withdrawing the nomination. Howes *v.* Turner, L. R., 1 C. P. Div. 670.

2. Fisher *v.* Dudley (Md. 1891), 22 Atl. Rep. 2, *In re* Cowie, 25 Abb. N. Cas. (N. Y.) 455; People *v.* Ryan, 60 Hun (N. Y.) 398; People *v.* Rice, 25 Abb. N. Cas. (N. Y.) 460.

3. *Ex parte* Attenborough, 5 W. W. & A'B. (Vict. L.) 103.

4. The usual form is the "blanket ballot," containing the names of all candidates to be voted for at the voting place for which it is used. In *New Jersey* and *New York* the laws provide for separate ballots for each party

In *Connecticut*, where the ballots are printed by the party organizations, it is held that ballots of one party, bearing the name of another organization, are void and should not be counted. Talcott *v.* Philbrick, 59 Conn. 472.

The *Rhode Island* constitution requires ballots for general officers to go to the secretary of State after the election, and others to the mayor and aldermen or to the town council. The ballot reform law does not conflict with this, as it does not prevent the use of separate ballots for general and local officers, or the separation of the local portion of each ballot from the general portion after the election, so that each portion can be sent to the proper office. Opinion of Justices (R. I. 1890), 19 Atl. Rep. 656.

Voting Machine.—By the *New York* act of March 15, 1892, any town may, by vote of the town board, use the Myers' ballot machine for elections of town officers. By this machine the names of candidates are on a key board, and for each name voted for a button must be pressed down, which registers a vote on the ballot, which is a single paper on which each vote is by this process marked in the proper place. This law affects the act of voting merely, not the regulations as to nominations, which necessarily remain.

5. It has been held in *Michigan* that if the same party name is certified by each of two committees, "the name so certified shall be printed without further addition or distinctive designation than such as is contained in the certificates furnished." Shields *v.* Jacob (Mich. 1891), 50 N. W. Rep. 105.

6. The names of candidates for the office of police commissioner must therefore be put on the same ballots as those of candidates for State, district, and county offices. *In re* McLaren (Supreme Ct.), 13 N. Y. Supp. 420. See also *In re* Grogan (Supreme Ct.) 13 N. Y. Supp. 421.

The omission of a candidate's name from the ballots does not invalidate an election without reasonable evidence that the result has been affected thereby. Reg. *v.* Mitchell, 4 Ont. Prac. 218; Reg. *v.* Bradburn, 6 Ont. Prac. 308.

The fact that the ballots used contain the names of the candidates of a

at the voting place for which such ballots are printed,[1] grouped under the titles of the respective offices,[2] though in some States the names of all the candidates nominated by each party are grouped together under the party title,[3] independent candidates being in that case arranged in similar groups.[4]

The back of each ballot is indorsed, either beforehand or when given to the voter, with an official stamp, or the name or initials of the election officer, or otherwise as the statute may require.[5]

party which, on account of its small number, was not entitled to have the names printed, is no reason for rejecting the returns of the districts where such ballots were used. Bowers *v.* Smith (Mo. 1891), 17 S. W. Rep. 761.

1. Ballots voted at any other voting place than that for which they were printed and indorsed cannot be counted. People *v.* Board of Canvassers (N. Y. 1891), 29 N. E. Rep. 327. But see State *v.* Russell (Neb. 1892), 15 N. W. Rep. 465.

2. Where a candidate was twice nominated for the same office (one of the nominations being defective on account of a mis-statement of his residence) and his name printed twice on the ballots, once with the right residence and once with the wrong, it was held that it should have been printed but once, but that all votes marked against either insertion had been intended for the one candidate, and must be counted for him. Northcote *v.* Pulsford, L. R., 10 C. P. 476.

3. Where party groups are required, if a candidate be nominated by a party and also by an independent body of citizens, his name should be printed with those of the other independent candidates as well as in his own party group. Fisher *v.* Dudley (Md. 1891), 22 Atl. Rep 2.

Some laws require each party group to be headed by an emblem or vignette as well as the party name.

Where the vignette adopted by a nominating convention contains within it the name of the political organization it represents, another heading of the ballot is unnecessary. Shields *v.* Jacob (Mich. 1891), 50 N. W. Rep. 105.

4. The representatives (provided for in the *New York* statute) of the signers of independent nomination papers for any candidate, can choose, out of the entire list of nominees for other offices, associates to be put on the ticket with their candidate. People *v.* Kaiser, 25 Abb. N. Cas. (N. Y.) 462.

5. The absence of an official indorsement has been held to vitiate ballots in Haswell *v.* Stewart, 1 Ct. of Sess. 925; 2 O'Mal. & Hard. 215.

But the contrary has been held in Montreal West Case, 20 Low. Can. Jur. 22; Monck Election Petition, 12 Can. L. J. 113; *In re* Loyd, 4 W. W. & A'B (Vict. L.) 226; Jenkins *v.* Brecken, 7 Can. Sup. Ct. 247 (the initials being on the counterfoil).

In Dionne *v.* Gagnon, 9 Queb. L. 20, the absence of the initials was held to invalidate, unless clear proof of the genuineness of the ballot was given.

In *Ex parte* Tremblay, 13 Que. L. 64, the absence of the initials from all the ballots at a certain polling place was held to be evidently due to the election officers' ignorance, and not to vitiate.

Where the ballots are required to be signed by the clerks, signature by initials is sufficient. *Ex parte* Reay, Browning (Vict.) 173.

Where the law directed the indorsement to be stamped on each ballot as it was given out, a prior stamping of all the ballots, to save time, was held not to invalidate the election, though a serious irregularity. Hamilton *v.* Police Comrs., 2 Ct. of Sess. 299.

Where the law directs an official mark to be put on both back and face of ballots, a ballot is not invalid merely because it has been marked on the back only. Ackers *v.* Howard, L. R., 16 Q. B. Div. 739.

A provision that the poll-clerks shall write their initials on the lower left-hand corner of the back of each ballot is directory merely. If, by honest mistake, they write them on the lower right-hand corner, the ballots should be counted. Parvin *v.* Wimberg (Ind. 1892), 30 N. W. Rep. 790.

Where ballots of one party were sent to a voting place other than that for which they were indorsed, and there used, the indorsement was held a distinctive mark, invalidating

Some laws require ballots and stubs to be numbered,[1] but otherwise no mark or device to identify them is allowed.[2]

All ballots must contain blank spaces for the insertion of other names than those of the candidates nominated.[3] Pencils or other means of marking ballots should be supplied.

IV. VOTING ROOMS.—Rooms must be provided,[4] with a portion railed off, which can only be entered, for the purpose of voting, by persons who have established their right to do so, the screened shelves being within the portion railed off.[5]

V. VOTING.—The voter's choice is usually[6] to be indicated by a cross-mark[7] in the square at the right of the name of each can-

them. People *v.* Board of Canvassers, 129 N. Y. 395. But see *contra*, State *v.* Russell (Neb. 1892), 51 N. W. Rep. 465.

1. Where the voter's registry number was erroneously placed on the front of the ballot, this was held to invalidate it, as it destroyed the secrecy. Woodward *v.* Sarsons, L. R., 10 C. P. 733.

The contrary was held in Hawkins *v.* Smith, 8 Can. Sup. 676, the number having been erased by the officer after the polls closed.

The absence of the number from the stub does not invalidate the ballot. Ackers *v.* Howard, L. R., 16 Q. B. Div. 739.

2. The omission of the word "for" from the titles of offices is not a mark or device to identify ballots within the *Connecticut* statute; but the addition of words describing the duties of an officer, or of the name of a person stated to be a candidate for an office not to be filled at that election, have been held to violate this statute. Fields *v.* Osborne, 60 Conn. 544. But see State *v.* Russell (Neb. 1892), 51 N. W. Rep. 465.

The official indorsement of ballots for another voting place than that where they are used is a distinguishing mark in *New York*. People *v.* Board of Canvassers, 129 N. Y. 395.

3. For the purpose of these blank spaces, see Chateau *v.* Board of Election Comrs. (Mich. 1891), 50 N. W. Rep. 102; Bowers *v.* Smith (Mo. 1891), 17 S. W. Rep. 761; Price *v.* Lush, 10 Mont. 61.

4. The performance of the duty of providing the proper instrumentalities for carrying out the provisions of a secret ballot law can be compelled by mandamus; and it is immaterial that the law may be silent as to the payment of the expenses of fitting up the rooms, etc., for the imposition of an active duty on certain officers imposes an obligation upon the localities where the elections are held to meet the expenses. Common Council *v.* Rusk, 82 Mich. 532.

In *New Jersey*, it is held that such expense must be borne by the counties and the cities equally, the booths being used by each. State *v.* Mayor, etc., of Newark (N. J. 1891), 22 Atl. Rep. 55.

5. Where two rooms with a landing between, were used, the election officers being in one room and the screened shelves in the other, and there was opportunity for outsiders to stand at the landing between the two, but no evidence of actual violation of secrecy was offered, it was held that no injury had been suffered, and the candidate elected should not be unseated for the act of the election officers. Drogheda Case, 9 Ir. L. T. R. 161; 2 O'Mal. & Hard. 201.

6. In *Arkansas*, *Missouri*, *Oregon* and *West Virginia* the names of candidates not voted for must be erased, instead of marking those voted for; *Arkansas* Acts, 1891, p. 46; *Missouri* Laws, 1889, p. 105, 109; *Oregon* Laws, 1891, p. 8, 28; *West Virginia* Code, 1891, ch. 3, § 34.

7. **Style of the Mark.**—A single cross, though of irregular shape, or made with more than two lines, has been held valid. Haswell *v.* Stewart, 1 Ct. of Sess. 925; North Victoria Petition, 11 Can. L. J. 163; Dionne *v.* Gagnon, 9 Queb. L. R. 20; Monck Election Petition, 12 Can. L. J. 113; Hawkins *v.* Smith, 8 Can. Sup. Ct. 676.

But a cross in the form of an ornate script has been held invalid. Jenkins *v.* Brecken, 7 Can. Sup. Ct. 248.

In *Rhode Island* a cross is the only mark allowed. *In re* Vote Marks (R. I. 1890), 21 Atl. Rep. 962.

An oval and also a circle have been

didate for whom he votes[1] (or, where the candidates are grouped by parties, in the square at the right of the party name, this oper-

held invalid. Wigtown Case, 2 O'Mal. & Hard. 215; Stepney Case, 4 O'Mal. & Hard. 34; Haswell *v.* Stewart, 1 Ct. of Sess. 925; Monck Election Petition, 12 Can. L. J. 113; Hawkins *v.* Smith, 8 Can. Sup. Ct. 676.

But the contrary was held in Buckrose Case, 4 O'Mal. & Hard. 110, on the ground that there was nothing about the circle to indicate that it was not intended as a vote.

A star or asterisk was held valid in Woodward *v.* Sarsons, L. R., 10 C. P. 733; but invalid in Montreal West Case, 20 Low. Can. Jur. 22.

Small curved lines, touching a principal line, like branches, are not a cross, nor are combinations of a spiral and straight lines, nor several small lines. Dionne *v.* Gagnon, 9 Queb. L. R. 20; North Victoria Petition, 11 Can. L. J. 163.

A single line is invalid. Haswell *v.* Stewart, 1 Ct. of Sess. 925; Robertson *v.* Adamson, 3 Ct. of Sess. 978; North Victoria Petition, 11 Can. L. J. 163; Monck Election Petition, 11 Can. L. J. 113; South Wentworth Case, Hodg. El. Cas. (Ont.) 531; Dionne *v.* Gagnon, 9 Queb. L. R. 20; Hawkins *v.* Smith, 8 Can. Supr. Ct. 676.

The contrary was held in Woodward *v.* Sarsons, L. R., 10 C. P. 733; and so, where the line had a loop at the top. Robertson *v.* Adamson, 3 Ct. of Sess. 978.

Two strokes on the right, not in the square, have been held valid. Anstruther *v.* Williamson, 13 Ct. of Sess. 577.

The name or initials of a candidate, written opposite his name, are not equivalent to a cross-mark. Woodward *v.* Sarsons, L. R., 10 C. P. 733; North Victoria Petition, 11 Can. L. J. 163.

In the case of cumulative voting, where both figures and crosses are required, figures without crosses, crosses without figures, or a number of straight lines have been held valid as sufficient evidence of the voter's intention. Phillips *v.* Goff, L. R., 17 Q. B. Div. 805.

Marking with Pencil, Ink, etc.—Where the law directs the cross to be made with a pencil, ink may be used; and *vice versa*. Such provisions are not mandatory, and in the absence of fraud, strict compliance with them will not be required, if the ballot be in other respects valid. Haswell *v.* Stewart, 1 Ct. of Sess. 925; Monck Election Petition, 12 Can. L. J. 113; State *v.* Russell (Neb. 1892), 51 N. W. Rep. 465.

In fact it is not even essential that the mark should discolor the paper, if from any circumstances the court can infer that it was intentionally made. Berwick-upon-Tweed Case, 44 L. T. N. S. 289.

Additional Marks.—The addition of superfluous crosses or other marks has been held to invalidate the vote, especially when near the names of opposing candidates. Woodward *v.* Sarsons, L. R., 10 C. P. 733; Buckrose Case, 4 O'Mal. & Hard. 110; Haswell *v.* Stewart, 1 Ct. of Sess. 925; Robertson *v.* Adamson, 3 Ct. of Sess. 978; Hawkins *v.* Smith, 8 Can. Sup. Ct. 676; North Victoria Petition, 11 Can. L. J. 163.

But in other instances the addition of crosses or marks of various sorts has been held to be immaterial, the marks being usually accidental. Woodward *v.* Sarsons, L. R., 10 C. P. 733; Wigtown Case, 2 O'Mal. & Hard. 232; Monck Election Petition, 12 Can. L. J. 113; Jenkins *v.* Brecken, 7 Can. Sup. Ct. 247; Hawkins *v.* Smith, 8 Can. Sup. Ct. 676; Reg. *v.* Wilson, 1 Anstr. Jur. R. (Vict.) 150.

A line through a candidate's name has been held not to affect a cross marked against his opponent's name. Woodward *v.* Sarsons, L. R., 10 C. P. 733.

But the addition of the voter's name, or that of the candidate or any other person invalidates the ballot. Woodward *v.* Sarsons, L. R., 10 C. P. 733; Haswell *v.* Stewart, 1 Ct. of Sess. 925; North Victoria Petition, 11 Can. L. J. 163.

Identifying marks made during the count, by some one unknown, do not invalidate a ballot. Bernatchez *v.* Fortin, 9 Queb. L. R. 81.

1. Position of the Mark.—The cross-mark must be on the face of the ballot. If put on the back, though opposite the candidates name and so that it strikes through and can be seen on the face of the ballot without turning it over, it will not be counted. Berwick-upon-Tweed Case, 44 L. T. N. S. 289; 3 O'Mal. & Hard. 178; Buckrose Case, 4 O'Mal. & Hard. 110; Jenkins *v.*

ating as a vote for every name in the group); or by inserting other names in the proper blank spaces.[1] New ballots will be

Brecken, 7 Can. Sup. Ct. 247; South Wentworth Case, Hodg. El. Cas. (Ont.) 531.

In an early case a mark so placed was held valid. Monck Election Petition, 12 Can. L. J. 113.

A fortiori any marks other than a cross, on the back, are invalid. Haswell *v.* Stewart, 1 Ct. of Sess. 925.

A mark on the upper margin of the ballot, or above the names of the candidates, is void for uncertainty, and cannot be counted for the candidate whose name stands first. Berwick-upon-Tweed Case, 3 O'Mal. & Hard. 178; Stepney Case, 4 O'Mal. & Hard. 34; Buckrose Case, 4 O'Mal. & Hard. 110.

A mark to the left of a candidate's name has been held void. Haswell *v.* Stewart, 1 Ct. of Sess. 925; 2 O'Mal. & Hard. 215; Robertson *v.* Adamson, 3 Ct. of Sess. 978; Monck Election Petition, 12 Can. L. J. 113; Montreal West Case, 20 Low. Can. Jur. 22.

But it has been held otherwise in *England*, in the absence of evidence of connivance or prearrangement. Woodward *v.* Sarsons, L. R., 10 C. P. 733.

Under a statute providing that the cross should be placed opposite the candidate's name, a cross to the left has been held valid. Dionne *v.* Gagnon, 9 Queb. L. R. 20.

And so, even where the cross was directed to be placed "on the right-hand side." North Victoria Petition, 11 Can. L. J. 163.

In *Indiana* the provision, that the mark must be made by stamping the square preceding the name of a candidate or a political party, is held to be mandatory. "In order that the elector may have his ballot counted at all, he must touch some one of the squares with the stamp. He can indicate his choice in no other manner, for this is the only mode prescribed by the law. He cannot stamp the ballot elsewhere, and leave the election board to guess at his intention." Parvin *v.* Wimberg (Ind. 1892), 30 N. W. Rep. 790.

In *Rhode Island* it is held that the cross must be placed in the margin at the right of the candidate's name, but it need not be in the square provided for it. *In re* Vote Marks (R. I. 1890), 21 Atl. Rep. 962.

A cross anywhere to the right of the candidate's name, even in the same compartment with it, has been held valid. Robertson *v.* Adamson, 3 Ct. of Sess. 978; Athlone Case, 8 Ir. Rep. C. C. 240; 2 O'Mal. & Hard. 186.

A cross in the same compartment as the candidate's name and above it has been held valid, and so of a cross below the name. Haswell *v.* Stewart, 1 Ct. of Sess. 925; 2 O'Mal. & Hard. 215; North Victoria Petition, 11 Can. L. J. 163. But not a mark other than a cross. Berwick-upon-Tweed Case, 44 L. T. N. S. 289.

Where a cross was made directly upon the name, so as to make it appear possible that the voter intended to strike the name out, the vote was disallowed. Buckrose Case, 4 O'Mal. & Hard. 110.

A cross in two squares has been counted in which the intersection was. Berwick-upon-Tweed Case, 44 L. T. N. S. 289; Jenkins *v.* Brecken, 7 Can. Sup. Ct. 247. But in the latter case, where two crosses had been made with the intersections exactly on the first and second lines of the ballot, it was counted as one cross for the candidate whose name was between those lines.

The general tendency, as is seen from the above cases, has been not to require a very strict compliance with the directions of the law as to the position of the cross-mark, but this is a rather dangerous course, as it might lead to violations of secrecy by collusion with election officers. There ought to be as little as possible to distinguish one man's mark from another.

1. See Price *v.* Lush, 10 Mont. 61.

A law allowing the insertion of names, and requiring ballots to be printed with blank spaces for the purpose "preserves the right of every citizen to vote for any candidate whose name is not on the official ballot," and without unnecessary inconvenience. If the word used is "insert," this does not mean insertion by writing only, but allows the use of "stickers." Even if such insertion were required to be by writing, it could not be said, as a matter of law, that the consequent inconvenience amounted to a denial of the franchise. De Walt *v.* Bartley (Pa. 1892), 24 Atl. R. 185.

issued in place of those accidentally spoiled, but a torn ballot, if used, may be valid.[1]

VI. ILLITERATE AND DISABLED VOTERS.—Voters who make a declaration, usually required to be sworn, that they cannot mark their ballots,[2] either because they cannot read or from physical causes, are allowed to receive help in marking,[3] from the election officers or others, as the law may provide,[4] which help should be

1. Woodward *v.* Sarsons, L. R., 10 C. P. 733; Montreal West Case, 20 Low. Can. Jur. 22; Monck Election Petition, 12 Can. L. J. 113.

2. It is improper to allow an illiterate to be aided in marking, without requiring a declaration of inability. Halton Case, Hodg. El. Cas. (Ont.) 283.

But if the number of votes so marked does not affect the result, the election is valid. Hickson *v.* Abbott, 25 Low. Can. Jur. 289.

A declaration that the voter is unable "to read or write sufficiently to mark the ballot paper," instead of one of inability to read or write, is not a fatal irregularity. Cunningham *v.* Hagar, Ont. El. Cas. 88.

3. **Constitutional Right to be Helped.**—It has been held in *Kentucky*, where the constitution of 1850 declared that elections should be "free and equal," and there was no educational qualification for voting, that a law requiring all voters, not blind, to go alone into the compartments and mark their ballots, could not be enforced against illiterates. The court, by Lewis, C. J., said: "[This section] practically operates to deprive a person who is unable to read or write of a free and intelligible choice of those he may desire to vote for, and, in fact, makes free suffrage as to them a matter of chance or accident. . . . They have a right to avail themselves of whatever reasonable or legal aid or information may be necessary to enable them to vote understandingly, and cannot legally be deprived of it." Rogers *v.* Jacob, 88 Ky. 502.

So, in *Michigan*, where it was claimed that the law of 1889 (since superseded by that of 1891), though not a complete adaptation of the Australian system, deprived illiterates, the blind and cripples, of the opportunity of voting, the court, by Grant, J., said: "It is clear that if voters are limited to the use of tickets provided in the booths, then some voters are disfranchised by the very terms of the law. But we do not think that the law necessarily bears that construction. There is no express prohibition against assisting such a person in the preparation of his ticket, nor against his obtaining a ticket outside the polling place for that purpose, nor against assisting to a booth or the polls one unable to go alone. Such a case is not within the mischief aimed at, and we hold that under this law such a voter is entitled to receive assistance in the preparation of his ticket, and to receive and have his ticket prepared outside the polling places." Common Council *v.* Rush, 82 Mich. 532.

In *Tennessee*, however, where the constitution also declares that "elections shall be free and equal," but authorizes the legislature to enact laws "to secure the freedom of elections and the purity of the ballot-box," it is held that no exception to the rule that a voter must mark his ballot alone need be made in the case of illiterates. The court, by Turney, C. J., said: "Every voter, however illiterate, can always find a friend to himself, or some candidate, who will read and explain the law and the manner of its observance. Ballots and cards of instruction are always at hand, the names of the candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and with easy readiness place his cross opposite that name, and fold his ticket as required. The argument of inconvenience is as nothing compared to the rights intended to be protected by that inconvenience. . . . The inconvenience to a part of the community must yield to the good of the whole." Cook *v.* State, 90 Tenn. 407.

4. Where the help is to be given by election officers, but the law does not expressly forbid other persons to give such help, a bystander's act in so doing is not unlawful, though the practice might materially interfere with se-

given with, as far as possible, the same secrecy that is required in the marking of ballots in other cases.[1]

VII. Errors of Public Officers.—Errors committed by public officers in regard to an election,[2] or a failure to supply sufficient ballots and means of marking thereat,[3] will invalidate it, if they are such as might have affected the result. In *New York* it is held that ballots of one party, used at the wrong voting place, by the mistake of an officer, cannot be counted,[4] but the propriety of this decision has been questioned.[5]

VIII. Construction of Secret Ballot Laws.—The construction of those provisions of a ballot law which have been adopted from a foreign country or another State, must be that which they have

crecy. *In re* Hutton, 5 Anstr. Jur. R. (Vict.) 135.

1. Hickson *v.* Abbott, 25 Low. Can. Jur. 289.

By the *Arkansas* act, all other voters must withdraw from the room when such help is given. *Arkansas* Acts 1891, pp. 32, 46.

2. Drogheda Case, 9 Ir. L. T. R. 161; 2 O'Mal. & Hard. 201.

Where, in consequence of an error in the public notice, a nomination paper was filed too late, and rejected, the election was held void, as otherwise the candidate whose paper was rejected might have been elected. Howes *v.* Turner, L. R., 1 C. P. Div. 670.

So where a nomination paper was refused for non-compliance with an unlawful condition. Davis *v.* Kensington, L. R., 9 C. P. 720.

So where papers have erroneously been declared invalid after filing. Reg. *v.* Munday, 5 W. W. & A'B. (Vict. L.) 143; Sonth Renfrew Case, Hodg. El. Cas. (Ont.) 705.

3. A substantial failure of opportunity for the electors to vote, on account of a contractor's failure to deliver ballots, pencils, etc., at certain voting places, invalidates an election. Hackney Case, 31 L. T. N. S. 69; 2 O'Mal. & Hard. 78.

But not under the Ontario Elections Act, the closing of the polls for a short time, while waiting for more ballots, the election not being affected by the number of persons kept from voting. Reid *v.* Drury, 1 Ont. El. Cas. 291.

The objection that sufficient ballots or accommodations were not supplied cannot be raised as between two candidates only, out of a greater number, on petition for a recount. If such a defect affects the election at all, it avoids the whole, and must, therefore be alleged in a special claim to which all the candidates must be made respondents. Jenkins *v.* Brecken, 7 Can. Sup. Ct. 247.

4. **Ballots Indorsed for Another Voting Place.**—Under the *New York* statute (Laws, 1890, ch. 262; amended by Laws, 1891, ch. 296) which provides that no ballot not properly indorsed shall be deposited or counted, and that no ballot that has any distinguishing mark on the outside shall be deposited, it was held that ballots inadvertently sent to the wrong voting place, where the same candidates were to be voted for, and there voted and deposited, could not be counted, as they were not properly indorsed for the place where they were used, and the wrong indorsement was in effect, a distinguishing mark, they being the ballots of one party only. The *bona fides* of the voters in using these ballots, and of the inspectors in receiving them, was held immaterial. People *v.* Board of Canvassers, 129 N. Y. 395.

5. See dissenting opinion of Peckham, J., in People *v.* Board of Canvassers, 129 N. Y. 395, 445, where it is said: "To utterly disfranchise hundreds of innocent legal voters because the employé or messenger of some public officer made a mistake like the one in question seems to me to work a burlesque on the ballot act and its construction."

See also the approval of this dissent in State *v.* Russell (Neb. 1892), 51 N. W. Rep. 465.

The purpose of the statute "is to secure a fair expression of the will of the electors of the State, by secret ballot, uninfluenced by bribery, corruption or fraud. The disfranchisement of whole precincts by reason of an

received in such State or country.[1] Those requirements of the ballot laws which are essential to a fair election, whether so declared in the statute or not, are mandatory and must be strictly construed.[2]

SECTARIAN—(See generally RELIGION; RELIGIOUS LIBERTY; RELIGIOUS SOCIETIES).—See note 3.

SECTION.—1. A section is commonly the smallest numbered subdivision of a statute, code, text-book, etc., which contains a distinct subject; a paragraph; an article.[4]

2. The public lands of the *United States* and of some of the States, are surveyed into parcels which contain six hundred and forty acres each and are called "sections."[5]

SECULAR—(See also SERVILE; SUNDAY).—The word "secular" means temporal, pertaining to temporal things—things of this world, worldly; also, opposed to spiritual, holy.[6]

SECURE—(*Compare* SECURITY).—"This word, when used as a verb, active, signifies to protect, insure, save, ascertain, etc."[7]

honest mistake on the part of the election officers is inconsistent with this purpose." Parvin *v.* Wimberg (Ind. 1892), 30 N. E. Rep. 790.

1. Price *v.* Lush, 10 Mont. 61. See STATUTES.

2. Mather *v.* Brown, L. R., 1 C. P. Div. 596; Howes *v.* Turner, L. R., 1 C. P. Div. 670; Monks *v.* Jackson, L. R., 1 C. P. Div. 683; Price *v.* Lush, 10 Mont. 61; State *v.* Russell (Neb. 1892), 51 N. W. Rep. 465.

Authorities.—Lee and Le Marchant's Guide to Election Law (4th ed.), 1885; Lely and Foulkes' Parliamentary Election Acts, 1885; Paine's Law of Elections, 1888; Wigmore's Australian Ballot System (2d ed.), 1889.

3. The constitution of *Nevada* forbids the use of public funds for "sectarian purposes." In State *v.* Hallock, 16 Nev. 373, it was held that a Roman Catholic Orphanage, where the Catholic pupils were instructed in the tenets of their church, was a "sectarian" institution within the meaning of the provision, even though Protestant pupils were not so instructed. The court, by Leonard, C. J., said: "A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is 'sectarian' and all members thereof are sectarians."

4. "A part separated from the rest, a division, a portion; 'as, specifically, a distinct part of a book or writing; the subdivision of a chapter; the division of a law or other writing; a paragraph, an article; hence the character §, often used to denote such a division.' A correct definition of the word, probably, as applied to a chapter in a statute, is a subdivision." State *v.* Babcock, 23 Neb. 128.

5. "The general and proper acceptation of the terms 'section,' 'half,' and 'quarter-section,' as well as their construction by the General Land department, denotes the land in the sectional and subdivisional lines, and not the exact quantity which a perfect admeasurement of an unobstructed surface would declare." Brown *v.* Hardin, 21 Ark. 327.

6. Richardson's Eng. Dict. *followed* in Allen *v.* Deming, 14 N. H. 139; 40 Am. Dec. 179.

7. Wheaton *v.* Peters, 8 Pet. (U. S.) 660. In that case it was held that the word "secure"—as used in that clause of the Constitution, which provides that Congress may promote the progress of science, etc., by "securing for a limited period" to authors the exclusive right to their writings—did not imply the existence and protection of an acknowledged legal right. *Compare* Myers *v.* Callaghan, 5 Fed. Rep. 732.

That "secure" may be used in the sense of "save," see Oliver *v.* Stirling, 20 Ohio St. 401. In that case an agent had testified that his authority was to

To give security; to assure of payment, performance, or indemnity, to guaranty or make certain the payment of a debt or discharge of an obligation.[1]

SECURITY—(See also GUARANTY, vol. 9, p. 67; INVESTMENT, vol. 11, p. 813; RAILROAD SECURITIES, vol. 19, p. 694; SURETYSHIP; WILLS).—1. That which renders a matter secure; an instrument which renders certain the performance of a contract.[2]

2. A surety.[3]

SECURITY FOR COSTS.—See COSTS, vol. 4, p. 324.

SECURITY TO KEEP THE PEACE.—See BREACH OF THE PEACE, vol. 2, p. 516; JUSTICE OF THE PEACE, vol. 12, p. 419.

secure a debt due his principal. The court, by Welsh, J., said: "The jury had a right, in view of all that White said on the subject of his authority, to hold that he used the word 'secure' not in its primary legal sense, but in the sense of 'saving' the debt, in which I suppose he actually did use the word."

1. Black's L. Dict.

Under a contract for the sale of realty, the vendor covenanted to convey the same as soon as the purchaser "secures the payment" of the purchase price. It was held that, "The word 'secures' was used in its popular signification and that signification is not equivalent to payment in money, but implies something given and received by means of which payment may at some future time be procured or compelled. It implies a term of credit." Foot *v.* Webb, 59 Barb. (N. Y.) 38.

The direction in § 32, *English* Divorce Act, 1857 (20 & 21 V., ch. 85), to "secure" a gross or annual sum to a wife, does not authorize an order for payment direct to the wife; but means that the sum is to be secured in such a way as to provide for her. Medley *v.* Medley, 7 P. D. 122.

Secure in the Sense of Perfect.—To "secure" a mechanic's lien means to do such acts as will perfect an incipient lien, that is to make it available. And. L. Dict., *citing* Boston *v.* Chesapeake, etc., R. Co., 76 Va. 181.

2. Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 506, *following* Bouv. L. Dict.

"A security," speaking generally, is anything that makes money more assured in its payment or more readily recoverable as distinguished from (*e.g.*) a mere I. O. U., which is only evidence of debt. Stroud's Jud. Dict.

Bills of exchange, bonds for the payment of money, and promissory notes are, in the popular acceptation of the term, "securities" for money. Jennings *v.* Davies, 31 Conn. 139. See also Stroud's Jud. Dict. *Compare* U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 121.

The Liability of a homestead for antecedent debts is not a "security" within the meaning of the law governing the application of payments to secured and unsecured debts. First Nat. Bank *v.* Hollingsworth, 78 Iowa 575.

Verdicts; Judgments.—A verdict before judgment is probably not a "security" (Jones *v.* Thompson, E. B. & E. 63; 96 E. C. L. 63); but "a judgment is in every sense of the word a security to the creditor for the payment of his claim." West Ham Union *v.* Ovens, L. R., 8 Exch. 37.

A power of attorney to confess judgment is a "security" within a provision of a bankrupt act avoiding securities given by a debtor in contemplation of bankruptcy. Buckingham *v.* McLean, 13 How. (U. S.) 151.

Money paid into court to abide the event of an action is a "security" to the other litigant. *Ex parte* Banner, 9 Ch. 329; *Ex parte* Bouchard, L. R., 12 Ch. Div. 26.

Securities or Effects.—See EFFECTS, vol. 6, p. 190.

Collateral Security.—See COLLATERAL, vol. 3, p. 310; PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 585.

Public Securities.—Railroad bonds are not public securities. Hale *v.* Hampshire Co., 137 Mass. 114; but securities issued under legislative sanction in furtherance of public works are. Hall *v.* Middlesex Co., 10 Allen (Mass.) 102.

3. Favorite *v.* Stidham, 84 Ind. 425; Boulware *v.* Hartsook, 83 Va. 679. See also SURETYSHIP.

SECUS.—Otherwise, used in the reports and digests to introduce a converse proposition, or an exception to the general principle which has been previously stated.[1]

SEDGE-FLAT.—See note 2.

SEDITION—(See also TREASON).—Conduct tending toward treason, but wanting an overt act; attempts made, by meetings or speeches, or by publications, to disturb the tranquillity of the state, which do not amount to treason. All contempts against the sovereign and the government, and riotous assemblies for political purposes, may be reckoned under the head of sedition.[3]

1. 1 Abb. L. Dict.

2. Premises conveyed by a deed were described therein as "a certain piece of sedge-flat." It was held that the term "sedge-flat" imports a tract of land below high-water mark. Church *v.* Meeker, 34 Conn. 424.

3. Abb. L. Dict.

"In *England*, there are various misdemeanors, which, not amounting to treason, are of like nature with it, known under the general name of sedition; such as libels upon the government, oral slanders of it, riots to its disturbance, and the like. Offenses of this sort against the United States could be punished only under a statute, and there has been little occasion for pursuing like offenses against the States. Moreover with us, popular sentiment tolerates great latitude in the discussion of governmental affairs. We have, therefore, no cases informing us to what extent sedition is an offense at common law in our States." Bishop's Crim. Law (7th ed.), § 457.

In Archbold's Cr. Pl. & Ev. (13th London ed.) 631–2, it is said: "A man may lawfully discuss and criticize the measures adopted by the queen and her ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. See Rex *v.* Lambert, 2 Camp. 398. If a man curse the queen; wish her ill; give out scandalous stories concerning her, or do anything that may lessen her in the esteem of her subjects; may weaken her government or may raise jealousies between her and her people—all these are sedition. In Rex *v.* Tutchin, 5 Harg. St. Tr. 527, Lord Holt said, that if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished.

"And Lord Ellenborough in Rex *v.* Cobbett, Holt on Liable 114, said that if a publication be calculated to alienate the affection of the people by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer and publisher are punishable; and whether the defendant really intended by his publication to alienate the affection of the people from the government or not, is immaterial; if the publication be calculated to have that effect it is seditious. Rex *v.* Burdette, 4 B. & Ald. 95."

So, also, in the United States it has been held that all publications which tend to degrade and vilify the Constitution, to promote insurrection and circulate discontent through its members; to asperse its justice and anywise impair the exercise of its functions—all such writings are seditious, and are visited with the peculiar rigor of the law. Resp *v.* Dennis, 4 Yeates (Pa.) 270.

By act of Congress a seditious conspiracy is made punishable by a fine and imprisonment. Rev. St. of the United States, § 5336; Gibson *v.* State, 38 Ga. 571.

So the guilt of libelous publications on persons employed in a public capacity is aggravated by tending to scandalize the government by reflecting on those charged with the administration of public affairs; for they both endanger the public peace and tend directly to faction and sedition. 1 Russ. Cr. (9th ed.) 339.

SEDUCTION; CRIMINAL CONVERSATION.—(See also ABDUCTION, vol. 1, p. 21; CHARACTER, vol. 3, p. 113; HUSBAND AND WIFE, vol. 9, p. 834; PARENT AND CHILD, vol. 17, p. 331.)

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I. THE CIVIL ACTION—1. At Common Law.—Seduction, as defined in actions under the common law, is the act of a man in inducing a woman to commit unlawful sexual intercourse with him. The use of seductive arts or promises by the man is not an essential part of the offense.[1] The common law gave the father an action for the seduction of his daughter,[2] but regarded it as an action of

1. Definition.—Bouv. L. Dict.

"It was not necessary for the plaintiff to show that the defendant had used flattery, or made false promises to his daughter; that it would be sufficient if the seduction resulted from the solicitation and importunity of the defendant to the daughter to indulge in criminal intercourse, in consequence of which she consented. . . . So far as the right to maintain this action is concerned, it cannot be at all important by what means, or by which of the multifarious devices of the seducer, he may have prevailed in the accomplishment of his purpose. It is enough that by any means or arts he tempted or persuaded his victim to the surrender of her chastity." Reed *v.* Williams, 5 Sneed (Tenn.) 580; 73 Am. Dec. 157.

Where the proof was that the defendant had had sexual intercourse with the plaintiff's minor daughter, while she was living with her father, and that she was afterwards confined and delivered of a child, it was held to be sufficient proof of seduction to support an action by the father. Leucker *v.* Stileu, 89 Ill. 545; 31 Am. Rep. 104.

Where, however, the seduction occurs without flattery or artifice, the damages are limited to actual loss. Comer *v.* Taylor, 82 Mo. 341.

"It has been held that when carnal intercourse with a girl takes place without seduction—that is without the aid of flattery and artifice—no recovery can be had by the father beyond the loss of service and incidental expenses." Simpson *v.* Grayson, 54 Ark. 404. With reference to the second proposition, viz., that the bare fact of a criminal intercourse entitles the master, who, at the time of the intercourse, had a right to the services of the female servant which have been impaired by that act, to recover compensation for the impairment of that right, and for such expenses as he legitimately incurred and was legally liable for. I think it is correct." Hogan *v.* Cregan, 6 Robt. (N. Y.) 138.

2. Woman Cannot Sue.—A woman cannot maintain an action for her own seduction. Cline *v.* Templeton, 78 Ky. 550; Woodward *v.* Anderson, 9 Bush (Ky.) 624. Except by statute, or for fraud. Conn *v.* Wilson, 2 Overt. (Tenn.) 233; 5 Am. Dec. 663; Hamilton *v.* Lomax, 26 Barb. (N. Y.) 615; Paul *v.* Frazier, 3 Mass. 71; 3 Am. Dec. 95; Buckles *v.* Ellers, 72 Ind. 220; 37 Am. Rep. 156; Thompson *v.* Young, 51 Ind. 599; Watson *v.* Watson, 49 Mich. 540; Roper *v.* Clay, 18 Mo. 383; 59 Am. Dec. 314.

An action was brought by a girl under age, by her next friend, in which the

trespass for assaulting his servant, whereby he lost her services; later, an action on the case was allowed, and it is now well settled that the action may be brought in either form.[1] The action was based upon the relation of master and servant, and not upon

declaration alleged that the defendant fraudulently, and with the intention of getting her within his power for purposes of prostitution, she being then but fourteen years of age, destitute, without relatives, and in the care of a charitable society in New York, represented to her, and to the persons who had her in charge, that he wanted her to go to his house in Connecticut and live in his family, and that he was a suitable person to take charge of her; and that, with the advice of her friends, she came to his house with him for the purpose, and that, while she was living in his house, the defendant, by taking advantage of her ignorance and dependence, persuaded her to submit to intercourse with him, and that he thus debauched her. *Held*, that the action would lie and the declaration would be good on demurrer. Smith *v.* Richards, 29 Com. 232.

A female servant who has been persuaded by her master to have sexual intercourse with his infant son, to whom she was engaged to be married, and who afterwards broke the engagement, cannot maintain an action for damages against the master. Jordan *v.* Hovey, 72 Mo. 574; 37 Am. Rep. 447.

The father has the exclusive right of action in his lifetime unless he has parted with that right. Blanchard *v.* Ilsley, 120 Mass. 487; 26 Am. Rep. 535.

1. **Form of Action.**—Chamberlain *v.* Hazlewood, 5 M. & W. 515; 3 Jur. 1079; 7 Dowl. P. C. 816; Parker *v.* Bailey, 4 D. & R. 215; 16 E. C. L. 195; Bennett *v.* Alcott, 2 J. R. 166; Mercer *v.* Walmsley, 5 Har. & J.(Md.) 27; 9 Am. Dec. 486; Briggs *v.* Evans, 5 Ired. (N. Car.) 16; Donohue *v.* Dyer, 23 Ind. 521; Damon *v.* Moore, 5 Lans. (N. Y.) 454; Moran *v.* Dawes, 4 Cow. (N. Y.) 412; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100; Hubbell *v.* Wheeler, 2 Aik. (Vt.) 359; Logan *v.* Murray, 6 S. & R. (Pa.) 175; 9 Am. Dec. 422; Parker *v.* Elliot, 6 Munf. (Va.) 587; Watson *v.* Watson, 49 Mich. 540; Cavan *v.* Welch, Dra. (Up. Can.) 246.

"The action itself is anomalous. At first, the remedy of the father whose daughter was seduced was by an action of trespass *quare clausum fregit*, and a right of action having been established by the entry of the defendant into the plaintiff's close, the seduction of the daughter was admissible in evidence to enhance the damages of the trespass *quare clausum*. At subsequent periods different modes of declaring, both in trespass and in case, were resorted to and were sustained by the courts." Blagge *v.* Ilsley, 127 Mass. 191; 34 Am. Rep. 361.

"There was no express remedy given by the law to redress the wrong done the parent in the seduction of his child. The special action on the case was therefore allowed in this, as in other instances where a wrong was done, and no 'original writ' would be found in the chancery that would suit the circumstances. This form of action was early accepted—grounded on the idea that the daughter bore the relation of servant to the plaintiff; the declaration alleging, '*per quod servitium amisit.*' . . . "The form of the action may sometimes be trespass, alleging the breaking and entering the plaintiff's close, as the 'technical right,' the seduction being in aggravation." Ellington *v.* Ellington, 47 Miss. 329.

"The action in most cases may be either trespass or case; and the distinction between the two actions, as respects the ground of recovery, is important to be kept in view. Where there has been an illegal entry into the father's house or premises, by the seducer, an action of trespass, *vi et armis*, may be maintained, for the breaking the house, or trespass on the premises, and the seduction of the daughter and consequential loss of services, may be alleged and proved as an aggravation of the damages; or an action on the case may be supported, founded merely on the consequences of the seduction.

"In the former action, in which the illegal entry of the father's house is the technical ground of the action and the seduction and loss of service is considered as only matter in aggravation of the trespass, it may well enough be maintained, consistently with the nature of the action and the

that of parent and child, and the measure of damages was such only as a master would recover for a disabling physical injury to his servant. The extent of the recovery has been enlarged by the courts from the necessity of the case, rather than from the principles which govern the action, until compensation is awarded to the parent, as such, for the shame and mortification which that wrong brings upon him and his family.[1] No action could be maintained by the father for the injury in his parental capacity,[2] but in the struggle between substantial justice to the parent

principles by which it is governed, that it cannot be supported unless the daughter were living with the plaintiff at the time of the injury. But in an action on the case, the ground of which is the consequential injury resulting from the seduction, it is unimportant whether or not the person seduced lived with the plaintiff at the time the seduction took place." Parker *v.* Meek, 3 Sneed (Tenn.) 29.

See also the learned note to Vanhorn *v.* Freeman, 6 N. J. L. 322.

An action on the case for seduction of a daughter cannot be considered as an action for recovery of damages to personal property, within the act of *North Carolina* of 1805. M'Clure *v.* Miller, 4 Hawks (N. Car.) 133.

Trespass and a count for debauching may be joined with a count for breaking and entering. Woodward *v.* Walton, 2 N. R. 476.

Compare Woodward *v.* Anderson, 9 Bush (Ky.) 624 (Trespass); Tullidge *v.* Wade, 3 Wils. 18 (Trespass); Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584 (Case); Dean *v.* Peel, 3 East 45; but this case of Dean *v.* Peel was doubted in Parker *v.* Meek, 3 Sneed (Tenn.) 29.

For Forms of Declaration, see Riddle *v.* McGinnis, 22 W. Va. 253; 2 Chitty on Pl., p. 643.

"The form of declaration in case is given in 2 Greenl. Ev., § 571 (14th ed.) as follows: "For that the said (defendant) on —— and on divers days and times after that day and before the commencement of this suit, debauched and carnally knew one E F, she then being the [daughter and] servant of the plaintiff, whereby the said E F became sick and pregnant with child, and so continued for a long time, to wit, until the —— day of —— when she was delivered of the child of which she was so pregnant; by means of all which the said E F was unable to perform the business of the plaintiff, being her [father and] master aforesaid, from the day first aforesaid hitherto, and the plaintiff has wholly lost her service and been put to great expenses for her delivery, cure, and nursing. To the damage," etc.

The form in trespass runs thus: "For that the said [defendant] on —— and on divers days and times after that day and before the commencement of this suit, with force and arms assaulted one E F, she then being the [daughter and] servant of the plaintiff, and then debauched and carnally knew the said E F, whereby [here proceed as in the preceding form to the end, concluding thus], and other wrongs to the plaintiff, the said [defendant] then and there did, against the peace. To the damage," etc.

1. See *infra*, this title, *Damages*. Simpson *v.* Grayson, 54 Ark. 404.

2. Coon *v.* Moffet, 3 N. J. L. 169; 4 Am. Dec. 392; Grinnell *v.* Wells, 7 M. & G. 1033; 49 E. C. L. 1032; Eager *v.* Grimwood, 1 Exch. 61; Norton *v.* Jason, Styles 398 (earliest case in England, 1653); Hedges *v.* Tagg, L. R., 7 Ex. 283.

In Thompson *v.* Ross, 5 H. & N. 16, a daughter not residing with her parent, but being in the service of another, was seduced. She occasionally assisted her mother with the permission of her mistress when her own work was done. *Held*, the parent had no right of action. Pollock, B., said: "We are all agreed that there was no service in this case. The service must be a real genuine service. Here, the girl did work for her mother, by the consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to enable the parent to sue for a loss of such service, a parent might sue in the case of a domestic servant going home on Sunday evenings and making tea there. But here, as in that case, there was merely a permission which might at any moment be withdrawn."

and the precedents in actions for seduction, the courts have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation of master, and permitting a recovery in his relation of parent.[1] The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action,[2] but it is now little more than a legal fiction used as a peg to hang a substantial award of damages upon, as compensation, not to the master, but to the

"According to the modern rule, the plaintiff goes through the form of showing that he was entitled to the daughter's service, in order to reach the higher plane of injury and wrong, for which he is entitled to compensation." Barbour *v.* Stephenson, 32 Fed. Rep. 66.

1. Simpson *v.* Grayson, 45 Ark. 404.

"Upon the principle of the right of the father to the service of his minor child, he is entitled to an action if his minor child be enticed away from him. On these principles, the action so often brought by a father when his daughter has been debauched, is founded—viz., the loss of service. But this loss of service is not the rule of damages—it is scarcely an item in the account. The real ground for damages is the disgrace of the family. The loss of service in many instances, could not be accounted anything, yet the damages will be large, and often where the least service is performed the highest damages are given." Reeves Dom. Rel. (4th ed.), p. 362.

"In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded." Blackburn, J., in Terry *v.* Hutchinson, L. R., 3 Q. B. 602.

Where no objection is taken at the trial that there is no relation of master and servant on which to base the action, a new trial will not be awarded on that ground. Roycroft *v.* Iago, 4 Aust. Jur. Rep. 145.

2. Coon *v.* Moffitt, 3 N. J. L. 169; 4 Am. Dec. 392; Dain *v.* Wyckoff, 7 N. Y. 191 (where the girl was indentured to the defendant); 72 Am. Dec. 493.

In Long *v.* Keightley, 11 Ir. R. C. L. 221, the seduction took place on the night of the departure of the girl for America. *Compare* 11 Ir. L. T. 339; 5 Cent. L. J. 80.

In Harper *v.* Lufkin, 7 B. & C. 387, the girl was married, but had separated from her husband and was living with her father, who was allowed to recover for her seduction.

A father cannot maintain an action for the seduction of his minor daughter, whom he had left to shift for herself, and who, at the time of her seduction, was working for another person as a household servant. Ogborn *v.* Francis, 44 N. J. L. 441; 43 Am. Rep. 394; Vanhorn *v.* Freeman, 6 N. J. L. 322; McDaniel *v.* Edward, 7 Iréd. (N. Car.) 408; 47 Am. Dec. 331; Knight *v.* Wilcox, 14 N. Y. 413.

In an action by the father, an allegation that the daughter was poor and had to maintain herself, and by being debauched she was unable to do so and had to be maintained by the father, was held insufficient. Grinnell *v.* Wells, 7 M. & G. 1033; 49 E. C. L. 1032. So it is not enough to allege that the father apprenticed his daughter to the defendant's wife and in consequence of the seduction she was unable to learn her trade. Harris *v.* Butler, 2 M. & W. 539.

A daughter, at the age of nine, left her mother, because the mother was a common prostitute, and went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by him, and left the State with him, and went to Louisiana, where she was delivered of a child. From the time she left, there was no intercourse between the mother and daughter. *Held*, that the mother could not maintain the action. Roberts *v.* Connelly, 14 Ala. 235.

Fraud in Service.—Where the defendant has hired the girl for the purpose of seducing her, this is a fraud, and does not terminate the father's right. Speight *v.* Oliveira, 2 Stark. 495; Dain *v.* Wycoff, 18 N. Y. 45; Smith *v.* Richards, 29 Conn. 232.

head of the family.[1] It is a logical sequence from that state of the law that proof of the mere nominal relation of master and servant should be sufficient to give the parent a footing in court to recover damages commensurate with the injury; and evidence of the slightest service will be held sufficient.[2] It is accordingly

1. **Fiction.**—"The action for seduction is in form a fiction—in substance a snare. It is pregnant with inconsistencies; it cannot be defended in principle; it is most unsatisfactory in practice." 8 U. C. L. J. 309.

"Both the alleged relation of master and servant and the loss of service have long been considered as innocent fictions, which only served to bring the real grievance before the court where damages were allowed, not for the loss of services only, but principally for the humiliation and disgrace brought upon the plaintiff's family, and for the mental anguish suffered on account of the ruin of his daughter and the dishonor of his household." Hudkins *v.* Haskins, 22 W. Va. 645.

In Vanhorn *v.* Freeman, 6 N. J. L. 322, the court by Kinsey, C. J., said: "In these cases, generally speaking, little or no service is either performed by the daughter, or expected from her; and were it not for the highly respectable characters by whom the fiction has been supported and recognized, I should not hesitate to express my opinion, that it disgraces the jurisprudence of the country."

"The labored efforts of courts to work out theories under which loss of service could be made out, were only made reasonable by the unreasonable fiction which, in order to recover damages for a real injury, made it necessary to rely on an unreal one." Stoudt *v.* Shepherd, 73 Mich. 588.

In Lawyer *v.* Fritcher, 54 Hun (N. Y.) 586, the court, by Landon, J., said: "In this case all the requirements of the fiction are made out, except, possibly, the inability to render service consequent on the seduction. Why is proof of this consequent inability required? Simply to complete the logical consistency of the fiction. Justice does not require it. Justice examines to see if the alleged outrage is really such, and of what degree of aggravation. The outrage proven, a scintilla of evidence of the consequent inability to render service will suffice, and ought to suffice. Liberal presumptions will be indulged, if the justice of the case requires it, to establish this member of a series of fictional requirements. Here the seduction was proved, and the daughter's subsequent suicide. The jury could infer that before she took the poison there were some moments—a single one would be enough—in which she was not so capable of rendering service as she would have been if her seduction had not been effected."

In Stoudt *v.* Shepherd, 73 Mich. 588, it is said that the fiction was used only because a party was incompetent to testify.

2. **Slightest Service.** — Martin *v.* Payne, 9 Johns. (N. Y.) 387; 6 Am. Dec. 288; Nickleson *v.* Stryker, 10 Johns. (N. Y.) 115; 6 Am. Dec. 318; Clark *v.* Fitch, 2 Wend. (N. Y.) 459; 20 Am. Dec. 659; Badgley *v.* Decker, 44 Barb. (N. Y.) 577; Hewitt *v.* Prime, 21 Wend. (N. Y.) 79; Mercer *v.* Walmsley, 5 Har. & J. (Md.) 27; 9 Am. Dec. 486; Keller *v.* Donelly, 5 Md. 218; Emery *v.* Gowen, 4 Me. 33; 16 Am. Dec. 233; Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584; Boyd *v.* Byrd, 8 Blackf. (Ind.) 113; 44 Am. Dec. 740; Pence *v.* Dozier, 7 Bush (Ky.) 133; Doyle *v.* Jessup, 29 Ill. 460; Sutton *v.* Huffman, 32 N. J. L. 58; Kinney *v.* Laughenour, 89 N. Car. 365; Lipe *v.* Eisenlerd, 32 N. Y. 236; Damon *v.* Moore, 5 Lans. (N. Y.) 459; South *v.* Denniston, 2 Watts (Pa.) 474; Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768; Davidson *v.* Abbott, 52 Vt. 570; 36 Am. Rep. 767; McKersie *v.* McLean, 60 Ont. Rep. 428; Mann *v.* Banet, 6 Esp. 32; Blaymire *v.* Haley, 6 M. & W. 55; Dean *v.* Peel, 5 East 45.

In Bennett *v.* Alcott, 2 J. R. 116, the daughter was thirty years old, no contract of service was proved, and milking the cows was held sufficient evidence of service.

In Carr *v.* Clarke, 2 Chitty Rep. 260, making tea was held sufficient service.

In Holloway *v.* Abell, 7 C. & P. 528; 32 E. C. L. 615, the girl worked away from her father, but acted as mistress of his house. Rist *v.* Faux, 4 B. & S.

established in the *United States*, at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but in the actual employ of another, enjoying the fruits of her labor with her father's consent, if he has not relinquished, past the power of recall, his right to control her services:[1] the facts that the daughter

409; 11 W. R. 918; 106 E. C. L. 108; Ogden *v.* Lancashire, 15 W. R. 158.

Where the girl is in the service of another, an *animus revertendi* to the father will be presumed when she leaves such service, and his right of action accrues at that moment. Terry *v.* Hutchinson, L. R., 3 Q. B. 599.

Where the girl was a milliner and rented the house, her mother and children living with her and her father lodging elsewhere, no action was allowed. Manley *v.* Field, 7 C. B. N. S. 96; 97 E. C. L. 96.

In Hedges *v.* Tagg, L. R., 7 Ex. 283, the girl was a governess and was seduced while on a three days' visit to her mother. As the girl returned to her employer, no action was maintainable. But a temporary absence does not end the relation of master and servant. Griffiths *v.* Teetgen, 15 C. B. 344; 80 E. C. L. 343; Evans *v.* Walton, L. R., 2 C. P. 615.

"The rule adopted by the *English* courts requires that the relation of master and servant should be proved with greater strictness where the daughter does not reside under the paternal roof; and according to Thompson *v.* Ross, 5 H. & N. 16, the action cannot be maintained if, at the time of the seduction, she was a domestic servant in a family other than that of her father. But it is well settled, even under the *English* rule, that the amount and value of the actual service to the father are of but little importance, and that any service, however slight, is sufficient. Bennett *v.* Alcock, 2 T. R. 166. It is enough if the father had a right to her services, and if some service was rendered." Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584.

In Manvell *v.* Thompson, 2 C. & P. 303; 12 E. C. L. 136, Abbott, C. J., said: "The smallest degree of service will do. It seems that there was no servant kept, and it is reasonable to conclude that all the members in the family assisted, in turn, in the performance of household work." Manvell *v.* Thompson, 2 C. & P. 303; 12 E. C. L. 136.

1. Right to Service.—Simpson *v.* Grayson, 54 Ark. 404.

"Our cases stand upon the same foundation, with only this difference, that we go further than the *English* courts in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided that the case be such that the father then had a legal right to her services, and might have commanded them at pleasure." Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338.

In Martin *v.* Payne, 9 Johns. (N. Y.) 387; 6 Am. Dec. 288, the court by Spencer, J., said: "Put the case of a gentleman's daughter at a boarding-school debauched and gotten with child: on what principle can the father maintain the action, but on the supposed relation of master and servant arising from the power possessed by the father to require menial services; for in such a case there is no actual existing service, constituting the relation of master and servant. Would it not be monstrous to contend that for such an injury the law afforded no redress?"

"That (*English*) rule, so far as it requires actual service, or actual residence with the father at the time, has been relaxed by *American* courts, and the general rule here is, that it is only necessary to show that the parent has the legal right, at the time, to command the services of the child, and very slight evidence of loss will suffice." White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

But in cases of a minor, it is immaterial whether she lives with her father or not. If she be at school abroad, she is his servant; that is, he has a right to her services, and can recall her when he pleases. Reeves' Dom. Rel. (4th ed.) 363, 364.

"We have gone far enough into the subject to show quite clearly that the '*per quod servitium amisit*' feature of

the action has not been permitted to stand in the way of the recovery of damages for the substantial injury. If an indenture of apprenticeship be in the way, the misconduct of the apprentice has been held to be a cause of dissolution, and if the daughter quits the master, the dissolution will be made to relate back, if necessary, to the date of the wrongful act. If the debauchment occur in a distant State or town, as where the daughter is at school, or in employment for wages, on the declaration of the father that she must shift for herself or support herself, yet he is *de jure* entitled to herservices, earnings and society, and so may maintain the action." Ellington *v.* Ellington, 47 Miss. 329.

Maunder *v.* Venn, M. & M. 323, Littledale J., said to the jury: "Proof of any acts of service was unnecessary; it was sufficient that she was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient. I remember Lord Alvanley so ruling, and I have always been of the same opinion; if it were otherwise, no action could be maintained for this injury by a father in the higher ranks of life where no actual services by the daughter are usual."

"But no *English* case, so far as we know, has gone the length of supporting the action, where the daughter having left her father, was subsequently seduced. Several of the *American* courts, however, taking a more liberal view of this remedy, have decided that the action may be maintained, if the unmarried daughter, at the time of her seduction, was under the age of twenty-one years, though her father had relinquished all claim to her services, and she was in the employment of another person. The reasons assigned for those decisions are, that until the majority of the daughter, the relation of master and servant must be supposed between her father and her, inasmuch as he has the legal right to control her conduct, is bound for her support, and may, at any time, revoke his leave of absence, and reclaim her services." Boyd *v.* Byrd, 8 Blackf. (Ind.) 113; 44 Am. Dec. 740.

In the case of Dean *v.* Peel, 5 East 45, the action was not maintained, the child, though a minor, not residing in her father's family; but the case appears to have turned rather upon the fact that she had no intention of returning, than upon the circumstances of her happening to reside elsewhere. The court by Spencer, J., in Martin *v.* Payne, 9 Johns. (N. Y.) 387; 6 Am. Dec. 288, says that he considers this case of Dean *v.* Peel, 5 East 45, as the only one which has ever denied the right of the father to maintain an action for debauching his daughter while under age, and he deems it a departure from all former decisions on this subject.

"In order to maintain an action of this description, the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed, either in fact or constructively, at the time of the seduction. According to numerous decisions of the courts of New York, Pennsylvania and some other States of our Union, this relation is sufficiently proved by evidence that the daughter was a minor, and that the father had a right to her services. Those decisions also lay down the rule that the effect of such evidence is not impaired by the fact that, at the time of the injury, she was not living in her father's family, but was in the actual employment of another person. It was held that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter had been actually bound out as an apprentice. In other words, the relation results constructively from his right to reclaim the custody of her person, from his responsibility for her education and from his obligation to support her if she should become sick or disabled while so absent from her home." Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584; Blanchard *v.* Ilsley, 120 Mass. 487; 26 Am. Rep. 535; Nickleson *v.* Stryker, 10 Johns. (N. Y.) 115; 6 Am. Dec. 318; Clark *v.* Fitch, 2 Wend. (N. Y.) 459; 20 Am. Dec. 659; Mulvehall *v.* Millward, 11 N. Y. 343; Mercer *v.* Walmsley, 5 Har. & J. (Md.) 27; 9 Am. Dec. 486; Furman *v.* Van Sise, 56 N. Y. 435; 15 Am. Rep. 441; Clinton *v.* York, 26 Me. 167; Emery *v.* Gowen, 4 Me. 33; 16 Am. Dec. 233; Griffiths *v.* Teetgen, 15 C. B. 344; 80 E. C. L. 343.

"The defendant having done an act which has deprived the father of his daughter's services, which he might have required and enjoyed but for this injury, his obligation to support her,

is a minor and unmarried at the time of the seduction and the father was, at that time, entitled to her services and attentions, are held to create a conclusive presumption of law that the relation of master and servant exists between them.[1]

When the daughter is of age, however, it must appear that she resided in her father's family; in that case, if some acts of service, however slight, are proved, the action can be maintained.[2]

his right to her services, his title to her wages until her majority, are grounds of the action." Hornketh *v.* Barr, 8 S. & R. (Pa.) 36; 11 Am. Dec. 568.

"The only circumstances in this case, which are not found in other cases, are 1. That the father gave his daughter her time absolutely. 2. He in fact incurred no expense. 3. The suit was not instituted by him." Clark *v.* Fitch, 2 Wend. (N. Y.) 459; 20 Am. Dec. 659.

In this case the daughter was in the service of another in another State, and the father was not aware of the seduction until the suit had been brought. *Held*, that as the father had the right to recall the daughter to his service, he might adopt the suit and recover.

Where a servant girl was engaged to go to service in the country, but owing to the state of the roads was compelled to wait several weeks, during which she was seduced, it was held that the master could bring an action against the seducer, as he had a vested right to her services from the time she was hired. Ewing *v.* M'Donald, reported in Australian "Argus," Sept. 17, 1887, cited in Ewing *v.* McDonald, Kerferd & Box's Dig. of Victoria Reports 687.

Where a father verbally agrees that his daughter shall reside as a servant in a stranger's family for a certain number of years, he does not thereby surrender his parental control so as to bar his right to recover for her seduction, during her minority, by a son of her employer. Mohry *v.* Hoffman, 86 Pa. St. 358.

The father's failure or inability to support his daughter does not deprive him of his right of action. Benson *v.* Remington, 2 Mass. 113.

Roberts *v.* Connelly, 14 Ala. 235; Thompson *v.* Patterson, 23 Ark. 159; Bolton *v.* Miller, 6 Ind. 262; Hays *v.* Borders, 6 Ill. 46; Anderson *v.* Ryan, 8 Ill. 583; Greenwood *v.* Greenwood, 28 Md. 369; McKay *v.* Bryson, 5 Ired. (N. Car.) 216; Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768; L'Esperance *v.* Duchene, 7 U. C. Q. B. 146.

Where the father had abandoned the girl for ten years, and refused to provide for her it was held that the action still lay, although those facts would mitigate the damages. James *v.* Hawkins, 12 Can. L. J. N. S. 145. So where the father turned the girl out on learning of her pregnancy. Joseph *v.* Corvander, Roscoe N. P. (13th Eng. ed.) 878.

1. "The law is now well settled that where the daughter at the time of her seduction is under the age of twenty-one years, and the father then was entitled to her services and attentions, the law conclusively presumes that the relation of master and servant exists between them, although at the time of the seduction she may be in the actual service of another, under a contract made by herself for her own benefit." Hudkins *v.* Haskins, 22 W. Va. 645; Riddle *v.* McGinnis, 22 W. Va. 253.

In Vanhorn *v.* Freeman, 6 N. J. L. 322, the court, by Kinsey, C. J., said: "For my own part, I think, that whilst the daughter is under age, and is maintained by the parent, he always has a sufficient interest in her labor and services to afford a foundation for this action."

In an action for the seduction of the plaintiff's reputed daughter, evidence that his marriage with his reputed wife is void is admissible to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services. Howland *v.* Howland, 114 Mass. 517; 19 Am. Rep. 381.

The father of an illegitimate daughter cannot sue merely on his right as parent. Biggs *v.* Burnham, 1 U. C. Q. B. 166.

2. Adult Daughter. — Emery *v.* Gowen, 4 Me. 33; 16 Am. Dec. 233.

In Herring *v.* Jester, 2 Houst. (Del.) 66, Gilpin, C. J., charged the jury: "That when the daughter seduced is a minor under the age of twenty-one years and is residing at the time with her parent, the law presumed service because she owed it to him, and he might maintain an action

In accordance with these principles, the courts allow the mother, when she becomes the head of the family on the death of the father, to maintain an action for the seduction of her daughter;[1] and following the doctrine of parent and child, rather

for her seduction without any proof of actual service by her; but when the daughter was over that age at the time of her seduction and was living with her father, as had been proved in the present case, then some proof of actual service and the loss of it by reason of her seduction was necessary to entitle him to recover damages for it. But any service rendered him in his family, or otherwise by her, however slight, would be sufficient for this purpose, and would entitle him at least to nominal damages.'"

"When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of master and servant actually existed at the time of the injury. It is not enough that the daughter returned to his house before the child was born, and he paid the expenses of her sickness." Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338.

"It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case." Martin *v.* Payne, 9 Johns. (N. Y.) 387; 6 Am. Dec. 288.

In Cumber *v.* Morley, 4 Vict. L. R. (L.) 3 (*Australia*), the daughter was nearly thirty years of age and resided in the defendant's family, assisting his wife, but without wages. She returned home every Sunday, assisting in the household work while at home. It was held that the jury were entitled to hold the defendant liable for the seduction of the girl and award damages to the father, as the daughter was still the servant of the father. Ellington *v.* Ellington, 47 Miss. 327; Blanchard *v.* Ilsley, 120 Mass. 487; 26 Am. Rep. 535; Wert *v.* Strause, 38 N. J. L. 184; Sutton *v.* Huffman, 32 N. J. L. 58; Hornketh *v.* Barr, 8 S. & R. (Pa.) 36; 11 Am. Dec. 568; Wilson *v.* Sproul, 3 P. & W. (Pa.) 49; Clark *v.* Fitch, 2 Wend. (N. Y.) 459; 20 Am. Dec. 659; Lee *v.* Hodges, 13 Gratt. (Va.) 726; Mercer *v.* Walmsley, 5 Har. & J. (Md.) 27; 9 Am. Dec. 486; Patterson *v.* Thompson, 24 Ark. 55.

A daughter over twenty-one years of age lived with her father, but from the age of fourteen had been working out, returning to the house at night. She received her own wages, clothed herself, paid her board, and sometimes assisted in paying the rent. After returning from work, and before going in the morning, she daily performed some of the work about the house. In an action of seduction brought by her father, held, that the evidence of services rendered was sufficient to establish the relation of master and servant. It is immaterial whether the household services so rendered by the child are paid for or not, or whether any special contract existed. Lamb *v.* Taylor, 67 Md. 85.

After the majority of the daughter the father may maintain an action for her seduction while a minor. Stevenson *v.* Belknap, 6 Iowa 97; 71 Am. Dec. 392.

1. Right of Mother.—Furman *v.* Van Sise, 56 N. Y. 435 (Allen and Folger, J. J. dissenting), 15 Am. Rep. 441; Damon *v.* Moore, 5 Lans. (N. Y.) 454; Vossel *v.* Cole, 10 Mo. 634; 47 Am. Dec. 136; Blanchard *v.* Ilsley, 120 Mass. 487; 26 Am. Rep. 535; Ellington *v.* Ellington, 47 Miss. 329; Felkner *v.* Scarlet, 29 Ind. 154; Sargent *v.* ———, 5 Cow. (N. Y.) 106; *doubted* in Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338; but approved in Gray *v.* Durland, 50 Barb. (N. Y.) 100; Gray *v.* Durland, 51 N. Y. 424; Ryan *v.* Fralick, 50 Mich. 483; Long *v.* Keightley, 11 Ir. L. C. L. 221; Andrews *v.* Askey, 8 C. & P. 7; 34 E. C. L. 270. Even though the mother has remarried. Lampman *v.* Hammond, 3 Thomp. & C. (N. Y.) 293; Meyee *v.* Bell, 13 Ont. Rep. 35. *Contra*, in South *v.* Denniston, 2 Watts (Pa.) 474, the court by Gibson, C. J., said: "A mother, being at best in the category of a father who has parted with his right, can maintain an action but on proof of actual service at the time of the seduction. Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and

than that of master and servant, have given an action also to any one standing *in loco parentis* to the girl.[1] The right of action

standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it." Muckleroy *v.* Burnham, 1 U. C. Q. B. 351; Roberts *v.* Connelly, 14 Ala. 235.

A mother, after the death of her husband, cannot maintain an action for the seduction of her daughter in his lifetime, where it appears that the daughter was upwards of twenty-one years of age, and in the actual service of another person; although she shortly afterwards returned to her mother's family, and was taken care of by her during her confinement. George *v.* Van Horn, 9 Barb. (N. Y.) 523.

To entitle a mother to maintain an action for the seduction of her daughter, it must appear that her husband is dead, or that the custody of the daughter has been decreed to her, and that, in the absence of any proof that the relation of master and servant existed between them, she was entitled to her daughter's services. Hobson *v.* Fullerton, 4 Ill. App. 282.

An action on the case, *per quod servitium amisit*, will lie against a seducer in favor of a widowed mother, living with her daughter, who is over twenty-one years of age, and is owner of the establishment, but renders service to the mother and family. Villepique *v.* Shulor, 3 Strobh. (S. Car.) 462.

Under the statutes of *New York* relating to married women, a wife who has been abandoned by her husband, and who keeps a boarding-house on her sole and separate account, may sue in her own name for the seduction of her daughter over twenty-one years of age, who lives with and performs services for her about the house. Badgley *v.* Decker, 44 Barb. (N. Y.) 577.

In such an action, proof of the slightest service rendered by the daughter is sufficient to maintain the action.

Where Father Is Absent.—The same principle holds true where the father is alive but absent from the jurisdiction. Gould *v.* Erskine, 20 Ont. Rep. 347; 11 Can. L. T. N. 47.

In an action on the case by a woman whose husband had been more than seven years absent and unheard from, for the debauchment of a daughter, who was thirty-one years old, the testimony on the part of plaintiff tended to prove that the daughter had always lived at home with plaintiff; had assisted her about her household work; had done errands for the family; had worked in a neighboring factory most of the time since she was fifteen years old, and had paid her wages to plaintiff, who had used them in the support of her family. A verdict was directed for defendant. *Held*, that, on the evidence, the daughter was *de facto* plaintiff's servant, and that the direction of a verdict was erroneous. Davidson *v.* Abbott, 52 Vt. 570; 36 Am. Rep. 767; Harper *v.* Luffkin, 7 B. & C. 387; 14 E. C. L. 58. *Compare* Martinez *v.* Gerber, 3 M. & G. 88; 42 E. C. L. 55.

Seduction in Lifetime of Father.—A mother cannot maintain an action for the seduction of her daughter, where the father was living at the time of the seduction, although he died before the daughter gave birth to a child. Heinrichs *v.* Kerchner, 35 Mo. 378.

Smart *v.* Hay, 12 U. C. C. P. 528; James *v.* Hawkins, 25 U. C. C. P. 346; Logan *v.* Murray, 6 S. & R. (Pa.) 175; 9 Am. Dec. 422. *Contra*, Coon *v.* Moffitt, 3 N. J. L. 169; 4 Am. Dec. 392; Parker *v.* Meek, 3 Sneed (Tenn.) 29.

On the subject of the mother's right to maintain the action, see Bigelow's Leading Cases on Torts, p. 297; 10 Alb. J. L. 354–400.

1. In Loco Parentis. — Manvell *v.* Thompson, 2 C. & P. 303 (uncle or aunt); 12 E. C. L. 136; Edmondson *v.* Machell, 2 T. R. 4 (*semble*); Irwin *v.* Dearmain, 11 East 23 (adopted child); Fores *v.* Wilson, Peake 55.

"It follows, therefore, that for the purpose of this action, a stepfather, who has adopted the child of his wife, may not only maintain the action, but that it must be governed by the same rules and principles of evidence as if the suit were by the father." Maginnay *v.* Sandek, 5 Sneed (Tenn.) 146. *Compare* Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338; Ball *v.* Bruce, 21 Ill. 161; Kinney *v.* Laughenour, 89 N. Car. 365 (stepfather); Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Davidson *v.* Goodall, 18 N. H. 423 (cousin); Howard *v.* Crowther, 8 M. & W. 601

of the parent accrues immediately on the seduction of the daughter, as it is that act which deprives him of service,[1] but

(brother); Wilson *v.* Sproul, 3 P. & W. (Pa.) 49; Keller *v.* Donnelly, 5 Md. 211; McIntosh *v.* Tyrhurst, 24 U. C. Q. B. 443 (stepfather); Paterson *v.* Wilcox, 20 U. C. C. P. 385; Abernethy *v.* McPherson, 26 U. C. C. P. 516 (uncle); McKay *v.* Burley, 18 U. C. Q. B. 251 (brother); Tweedlie *v.* Bogie, 27 U. C. C. P. 561 (brother); McKersie *v.* McLean, 6 Ont. Rep. 428.

A stepfather who has adopted the illegitimate daughter of his wife into his family, stands *in loco parentis*, and can maintain an action for her seduction. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273. But *compare* Biggs *v.* Burnham, 1 U. C. Q. B. 166.

Where in an action for seduction, it appeared that the person seduced had a mother living, but had not heard from her father for fourteen years, and supposed him dead; that she had lived in the plaintiff's family most of the time since she was seven years old, and the plaintiff had taken her to bring up; that she was treated by him like one of his own children, and worked for him as they did, and was supported, and clothed, and educated by him, and taken care of by him during her sickness, and he paid the expenses of her lying-in—held, that the plaintiff, for the purpose of maintaining such suit, stood *in loco parentis*, and might maintain the action, although the girl, at the time of her seduction, lived and worked in the family of another, with the plaintiff's assent. Ingersoll *v.* Jones, 5 Barb. (N. Y.) 661. But this case has been doubted in Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338.

Grandfather.—Where, at the request of the deceased parents of a female infant, her grandfather assumes the obligations of a parent in respect to her, he can maintain an action for her seduction, although she was living away from him in the service of the defendant, appropriating the wages received to her own use at the time the injury occurred. Certwell *v.* Hoyt, 6 Hun (N. Y.) 575; Moritz *v.* Garnhart, 7 Watts (Pa.) 302, *semble;* 32 Am. Dec. 762.

Guardian.—One in whose household, during the sickness of his wife, the injured girl was residing without paying board, with an understanding with him, but with no agreement with her father or herself as to the payment of wages, or for any definite period of service, held not to hold towards her such relation of master and servant as to give him a right of action for her seduction. Blanchard *v.* Ilsley, 120 Mass. 487.

The case would not be affected by the fact that he was the legally appointed guardian of the injured girl. Blanchard *v.* Ilsley, 120 Mass. 487. *Contra*, Fernslee *v.* Moyer, 3 W. & S. (Pa.) 416; 39 Am. Dec. 33.

An action on the case cannot be maintained by the commissioners' court of Butler county against the keeper of the poor-house, for debauching and getting with child one of the inmates of said poor-house. Butler Co. *v.* McCann, 23 Ala. 599.

1. When the Action Accrues.—"If the loss of service is the foundation of the action, it is clear that the relation of master and servant between the plaintiff and the person seduced must subsist at the time of seduction; for otherwise the defendant's act does not deprive the plaintiff of anything belonging to him." Davies *v.* Williams, 10 Q. B. 725. In this case the daughter was seduced by the defendant while in his service. She then returned home and gave birth to a child. In a suit by the parent it was held that an action could not be maintained. Coleridge, J., said: "Where such relation [of master and servant] is contracted after the seduction, the state of the case is, that the master employs a servant who is less valuable by reason of an antecedent occurrence; there is no consequential injury of which he can complain."

"A party cannot entitle himself to an action for what was no wrong to him by employing a disabled servant. An action for loss of service would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether such unfitness was caused by beating or impregnation." South *v.* Denniston, 2 Watts (Pa.) 474.

Declaration by husband and wife, for seducing the daughter of the wife by a former marriage, alleging her to be the servant of the plaintiffs,

being a personal action for tort, it does not survive to his personal representatives.[1]

whereby the plaintiffs lost her services—held bad; for if the cause of action accrued before the marriage of the plaintiffs, the girl was not then the servant of the husband; and, if after, she was his servant alone; so that in either case she could not be the plaintiffs servant as alleged. Smith *v.* Crooker, 23 U. C. Q. B. 84; Green *v.* Wright, 24 U. C. Q. B. 245. And see Waters *v.* Powers, 29 U. C. Q. B. 336.

"It cannot, therefore, be necessary, according to the theory or just principles by which this action is regulated, that the parent, in order to sustain it, should be entitled to the services of the daughter at the very instant when the act is committed, which subsequently results in a loss of service or necessary pecuniary disbursements. The latter circumstances constitute the real gravamen; and if that fall upon the parent, it entitles him to the legal redress." Sargent *v.* ——, 5 Cow. (N. Y.) 106; but this case has been substantially overruled by later cases in *New York*. See Bartley *v.* Richtmyer, 4 N. Y. 38; 53 Am. Dec. 338; McKersie *v.* McLean, 6 Ont. Rep. 428; Riddle *v.* McGinnis, 22 W. Va. 253; Parker *v.* Meek, 3 Sneed (Tenn.) 29; Vossel *v.* Cole, 10 Mo. 634; 47 Am. Dec. 136; *denying* Coon *v.* Moffit, 3 N. J. L. 169; 4 Am. Dec. 392; Evans *v.* Watts, 2 Ont. Rep. 166; Westacott *v.* Powell, 2 Err. & App. (U. C.) 525.

"These facts alleged and proved, the father, by the common law, was entitled to recover from the seducer of his daughter damages for the loss occasioned by his wrongful act, and the father's right to sue for and recover the same accrued as soon as the loss consequent upon the wrongful act was sustained, and not before; for the loss sustained by the master was the real foundation for the recovery, and not the wrongful act which occasioned the loss." Riddle *v.* McGinnis, 22 W. Va. 253.

"It is true that loss of service in fact, though very slight, must be shown, where the daughter is over twenty-one years, the law not presuming service, as in a daughter under age, yet the loss of service, in most cases where there is no personal violence occurs months after the seduction. If the relation of master and servant existed at the time, and the service lost afterwards was due the parent by virtue of such relationship that existed at the seduction, it is sufficient to sustain the action." Sutton *v.* Huffman, 32 N. J. L. 58.

Statute.—Stat. 7 Wm. IV, ch. 8 (Canada), prevents the master of an unmarried girl from suing for her seduction until six months after the birth of the child, in order to see if the parent intends to sue. Whitfield *v.* Todd, 1 U. C. Q. B. 223.

1. Survival of Action.—"The executors or administrators of a deceased father, or master, cannot maintain this action for the seduction of his daughter and servant in his lifetime. As well might an action lie, in their names for *crim. con.*, with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and, like assaults, libel, and slander, die with the person." George *v.* Van Horn, 9 Barb. (N. Y.) 523; Garrison *v.* Burden, 40 Ala. 513; Ball *v.* Goodman, 10 U. C. C. P. 174; Hoover *v.* Palmer, 80 N. Car. 313 (*semble*); Vossel *v.* Cole, 10 Mo. 634; 47 Am. Dec. 136; *contra*, Gimbel *v.* Smidth, 7 Ind. 627.

The action may survive by statute. See *Indiana* Code Civ. Proc., § 282; Noice *v.* Braun, 39 N. J. L. 569; Shafer *v.* Grimes, 23 Iowa 550; Simons *v.* Busby, 119 Ind. 13; Cox *v.* Whitfield, 18 Ala. 738.

The master's right does not pass to an assignee in bankruptcy. Howard *v.* Crowther, 8 M. & W. 601; 5 Jur. 91.

Where the plaintiff dies after verdict and a new trial is granted, his personal representatives may proceed. Chisholm *v.* Goodman, 6 L. J. (U. C.) 88; *compare* Cross *v.* Goodman, 20 U. C. Q. B. 242.

Death of the Female.—The death of the female is immaterial. Wilton *v.* Webster, 7 C. & P. 198; 32 E. C. L. 491; Ingerson *v.* Miller, 47 Barb. (N. Y.) 47; and where the woman is allowed to sue for her own seduction, the action may survive by statute to her personal representatives. Shafer *v.* Grimes, 23 Iowa 550.

It is immaterial whether pregnancy or venereal disease is a result of the seduction if there is any loss of service consequent thereon.[1] It is also immaterial, in a suit by the parent, whether

1. Pregnancy or Venereal Disease.—"It cannot be laid down, as matter of law, that loss of health would not be the natural, probable, and direct consequence of the defendant's act, although that act was followed by no sexual disease, and no pregnancy. Shame, humiliation, and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure." Blagge *v.* Ilsley, 127 Mass. 191; 34 Am. Rep. 361.

"When a man commits such an injury as is here proved upon the defendant, and in consequence of his act an incapacity to perform her accustomed duties results to the daughter, though it may proceed immediately from her mental sufferings. I know of no use and no principle of law which exempts him from recompensing the injury which he has inflicted." Vanhorn *v.* Freeman, 6 N. J. L. 322.

In Abrahams *v.* Kidney, 104 Mass. 222, 6 Am. Rep. 220, the court by Morton, J. said: "The rule which governs the numerous cases on this subject is, that when the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives the master an action where the connection causes pregnancy or sexual disease, applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service."

"There may be cases in which the seduction, without producing pregnancy or actual disease, causes bodily injury, impairing the health of the servant, and resulting in a loss of services to the master. So the criminal connection may be accomplished under such circumstances—as, for instance, violence or fraud—that its proximate effect is mental distress or disease, impairing her health, and destroying her capacity to labor. In either of those cases the master may maintain an action, because the loss of service is immediately caused by the connection, as much as in cases of pregnancy or sexual disease."

White *v.* Nellis, 31 Barb. (N. Y.) 279; 31 N. Y. 405; 88 Am. Dec. 282.

A minor daughter resided with her father, and was engaged as a school teacher under an agreement made with him; while thus employed, she was seduced, became pregnant, and died suddenly about four months after conception. A *post-mortem* examination disclosed a dead fœtus, and a congested brain, caused, as it was supposed, by nervous excitability or extreme mental agitation. It was held that, as a matter of necessity, she must have been in no condition for ordinary physical exertion for weeks prior to her death, and that such condition was the direct consequence of her seduction; and that the above facts showed an injury to her father's rights, giving him a right of action against the seducer. Ingerson *v.* Miller, 47 Barb. (N. Y.) 47.

Boyle *v.* Brandon, 13 M. & W. 738; Manvell *v.* Thompson, 2 C. & P. 303; 12 E. C. L. 136; Russell *v.* Chambers, 31 Minn. 54.

Must be Proximate Cause.—"But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes—such as abandonment by the seducer, shame resulting from exposure, or other similar causes—the loss of service is too remote a consequence of the criminal act, and the action cannot be maintained." Abrahams *v.* Kidney, 104 Mass. 222; 6 Am. Rep. 220.

"It is true that proof of a slight loss of service will be sufficient; but the injury to the parent or master must be shown to be the direct and proximate consequence of the wrongful act complained of. It will not do that, after the servant's guilt is exposed by others, and a sense of remorse and shame excited, and thereby she becomes ill and temporarily unfit to do menial service, the master shall be held to sustain a loss or injury by an illness arising from such a cause, on which to found an action of seduction." Knight *v.* Wilcox, 14 N. Y. 413.

In Eager *v.* Grimwood, 1 Exch. 61,

the intercourse complained of was accomplished by force or artifice; his loss is the same in either case.[1]

2. Under Statute.—Statutes have been enacted in some States giving (*a*) the woman a right of action in her own name, and (*b*) modifying the requisites of the common-law right of action to do away with the fiction of master and servant and give the parent, as such, a remedy.

(*a*) ACTION BY THE WOMAN.—Under these statutes an unmarried woman may prosecute as plaintiff in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as may be assessed in her favor;[2] but in such actions,

the court directed the jury to acquit the defendant if they found he was not the father of the child; but this rule is not followed in America.

1. Seduction by Force.—"The disgrace and wounded feelings are the same when accomplished by insinuating arts, wiles and strategy and persuasion. He abuses the simplicity and confidence of the victim without force, or by art and force combined or by force alone. I think the action can be maintained and exemplary damages recovered, whether the injury is inflicted within or without the technical meaning of what may be called seduction. The cases are not confined to the strict literal meaning of that term, as defined in the literary lexicons of the day." Damon *v.* Moore, 5 Lans. (N. Y.) 454; *disapproving* Hogan *v.* Cregan, 6 Robt. (N. Y.) 138.

In an action of seduction, it is no ground for nonsuit that, by the plaintiff's evidence, the offense was rape and not seduction; whether it was so or not is a question for the jury on the evidence. Furman *v.* Applegate, 23 N. J. L. 28.

Lawrence *v.* Spence, 99 N. Y. 669; 29 Hun (N. Y.) 169; Russell *v.* Chambers, 31 Minn. 54; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100; Wooten *v.* Geisner, 9 La. Ann. 523; Johnston *v.* Disbrow, 47 Mich. 59; Dalman *v.* Koning, 54 Mich. 320; DeHaven *v.* Helvie, 126 Ind. 82; Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584; Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768 (without such force as would constitute rape); Barbour *v.* Stephenson, 32 Fed. Rep. 66 (even if with force enough to constitute rape). *Contra*, Vincent *v.* Sprague, 3 U. C. Q. B. 283.

2. *Alabama* Civil Code (1886), § 2585; *California* Civil Code of Proced., §§ 374, 375; Dalman *v.* Koning, 54 Mich. 320; *Idaho* Rev. Stat., § 4097; *Indiana* Rev. Stat. (1876), p. 43 (Code, § 263); *Iowa* Code, § 2555; *Michigan*, Watson *v.* Watson, 49 Mich. 540; *Mississippi* Rev. Code, § 1508; *Montana* Comp. Stat., tit. 2, ch. 1, § 11; *Oregon*, Hill's Code, § 36 (if over twenty-one years of age); *Tennessee* Code, § 3501.

Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522; Smith *v.* Yaryan, 69 Ind. 445; 35 Am. Rep. 232.

The *Indiana* Rev. Stat. conferring upon any unmarried woman the right to prosecute an action for her own seduction has no extra-territorial effect. So held where plaintiff brought suit in that State for a seduction committed in Illinois; and this, though acts of criminal intercourse had continued in the former State as a consequence of such seduction. Buckles *v.* Ellers, 72 Ind. 220; 37 Am. Rep. 156.

Under Rev. St. *Indiana* 1881, § 263, providing that any unmarried female may prosecute an action for her own seduction, a woman of nonage may maintain such an action. McCoy *v.* Trucks, 121 Ind. 292.

In an action brought under *Iowa* Code, § 2555, by a father for the seduction of his daughter, where the plaintiff alleges that his daughter is of full age, or fails to allege that she is a minor, the petition is demurrable. Dodd *v.* Focht, 72 Iowa 579.

Where the action is given to "an unmarried woman," the declaration must allege that she was unmarried at the time of the injury. Gover *v.* Dill, 3 Iowa 337 (*Iowa* Code, §§ 1696–7); Galvin *v.* Crouch, 65 Ind. 56; Thompson *v.* Young, 51 Ind. 599.

But proof is unnecessary unless the allegation is specifically denied.

it is held that seduction must be defined as something more than the act of a man in inducing a woman to commit unlawful sexual intercourse with him; it must further appear that some artifice or deception was used to overcome the reluctant scruples of the woman.[1] If, without being deceived, and without any false promises, deceit or artifice, she voluntarily submits to the connection, the law affords her no remedy.[2]

b. STATUTORY CHANGES IN THE COMMON-LAW ACTION. — Statutes have been enacted in some States to make the seduction the gist of the action, and to give a right of action to the

Gover *v.* Dill, 3 Iowa 337. And marriage after the seduction to any one other than the seducer does not affect the right of action. Dowling *v.* Crapo, 65 Ind. 209; but the husband and wife may then join in the action. Wilcett *v.* Blackford, 6 Baxt. (Tenn.) 141.

No Action to the Woman.—The statute of *Kentucky*, that "an action for seduction can be maintained without allegation or proof of loss of service," does not give the right of action to any other persons than those who could maintain it at common law. The seduced woman has no cause of action against her seducer. Woodward *v.* Anderson, 9 Bush (Ky.) 624. *Contra*, Watson *v.* Watson, 49 Mich. 540; Weiher *v.* Meyersham, 50 Mich. 602.

1. Artifice or Deception Necessary.— Delvee *v.* Boardman, 20 Iowa 446; Hopkins *v.* Mathias, 66 Iowa 333; Broughton *v.* Smart, 59 Ill. 440.

The statute in *Indiana* gives a woman "an action for her own seduction." *Indiana* Rev. Stat. 1881, § 263. In Wilson *v.* Shefler, 86 Ind. 275, which was a suit by a woman, the declaration did not use the term seduction, but stated that "she being an unmarried woman, the defendant did her, the said plaintiff, unlawfully debauch and carnally know, whereby she became pregnant," etc. The court, by Woods, C. J., said: "The circuit court treated this as a complaint for seduction, and the appellant has not questioned its sufficiency. . . . If the action were by a father or master for the seduction of a daughter or servant the averments would doubtless be sufficient; but the suit being in the name and for the use of the woman herself, and maintainable only by virtue of the statute which grants the right of action, it is not clear but that a seduction ought to be alleged, if not a statement made of the particular arts and persuasions employed in its accomplishment."

"In the statutory suit by the girl, as in the criminal prosecution for the offense, there must be proof of seduction in its technical signification." Simpson *v.* Grayson, 54 Ark. 404.

2. Consent of Woman.—"To constitute seduction, it is not sufficient to establish sexual intercourse between the parties, but the plaintiff must also show that the defendant accomplished his purpose by some artifice, or that she was induced to yield to his embrace by flattery or deception. If without being deceived, and without any false promises, deceit or artifice, she voluntarily submits to the connection, the law affords her no recovery." Egan *v.* Murray, 80 Iowa 180; Hawn *v.* Banghart, 76 Iowa 683; Smith *v.* Milburn, 17 Iowa 30; Brown *v.* Kingsley, 38 Iowa 220.

"They (the jury) should have been told that the respondent could not recover unless it appeared from the evidence that the appellant employed such artifice or deceit as was calculated to mislead a virtuous woman; that the respondent was misled and deceived in consequence thereof, and that she submitted to the sexual intercourse through the artifice or deception practiced upon her by the appellant." Breon *v.* Henkle, 14 Oregon 494. Lord, C. J., dissenting, said: "When a right of action is given to a female herself, the fact that she was a voluntary party to the injury must, on principle, go in bar to a civil action on her part for damages. Beyond this, however, there would seem to be no reason why, in such civil action, there should be any modification of the elements which constitute seduction." Simpson *v.* Grayson, 54 Ark. 404; Stoudt *v.* Shepherd, 73 Mich. 588; McCoy *v.* Trucks, 121 Ind. 292; Bailey *v.* O'Bannon, 28 Mo. App. 39.

parent without the necessity of proving loss of service;[1] but these statutes do not supersede the common-law right, and the father may sue, at his option, at common law, or under the statute.[2] Whether, in an action under the statute, the seduction must be proved to have been accomplished by some artifice or deception, or whether the mere fact of sexual intercourse gives the parent a right of action, is a question on which the authorities do not agree; but the better opinion seems to be that consent

1. "A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service." *California* Civil Code of Proced., §§ 374, 375. The statute in *Alabama* is in substantially the same form, but it is provided that an action by the daughter is a bar to a suit by the parent. *Alabama* Rev. Code, §§ 2529, 2530; Civil Code of 1886, § 2586. The *Georgia* statute is as follows: "The seduction of a daughter unmarried and living with her parent, whether followed by pregnancy or not, gives a right of action to the father or to the mother if the father be dead, or absent permanently, or refuses to sue. No loss of service need be alleged or proved. The seduction is the gist of the action, and in well-defined cases the damages should be exemplary." *Georgia* Code, § 3009; *Idaho* Rev. St., § 4098; *Iowa* Code, § 2556; *Indiana* Rev. Stat. (1876), p. 43, § 264; *Kentucky* Gen. Stat., ch. 1, § 2; *Minnesota* Gen. Stat. (1891), § 4722; *Mississippi* Rev. Code, § 1509; *Montana* Comp. St., tit. 2, ch. 1, § 12; *Oklahoma* Stat., §§ 4317, 4318; *Oregon*, Hill's Code, § 36; *Pennsylvania*, 2 Brightly's Dig., p. 1530, § 2; *Tennessee* Code, § 3502; *Virginia* Code, ch. 145, § 1; *West Virginia*, Code, ch. 111, § 1.

Michigan Compiled Laws (1871), p. 1760, give very explicit provisions. "It shall not be necessary in an action on the case for seduction hereafter to be brought, to allege in the declaration or prove on the trial, any loss of service in consequence of such seduction; but if the female seduced be a minor at the time of the seduction, the action may be brought by her father, mother, guardian; and if such female be of full age, the action may be brought by her father or any other relative who shall be authorized by her to bring the same. It shall not be necessary in any such action to allege or prove that the person seduced was the servant of the plaintiff, but in stead thereof it shall be sufficient to set forth in the declaration the relationship of such person to the plaintiff, or that such person is the ward of the plaintiff, as the case may be." §§ 7779, 7780. Franklin *v.* McCorkle, 16 Lea (Tenn.) 609; 57 Am. Rep. 244; Davis *v.* Young, 90 Tenn. 303.

2. "The two last sections shall not be so construed as to prevent any person entitled to the services of the person seduced from maintaining an action for the loss of service or other damage sustained by him in consequence of the seduction." *Michigan* Compiled Laws (1871), p. 1760, § 7781.

"It may be that the father can now sue for the seduction itself, and if he so declares, possibly the limitation will run from the commission of the offense. The remedy is merely cumulative, however, and is rather the effect of the statute than its design. The sole purpose of the statute was to dispense with proof of loss of service, which in most cases was treated as a mere consequence to the action, the form simply through which the injury was presented to the court." Clem *v.* Holmes, 33 Gratt. (Va.) 722; 36 Am. Rep. 793.

A suit by the father for the seduction of his daughter is maintainable either by the common law for loss of service or by the statutes of *Kentucky* authorizing him to sue for seduction. The rule for damages is the same in both classes of actions. Pence *v.* Dozier, 7 Bush (Ky.) 133; Scott *v.* Cook, 1 Duv. (Ky.) 314; Wilhoit *v.* Hancock, 5 Bush (Ky.) 567. And see Watson *v.* Watson, 49 Mich. 540; Ryan *v.* Tralick, 50 Mich. 483; Weiher *v.* Meyersham, 50 Mich. 602; Cross *v.* Goodman, 20 U. C. Q. B. 242; Gould *v.* Erskine, 20 Ont. Rep. 347. But see Riddle *v.* McGinnis, 22 W. Va. 253; Humble *v.* Shoemaker, 70 Iowa 223.

on the part of the woman merely mitigates damages in an action by the parent.[1]

3. Pleading.—The declaration, in an action at common law, must allege that the female seduced is the servant of the plaintiff,[2] but an allegation that she is the daughter of the plaintiff and is a minor and unmarried has been held sufficient, as the law will imply service from these circumstances.[3] In an action by

1. Consent of Woman.—"Of course, a father is not so much injured by the misconduct of a naturally bad girl as by that of a good one, and a person who has illicit dealings for the first time with a girl already depraved, and is not the cause of her fall, does not accomplish the same degree of wrong as in other cases. But there is no rule which holds legally free from accountability to some extent any person who interferes with the peace of a household by indulging in wrong conduct with one of its inmates, even if she is a participant in the wrong. The scandal and suffering may be great, even in such a case, and the home of a wayward girl is at least some restraint upon her if she is let alone. Each case must be judged by its own facts. But a father who has not himself encouraged or aided in what has led to the dishonor of his daughter cannot be held entitled to no redress. An abandoned girl who is herself the active seducer of a young person stands in a very different condition." Stoudt *v.* Shepherd, 73 Mich. 588.

The rule in *Oregon* is *contra.* "This section has entirely changed the character of the action. Under the law as it stood formerly, loss of service was the gist of the action, without which it could not be sustained. The value of the services rendered was immaterial, but some service, or a legal duty to render the same, must have been alleged and proven, and then the jury was directed to assess damages for the loss of such service as well as for the dishonor brought upon the plaintiff's family by reason of the seduction of his daughter, etc.; but the damages in fact were assessed for the seduction.

This anomalous state of the law was sought to be remedied by the section above quoted, so that there need be now no loss of service by the parent or guardian, or liability to render service by the daughter or ward. Special damages, such as expenses incurred for medical treatment and the like, are still recoverable, but they must be specially alleged in the complaint."

"What is the legal effect of lewd practices and habits of the female alleged to have been seduced at and immediately before such alleged seduction? Do they only mitigate damages, and corroborate the defendant's denial of seduction? or do they go further, and defeat the plaintiff's right of recovery entirely, if the jury are satisfied that the female alleged to have been seduced was in the habit of seeking opportunities for criminal indulgence, not only with the defendant, but with various other persons, about the time of such alleged seduction? In other words, can a woman who engages in criminal indulgence with her male acquaintances as opportunities present themselves, and who will make opportunities for that purpose, be said to be seduced within the true intent and meaning if the statute? Is such a woman drawn aside from the path of virtue and overreached by the artifice, deception and cunning of the seducer? To hold otherwise would be to break down all distinctions between the virtuous and vicious, and to place the common bawd on the same plane with the virtuous woman whose life was pure and whose confidence had been betrayed by the heartless libertine." Patterson *v.* Hayden, 17 Oregon 238; 11 Am. St. Rep. 822; Breon *v.* Henkle, 14 Oregon 494.

2. The action by which a father recovers for the seduction of his daughter is founded, not on the relation of parent and child, but on the relation, actual or constructive, of master and servant; and a declaration which does not allege this relation is fatally defective. Lee *v.* Hodges, 13 Gratt. (Va.) 726; Woodward *v.* Anderson, 9 Bush (Ky.) 624.

3. Where, in an action by a father for the seduction of his daughter, the declaration alleged that she was under twenty-one, and unmarried at the time of the seduction, and that the plaintiff then was and still is entitled to her

the woman, the fact of seduction must be alleged, but the specific means by which the seduction was accomplished are matters of evidence;[1] an averment of previous chastity is not necessary.[2] Special damage need not be alleged in any action for seduction.[3]

4. Defenses.—The plea of not guilty, or of general denial, puts in issue both the fact of seduction and the fact that the person seduced was the servant of the plaintiff, and the defense to this action is therefore usually made under this plea.[4] It is matter of defense that the plaintiff permitted or connived at the intercourse complained of.[5] The Statute of Limitations is a defense,

attentions and services, this was held a sufficient averment of the relation of master and servant. Clem *v.* Holmes, 33 Gratt. (Va.) 722; 36 Am. Rep. 793; Parker *v.* Monteith, 7 Oregon 277; Riddle *v.* McGinnis, 22 W. Va. 253. *Compare* Lake *v.* Berniss, 4 U. C. C. P. 430; Ford *v.* Gourlay, 42 U. C. Q. B. 552.

If the declaration avers the daughter to be the plaintiff's servant, it is good, although the averment of the daughter's infancy is omitted. Applegate *v.* Ruble, 2 A. K. Marsh. (Ky.) 128. But see Wooten *v.* Geisser, 9 La. Ann. 523.

A complaint that defendant took plaintiff to his home "to adopt and rear her as a member of his family;" that "he undertook to pay her a reasonable compensation;" that she worked as his servant, and that he then and there seduced her, held, to be a good charge of seduction. Hart *v.* Walker, 77 Ind. 341.

1. In an action for seduction the allegation of "the ultimate fact" of seduction is sufficient, without a statement of the acts made use of to deceive the plaintiff. Brown *v.* Kingsley, 38 Iowa 220; Rees *v.* Cupp, 59 Ind. 566; Hodges *v.* Bales, 102 Ind. 494. *Compare* Breon *v.* Henkle, 14 Oregon 494.

2. Hodges *v.* Bales, 102 Ind. 494.

In an action by a father to recover damages for the seduction of his minor daughter, the petition need not allege that she was the "unmarried daughter" of the plaintiff, nor that she was of "previously chaste character." Updegraff *v.* Bennett, 8 Iowa 72; Bell *v.* Rinker, 29 Ind. 267; Smith *v.* Milburn, 17 Iowa 30.

In an action for seduction the woman's chastity prior to the alleged seduction is not to be presumed, but is a fact to be proved. Bailey *v.* O'Bannon, 28 Mo. App. 39.

3. McIlvain *v.* Emery, 88 Ind. 298; Phillips *v.* Hoyle, 4 Gray (Mass.) 568. *Compare* Gray *v.* Bean, 27 Iowa 221.

In trespass for seduction, under a general allegation for loss of services, damages for the dishonor and injury to the feelings of the parent are recoverable. Rollins *v.* Chalmers, 51 Vt. 592; Lunt *v.* Philbrick, 59 N. H. 59.

4. **General Issue.**—Holloway *v.* Abell, 7 C. & P. 528; 32 E. C. L. 615; Torrence *v.* Gibbins, 5 Q. B. 297; 2 Greenl. on Ev., § 571; *contra*, that a denial that the female is the servant of the plaintiff must be specially pleaded. Salter *v.* Walker, 21 L. T. N. S. 360; 18 W. R. 65; Alteman *v.* Smith, 4 U. C. C. P. 500.

The issue of not guilty, in action for seducing plaintiff's daughter, involves the general character of the daughter for chastity, and testimony of others may be introduced to show their own criminal intercourse with her. But, notwithstanding such evidence, if the jury are satisfied, from the whole evidence, that the defendant is the father of the child, their verdict must be for the plaintiff, though, perhaps, for diminished damages. White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

Where the action was based on the fraud of the defendant in procuring the plaintiff's daughter to enter his service for the purpose of seducing her, a plea that the girl was the servant of the defendant was held bad. Morgan *v.* Malony, 7 Ir. R. C. L. 240.

5. **Connivance.**—"In actions of this nature, the daughter is supposed to be violated with force, against the will and consent of the father; and it is then, and then only, that he is entitled to compensation for the loss of her services. But when he consents or connives at the criminal intercourse, he seeks with a very ill grace a retribution in damages." Travis *v.* Barger, 24 Barb. (N. Y.) 614; Seager *v.* Sligerland, 2 Cai. (N. Y.) 219;

and begins to run from the first act of sexual intercourse;[1] and an accord and satisfaction may be pleaded in bar.[2] It is not a matter of defense that the defendant is an infant,[3] or that he is liable

Smith *v.* Martin, 15 Wend. (N. Y.) 270; Vossel *v.* Cole, 10 Mo. 634; 47 Am. Dec. 136; Reddie *v.* Scoolt, Peake 240; Parker *v.* Elliot, 6 Munf. (Va.) 587.

Bundling.—In an action for the seduction of the plaintiff's daughter, the proof was that the defendant slept with the daughter on the occasion of the seduction, with the knowledge of and without any objection from the parent, according to the custom of bundling which prevailed in that section—held, that the parent's knowledge amounted to a connivance on his part, and that he could not recover damages. Hollis *v.* Wells, 3 Pa. L. J. 169.

Negligence of Parent.—Conduct not amounting to consent or connivance, but only to negligence, may be shown as tending to mitigate damages. Graham *v.* Smith, 1 Edm. Sel. Cas. (N. Y.) 267; Travis *v.* Barger, 24 Barb. (N. Y.) 614.

In an action by a father, his careless indifference in respect to his daughter in this behalf goes in mitigation of damages merely. Zerfing *v.* Mourer, 2 Greene (Iowa) 520.

That the plaintiff allowed the defendant, a married man, to visit his daughter as a suitor, and placed her in exposed situations, does not debar him from maintaining an action for the seduction, unless he knew the defendant to be married, though it is a circumstance for the jury to consider. Richardson *v.* Fouts, 11 Ind. 466.

Where defendant in an action for the seduction of plaintiff's minor daughter, alleges that plaintiff consented to his taking the daughter away, evidence of circumstances at that time and preceding it is admissible to show that such consent was obtained by fraud; it being, in that case, no defense. (Learned, P. J., dissenting). Lawyer *v.* Fritcher, 54 Hun (N. Y.) 586.

1. **Statute of Limitations.**—Franklin *v.* McCorkle, 16 Lea (Tenn.) 609; 57 Am. Rep. 244; McKay *v.* Burley, 18 U. C. Q. B. 251. That it runs from the loss of service, see Clem *v.* Holmes, 33 Gratt. (Va.) 722; 36 Am. Rep. 793; Riddle *v.* McGinnis, 22 W. Va. 253.

In an action for seduction the complaint may allege the time of the acts of connection, with a *continuando*, and evidence may be offered for any time covered by the complaint. Lemmon *v.* Moore, 94 Ind. 40.

The complaint charged the seduction as having occurred at a certain date. It appeared that there had been successive acts of intercourse and that the date named was that of the last act. *Held*, that the jury might consider the separate acts as the elements of one wrong consummated in the last, in which case there would be no variance. Haymond *v.* Saucer, 84 Ind. 3.

In an action by the female the statute does not begin to run until she is of age. Morrell *v.* Morgan, 65 Cal. 575.

Statutes.—One year, *Alabama* Civ. Code, § 2619; *Arizona* Rev. Stat., § 2309; *Kentucky* Gen. Stat., ch. 71, art. 3, § 3. Eighteen months, *Iowa* Code, § 4163. Two years, *Illinois* Rev. Stat., ch. 83, § 14; *Minnesota* Gen. Stat. (1891), § 6199; *New York* Penal Code, § 286; *Wisconsin* Stats., § 4581.

2. **Accord and Satisfaction.** — McHugh *v.* Grear, 18 U. C. C. P. 448.

A release of all demands by a daughter, who has been seduced, to the seducer, cannot be set up in bar to an action by the mother for the injury arising to her by the seduction. Gimbel *v.* Smidth, 7 Ind. 627; Sellars *v.* Kinder, 1 Head (Tenn.) 134.

A written agreement between a woman and the father of her child, by which she agrees to leave the town for a time, and to waive all claims against him, criminal or civil, for which he promises to pay her a monthly sum, and to convey to her certain land, is an entirety, and the agreement to suppress the criminal prosecution renders it void, so that it constitutes no defense to an action for seduction. Baird *v.* Boehner, 77 Iowa 622.

3. **Infancy.** — In such action, the answer by the defendant that at the time of the commission of the act, etc., he was an infant, under the age of twenty-one years, etc., constitutes no bar to the action, and is demurrable. Lee *v.* Hefley, 21 Ind. 98; Straughan *v.* Smith, 19 Ont. Rep. 558; Conklin *v.* Thompson, 29 Barb. (N. Y.) 218; Fry *v.* Leslie, 87 Va. 269.

to criminal prosecution for the offense,[1] or that the woman was willingly seduced,[2] or was unchaste prior to the alleged seduction,[3] except in an action by her,[4] or that the defendant has

1. Liability to Criminal Prosecution.—Where a parent sues the seducer of his daughter for the value of her lost services, a subsequent marriage between the seducer and seduced, and an acquittal of the former on an indictment for seduction, do not, either alone or together, constitute a complete bar to the father's right to recover, but they go to mitigate the damages. Eichar *v.* Kistler, 14 Pa. St. 282; 53 Am. Dec. 551; Klopfer *v.* Bromme, 26 Wis. 372; Furnival *v.* Brooke, 49 L. T. N. S. 134. *Compare* Appleby *v.* Franklin, 17 Q. B. Div. 93; Lawrence *v.* Spence, 29 Hun (N. Y.) 169; Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584.

2. Consent of Woman.—Harrison *v.* Price, 22 Ind. 165; Smith *v.* Milburn, 17 Iowa 30; Barbour *v.* Stephenson, 32 Fed. Rep. 66; Ross *v.* Merritt, 2 U. C. Q. B. 421.

3. Unchastity of Woman.—"Supposing the daughter to have been unchaste, and the alleged carnal intercourse to have been occasioned as much by her misconduct as by that of the defendant, the latter would not then have been guilty of seduction. That would be a case of criminal connection without seduction, and one in which, though the suit for loss of service could be sustained, the damages would not be aggravated on the ground of a seduction." Hill *v.* Wilson, 8 Blackf. (Ind.) 123.

"It has been held that when carnal intercourse takes place without seduction, that is with the aid of flattery and artifice, no recovery can be had by the father beyond the loss of service and incidental expenses. As the girl's willing assent, in the absence of the seducer's arts, is only evidence at most of a want of chastity, it would follow that direct proof of unchastity should have the same effect upon the father's recovery. But the cases holding that criminal connection without seduction cannot be the basis of the father's action, are based upon a false analogy. They seem to confound the statutory right conferred in some of the States upon the female for the redress of her own grievance against her seducer with the father's common-law injury for the injury which he sustains. In the statutory suit by the girl as in the criminal prosecution for the offense, there must be proof of seduction in its technical signification. But the father's action is independent of the daughter's, and is based upon a different injury. When the ignominy which is heaped upon him is the measure of damages, the daughter's willingness does not excuse the defendant, for, without his act, the father had not been injured. It is not a case for the application of the maxim, *volenti non fit injuria*, unless the father himself is at fault, as by connivance at the act." Simpson *v.* Grayson, 54 Ark. 404.

4. An action for seduction does not lie if the woman yielded because the man told her that if she did not he should go with other women, and where he informed her that he visited her to procure sexual intercourse. Baird *v.* Boehner, 72 Iowa 318.

A woman brought suit to recover damages for her seduction, which she permitted, as she alleged, in consideration of defendant's promise to pay her, which promise he failed to keep. *Held*, that, as the *gravamen* of the complaint appeared to be the breach of an immoral contract, she could not maintain her action. Wilson *v.* Ensworth, 85 Ind. 399.

The prior unchastity of the woman is no defense where there has been a real reformation on her part, and the offense complained of amounts to a new seduction. Updegraff *v.* Bennett, 8 Iowa 72; Stoudt *v.* Shepherd, 73 Mich. 588; Zitzer *v.* Merkel, 24 Pa. St. 408; Patterson *v.* Hayden, 17 Oregon 238; 11 Am. St. Rep. 822. *Compare* Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522.

"In early life the artless and credulous female may have yielded to the promises and artful influences of the vile and heartless seducer, and for ten, fifteen, or twenty years, her life may have been above reproach—not a whisper of suspicion uttered against her virtue; and yet, strictly, she is not chaste in person, for she has yielded to the illicit embrace. To say that such a woman could not be seduced; that she could recover no damages, however clear the proof that the connection for which she complains was

married the seduced woman,[1] or that he has received a discharge in insolvency since the commission of the offense.[2]

5. Evidence.—So far as any peculiar application of the rules of evidence to the action of seduction is concerned, it may be said that the courts are very liberal in allowing evidence to show all the circumstances, conduct, and relations of the respective parties, and the degree and character of the intimacy,[3] both at

not voluntary, but the result of the most deliberate, carefully planned and wicked artifice, would certainly be monstrous." . . . "But suppose the jury believe that in the particular case the proof establishes not a mere illicit connection, but seduction within the meaning of the law; while thereby she may not suffer in character, and for the loss thereof therefor may not be entitled to recover, why should not the defendant respond for the other consequences of his wrong?" Smith *v.* Milburn, 17 Iowa 30.

1. Marriage with Seducer.—Eicher *v.* Kistlar, 14 Pa. St. 282; 53 Am. Dec. 551; Pruitt *v.* Cox, 21 Ind. 15; Dowling *v.* Crapo, 65 Ind. 209; *compare* Humble *v.* Shoemaker, 70 Iowa 223.

2. Discharge in Insolvency.—Beniger *v.* Thrasher, 1 Ont. Rep. 313. The father is such a creditor that a transfer of property to defeat his judgment will be void as against him. Cameron *v.* Cusack, 18 Ont. Rep. 520. See Rev. St. *New Jersey*, p. 502, § 16.

3. "We do not think it was improper in such a case as this, to give the jury a full understanding of the whole family relations of these parties." Watson *v.* Watson, 58 Mich. 507.

Testimony relating directly to facts bearing on the relations of the persons whose conduct is in question, is admissible as part of the *res gestæ*. Threadgool *v.* Litogot, 22 Mich. 271; Watson *v.* Watson, 58 Mich. 507.

Continued attentions to a female for several months followed by an improper intercourse, is sufficient evidence to warrant the inference of seduction. Clark *v.* Fitch, 2 Wend. (N. Y.) 459; 20 Am. Dec. 659.

In an action for seduction, plaintiff may give evidence tending to show that on different occasions opportunities existed for defendant to commit the wrong complained of. McCoy *v.* Trucks, 121 Ind. 292; Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273; McCoy *v.* Trucks, 121 Ind. 292; Shewalter *v.* Bergman, 123 Ind. 155; Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768.

The threat of the defendant to dismiss the female from his service unless she yielded to him is admissible. Braun *v.* Kingsley, 38 Iowa 220.

The fact that the victim is weak-minded obviates the necessity of strict proof of seductive acts. Delvee *v.* Boardman, 20 Iowa 446.

It is admissible to prove that the girl took poison at the instance of the defendant. Gray *v.* Durland, 50 Barb. (N. Y.) 100–212.

Prior acts even before the period of limitations may be admitted to prove the relations of the parties. Conway *v.* Nicol, 34 Iowa 553; Thompson *v.* Clendening, 1 Head (Tenn.) 287.

So subsequent acts. Sherwood *v.* Tilman, 55 Pa. St. 77.

Letters.—In an action for seduction by the father, a letter written by the girl, and handed to defendant by plaintiff, and in which the girl accused defendant of getting her into trouble, and called on him to marry her, as he had promised, and asked for a reply, is competent evidence, together with defendant's reply as the correspondence amounts to conversation between the parties. Lee *v.* Cooley, 13 Oregon 433; Fry *v.* Leslie, 87 Va. 269.

Expressions or exclamations, denoting pain or illness, uttered by the servant, are admissible for plaintiff, whether uttered before or after the date of the writ. Hatch *v.* Fuller, 131 Mass. 574.

The only evidence for the plaintiff, the father of the seduced girl, was his statement that the defendant had admitted his guilt, and had asked what the case could be settled for. The girl died shortly after the birth of the child. The defendant denied that he had admitted the paternity of the child, but admitted that he asked what the case could be settled for, but said he did so merely from curiosity. A verdict against him was sustained. Palmby *v.* McCleary, 12 Ont. Rep. 192.

Inadmissible Evidence. — Evidence that when the defendant kept com-

the time of the alleged seduction and before and after, as bearing not only upon the question of the guilt of the defendant, but also on the question of the damages.[1] In some States, the plaintiff is allowed to produce the child alleged to be the result of the seduction as evidence by its resemblance to the putative father,[2] although the better opinion does not allow this evidence.[3] The plaintiff is not required to produce the female as a witness, but his failure to do so is a subject of comment to the jury.[4]

pany with plaintiff, at and before and after the alleged seduction, he also kept company with other unmarried women, is irrelevant. Simons *v.* Busby, 119 Ind. 13.

The fact that a man ran away six weeks after he was accused of seducing a woman, does not constitute any evidence of his guilt. Hopkins *v.* Mathias, 66 Iowa 333.

1. "Courts are liberal in such cases to allow evidence to show the circumstances and conduct of the respective parties, not only at the time of the alleged injury, but before and after, as bearing upon the question of damage." Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768; Klopfer *v.* Bromme, 26 Wis. 372; Hewitt *v.* Prime, 21 Wend. (N. Y.) 79; Davidson *v.* Goodall, 18 N. H. 423; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100; Blagge *v.* Ilsley, 127 Mass. 191; 34 Am. Rep. 361; Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584.

"But besides the loss of time and actual expenses, the injured party is entitled to compensation, for the disgrace and personal injury which she suffers, for which it is evident there can be no definite money standard or measure. The jury must exercise a reasonable discretion, and in order to do this with fairness, must be let into a knowledge of the situation and circumstances of the parties. . . . The character of the injury may be such that the jury will be influenced more by considerations of puishment than of compensation, substituting the former for the latter; but practically it must be evident that these are correlative terms." Wilson *v.* Shepler, 86 Ind. 275.

Evidence of the relationship between the plaintiff and the one seduced, the situation of the family, etc., may be given, to increase the damages. Wilson *v.* Sproul, 3 P. & W. (Pa.) 49.

Evidence that defendant boasted of his wealth and promised to care for plaintiff if she would yield to him, held not to show that the connection was the result of a mercenary bargain and therefore not seduction. Johnson *v.* Holliday, 79 Ind. 151.

2. Gaunt *v.* State, 50 N. J. L. 490; State *v.* Woodruff, 67 N. Car 89; State *v.* Smith, 54 Iowa 104; 37 Am. Rep. 192; *compare* Stumm *v.* Hummel, 39 Iowa 478.

3. See BASTARDY, vol. 2, p. 153, n. 4; Clark *v.* Bradstreet, 80 Me. 454; Robnett *v.* People, 16 Ill. App. 299.

4. **Evidence of Woman.**—Farmer *v.* Joseph, Holt 451; Cock *v.* Wortham, 2 Stra. 1054.

Where she testifies the jury may consider her relation to the plaintiff, his influence over her, and any contradictory statements by her; and, where force is charged, her age and physical ability. Duncan *v.* Welty, 20 Ind. 44. The defendant may show her contradictory statements as to the paternity of the child. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

But her contradictory statements as to her engagement with another man cannot be shown where she denies them in her testimony. Fisher *v.* Hood, 14 Mich. 189.

Corroboration.—The testimony of the female is viewed with suspicion, and corroboration should be made; but such corroboration may be made by showing visits, familiarities, and other incidents of courtship.

In an action for seduction, evidence of defendant's conduct toward her prior thereto is admissible in corroboration. Russell *v.* Chambers, 31 Minn. 54.

In an action for the seduction of the plaintiff's daughter, she testified that she never disclosed the fact of her pregnancy to the defendant, being advised by her mother not to do so, lest he should leave the State to avoid prosecution. The testimony of the witness was discredited, on cross-examination, and by the testimony of others, though

6. Damages.—Damages are given to the plaintiff as standing in the relation of parent, and the jury in estimating them need pay no attention to the technical relation of master and servant upon which the action is founded.[1]

a. RULE OF DAMAGES.—In computing the damages suffered by the plaintiff, the jury will take into consideration, not only the loss of service which he suffered, and the expense incurred by him by reason of the seduction, pregnancy, and confinement or other illness, but will also take into consideration the anxiety and suffering of mind caused by the loss of virtue of his daughter, the corrupting influence upon the morals of his other children, and the disgrace and dishonor of his family.[2] A like rule

not by any impeachment of her general character for truth. To corroborate her testimony, the plaintiff offered the deposition of her sister, which stated that the witness had disclosed to her the fact of her being pregnant by the defendant, and that she had been advised to say nothing about it until the defendant could be arrested. *Held*, such deposition was admissible. Lockwood *v.* Betts, 8 Conn. 130.

In an action for breach of promise of marriage, and seduction in reliance on such promise, the court charged the jury that the burden of proof was upon the plaintiff to prove the marriage contract as alleged, and that she must do this by a preponderance of testimony; that "the plaintiff's case rests mainly, if not entirely, upon her own testimony; but, if this" was of sufficient force to convince the jury, they were at liberty to base their verdict upon them, though unsupported by other evidence. *Held*, a sufficient statement of the law. Giese *v.* Schultz, 69 Wis. 521.

1. "In effect, the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant, beyond the mere technical point on which the action is founded. . . . As to the amount of damages. I hold that now the jury are to consider the injury as done to the natural guardian, and all that can be referred to that relation." Terry *v.* Hutchinson, L. R., 3 Q. B. 599.

Damages to the plaintiff's feelings may be recovered, though not specially alleged in the declaration. Phillips *v.* Hoyle, 4 Gray (Mass.) 568.

Statutes.—"The damages for seduction rest in the sound discretion of the jury." *Dakota* Code (1883), p. 100; *California* Code, § 3339; *Oklahoma* Code, § 2645.

2. Pecuniary Loss.—Coon *v.* Moffit, 3 N. J. L. 169; 4 Am. Dec. 392; Davidson *v.* Goodall, 18 N. H. 423; Akerly *v.* Haines, 2 Cai. (N. Y.) 292; Hogan *v.* Cregan, 6 Robt. (N. Y.) 138; Stiles *v.* Tilford, 10 Wend. (N. Y.) 338; Morgan *v.* Ross, 74 Mo. 318; medicines and medical attendance whether actually paid for or not. Comer *v.* Taylor, 82 Mo. 341. In an action by a father for the seduction of his daughter a verdict for the actual expenses of the confinement only should be set aside, where no fault or connivance of the father is shown. Stoudt *v.* Shepherd, 73 Mich. 588.

The expense of supporting the child. Terry *v.* Hutchinson, L. R., 3 Q. B. 599; 9 B & S. 487; 16 W. R. 932; but *compare* Hitchman *v.* Whitney, 9 Hun (N. Y.) 512; Haynes *v.* Sinclair, 23 Vt. 108.

The defendant in an action for breach of promise, in which seduction and the birth of a child are alleged in aggravation of damages, cannot complain of an instruction to the jury, that they may, in assessing damages, take into consideration the plaintiff's feelings, pain, and humiliation in giving birth to such child, though not the care and cost of maintaining and educating it. Wilds *v.* Bogan, 57 Ind. 453.

Wounded Feelings, etc.—Emery *v.* Gowen, 4 Me. 33; 16 Am. Dec. 223; Lunt *v.* Philbrick, 59 N. H. 59; Phillips *v.* Hoyle, 4 Gray (Mass.) 568; Hatch *v.* Fuller, 131 Mass. 574; Rollins *v.* Chalmers, 51 Vt. 592; Hornketh *v.* Barr, 8 S. & R. (Pa.) 36; 11 Am. Dec. 568; Kendrick *v.* McCrary, 11 Ga. 603; Felkner *v.* Scarlet, 29 Ind. 154; Taylor *v.* Shelkett, 66 Ind. 297; Clem *v.* Holmes, 33 Gratt. (Va.) 722; 36 Am.

Rep. 793; Riddle *v.* McGinnis, 22 W. Va. 253; Wilhoit *v.* Hancock, 5 Bush (Ky.) 567; Leucker *v.* Steilen, 89 Ill. 545; 31 Am. Rep. 104; Grable *v.* Margrave, 4 Ill. 372; 38 Am. Dec. 88; Parker *v.* Monteith, 7 Oregon 277; Paterson *v.* Wilcox, 20 U. C. C. P. 385; Phelin *v.* Kenderline, 20 Pa. St. 354; Ellington *v.* Ellington, 47 Miss. 329.

Jackson, J., in charging the jury in Barbour *v.* Stephenson, 32 Fed. Rep. 66, laid down the rule as follows: "As I have already stated, the plaintiff, in such cases, was originally awarded damages on the theory of simply compensating him for the loss of his servant's service, together with the expense, labor, and care of her confinement. But, to the credit of our modern jurisprudence, the law has advanced beyond that relic of barberism, and the father now is entitled, not only to compensation for loss of services and expenses attendant upon his daughter's confinement in such cases, but for all that he can feel from the nature of the injury. I do not put the case to you as involving vindictive damages, but I do put it to you as strongly as language can express it—that if you find the defendant had sexual intercourse with the plaintiff's daughter, and as a result of that intercourse, that a child was born to her, the plaintiff is entitled to recover, as damages, all that you choose to give him for his wounded feelings, up to the sum claimed in his declaration, which is $20,000. A father, of course, feels a consolation in the virtue of his daughter. All right thinking parents must understand that feeling. You may give the plaintiff damages in your discretion, up to the limit claimed in his declaration, for loss of that comfort and consolation which he had a right to feel in the purity and virtue of his child. You may take into consideration his loss of hope in the future of his daughter, and compensate him for the same. You may award him damages not only for his mental anguish for the disgrace of his daughter, but for his anxiety as to what is to become of her in the future. You may take into consideration his feeling of anxiety as to the effect of that daughter's example upon his other child. You may look to the loss to him and his family of social standing and position by reason of the daughter's disgrace. You may consider his mortification, humiliation, and sense of dishonor. The world, as we know, visits upon the girl or woman more severe condemnation for such acts than it does upon the man. She and her family are more or less slighted or ostracised. To a certain extent, the hopes and prospects of the family, as well as the girl herself, are blighted. We need not stop to consider whether it is right or wrong for the world and society to deal more leniently with the man than the woman for such offenses against virtue and chastity. There may, or may not, be reason—sound reason—for such discrimination. The fact exists, and may be taken into consideration by you in estimating the injury which the father has sustained by the seduction of his daughter. So that, in respect to damages, it may be summed up in one general statement or sentence: that, if you find the defendant committed the wrong complained of, you may compensate the plaintiff, up to the limit claimed in his declaration, for all that he, as father, may have felt and suffered for the wrong and injury he has received in the ruin of his daughter." The plaintiff here recovered $15,000 damages.

"As to the damages which the parent may recover, the loss of service is a comparatively unimportant part, and he is permitted to recover for his wounded feelings and sense of dishonor, loss of the society of a virtuous daughter, and, in short, all that a father can feel from the nature of the loss." Russell *v.* Chambers, 31 Minn. 54.

"The jury may take into their consideration all that the parent can feel from the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morality may be corrupted by her example." Lord Eldon in Bedford *v.* McKowl, 3 Esp. 119.

"The jury in estimating the injury sustained by the father in such a case, may very properly take into consideration the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction which he may have suffered in consequence of it; and thus estimating the injury to his character and feelings, the jury may give him the damages as

applies in actions brought by the woman under a statute,[1] and in actions by the parent where the female is of age.[2]

they may consider a fair and just equivalent and atonement for such an injury, under all the circumstances, proved before them in the suit. In aggravated or extraordinary cases of seduction, there is, it is true, another measure or standard of damages above and beyond this, usually called exemplary, or vindictive damages, which, in a proper case, the jury may allow, if, in their opinion, the grossness or enormity of the wrong under the circumstances attending it, should require that something more than a full pecuniary compensation to the parent merely, for the injury done him, should be awarded by them, and that an example, as it is termed, should be made of the case to punish the defendant and deter others from the commission of the like offense." Herring *v.* Jester, 2 Houst. (Del.) 66.

The court takes upon itself to instruct the jury whether a case for punitive damages has arisen.

"I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbors; but there is also a living memorial of the disgrace in a bastard grandchild." Terry *v.* Hutchinson, L. R., 3 Q. B. 599.

Tindall, C. J., in Andrews *v.* Askey, 8 C. & P. 7; 34 E. C. L. 270, laid down the rule: "You are not confined to the consideration of the mere loss of service, but may give some damages for the distress and anxiety of mind which the mother has felt. If you find for the plaintiff, you will take into consideration the situation in life of the parties, and say what you think under all the circumstances of the case is a reasonable compensation to be given to the mother."

1. Actions by Woman.—The instruction to the jury in an action by a female for her own seduction that they should consider the loss of time by plaintiff; the expense of medical attendance, if any; board while sick, and the like; physical suffering; mental anguish; loss of character and social standing, and sense of shame caused by the seduction, is not objectionable on the ground that there is no proof of actual damage, when it is proved that the plaintiff gave birth to a child. Gray *v.* Bean, 27 Iowa 221.

"The damages for personal injury, wounded feelings and dishonor suffered by reason of the seduction, are recoverable by a female in an action under our statutes for her own seduction, and the extent and amount of the damages must depend to some extent on the publicity given to the outrage and injury sustained by her." Simons *v.* Busby, 119 Ind. 13; Hawn *v.* Baughart, 76 Iowa 683; McCoy *v.* Trucks, 121 Ind. 292; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

In an action by the father against the seducer of his daughter, a former recovery by the daughter, in an action in her own name against her seducer, cannot be pleaded in mitigation. Pruitt *v.* Cox, 21 Ind. 15; Brown *v.* Kingsley, 58 Iowa 220; Klopfer *v.* Bromme, 26 Wis. 373; Hewitt *v.* Prime, 21 Wend. (N. Y.) 79.

A verdict for $1,500 in an action for seduction will not be disturbed as excessive, where it appears that in consequence of such seduction plaintiff gave birth to an illegitimate child. Egan *v.* Murray, 80 Iowa 180.

2. Adult Daughter.—"Here the father is the plaintiff and the money recovered will belong to him precisely as it would if the daughter were under age. The mortification and disgrace, and the injury to sentiment and affections are of the same character, and are not likely to be essentially different in degree. The delinquency of the defendant is in no respect different. Why should damages beyond a strict pecuniary compensation be given in one case and withheld in the other? I can see no reason for it whatever. The action, considered as one to redress a moral outrage and punish libertinism under the form of a remedy for the loss of manual services is peculiar and anomalous. This case is within all the reasons which have led to the exceptional course of decision, and I see no authority for distinguishing it from the rule now well established." Lipe *v.* Eisenlerd, 32 N. Y. 229.

"Upon the hypothesis of the daughter being above twenty-one years of age, had an issue been taken to the declaration, it would certainly have been essential to the father's recovery for him to have proven actual service in the

Exemplary damages may always be awarded in the discretion of the jury, and punishment of the defendant, and deterrence of others from the commission of a like offense, are regarded as proper elements of damage.[1]

b. AMOUNT.—No fixed rule has been laid down as to the amount of damages. The courts have been very slow to interfere with verdicts, on the ground that the damages awarded are excessive, and require, as a prerequisite to setting the verdict aside on that ground, that the defendant make out some flagrant abuse by the jury of the powers intrusted to them by the law.[2]

daughter, but even then the loss of service would not form the criterion of damages, but the jury might, and regarding the feelings of the father, ought, to give liberal and exemplary damages. Applegate *v.* Ruble, 2 A. K. Marsh. (Ky.) 128; Damon *v.* Moore, 5 Lans. (N. Y.) 454 (30 yrs.); Badgley *v.* Decker, 44 Barb. (N. Y.) 577 (24 yrs.).

1. **Exemplary Damages.**—"While the loss of service is the gist of the action, and essential to maintain it, yet we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages. On the contrary, the feelings of the parent, the dishonor of himself and family, and the example to his other children, have been regarded by all courts as the important elements making up substantial damages in connection with the slight pecuniary loss. The action is grounded in tort and necessarily willful, and we see no reason why punitive damages may not be allowed to a parent for such injury so intentionally inflicted upon him and his family." Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768.

"Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury had done right in giving liberal damages." Wilmot, C. J., in Tullidge *v.* Wade, 3 Wils. 18.

"Exemplary damages may always be allowed in this kind of actions, in the discretion of the jury." Ingersoll *v.* Jones, 5 Barb. (N. Y.) 661.

The jury in assessing damages may take into view the wounded feelings of the plaintiff, and not only recompense him but punish the defendant according to the aggravation of the offense; and a verdict for $650 in such a case is not so excessive as to indicate passion, partiality, prejudice, or corruption on the part of the jury. Knight *v.* Wilcox, 18 Barb. (N. Y.) 212. Irwin *v.* Dearman, 11 East 23; Edmondson *v.* Machell, 2 T. R. 4 (*semble*); Fores *v.* Wilson, Peake 55; Badgley *v.* Decker, 44 Barb. (N. Y.) 577; Torre *v.* Summers, 2 Nott & M. (S. Car.) 267; 10 Am. Dec. 597; Ball *v.* Bruce, 21 Ill. 161; Fox *v.* Stevens, 13 Minn. 272, Russell *v.* Chambers, 31 Minn. 54; Morgan *v.* Ross, 74 Mo. 318; Clem *v.* Holmes, 33 Gratt. (Va.) 722; Davidson *v.* Abbott, 52 Vt. 570; 36 Am. Rep. 767; Conwa *v.* Nicol, 34 Iowa 533.

2. "It is believed that no case can be found in the books where the verdict in an action such as this, has been set aside upon the sole ground of awarding excessive damages. Peculiar considerations exempt a verdict in an action of this nature from the interference of the court, when such interference is sought to be bottomed alone on the excess of such recovery, . . . and courts certainly would not interfere with a verdict in this and kindred cases, where there is no scale whereby the damages can be graduated with certainty, unless proof be introduced showing flagrant abuse of those powers which the law had confided to the intelligence and good sense of the jury." Morgan *v.* Rose, 74 Mo. 318.

"Never, so help me God, while I have the honor to occupy a seat on this bench, will I consent to control the jury in the amount of compensation which they may see fit to render a father for the dishonor and disgrace thus cast upon his family, for this atrocious invasion of his household peace. There is nothing like it since the entrance of Sin and Death into this lower world. Money cannot redress a parent who is wronged beyond the possibility of redress; it cannot minister to a mind diseased." Kendrick *v.* McCrary, 11 Ga. 603.

"It is strenuously urged that the

c. MITIGATION.—As the injury which the father, as distinguished from the master, sustains by the seduction of his daughter depends upon the value of her previous character, it is competent for the defendant to show that she did not have a good character for chastity before his intercourse with her. Such proof diminishes the father's right of recovery, for the damages should be commensurate with the pain and disgrace which follow the

court below erred in refusing to set aside the verdict, which was for sixty-seven hundred and fifty dollars, on the ground that it is excessive. It is not to be denied that it is large, but we are unable to say that it is beyond the limit demanded by justice, and indicates by its excess, passion and prejudice on the part of the jury. It was the province of the jury to assess the damage." Baird *v.* Boehner, 77 Iowa 622.

"The verdict was for about $650, and is claimed to be against the weight of evidence, and excessive. . . . As to damages, no fixed rule can be established. Extraordinary circumstances or the strong suspicion of prejudice or passion will alone justify the disturbing of a verdict in this class of cases on this ground." Smith *v.* Milburn, 17 Iowa 30.

On the trial of such an issue, therefore, we are not of opinion that a verdict for $1,800 against a person worth $18,000 could be considered so flagrantly excessive as to authorize a new trial." Applegate *v.* Ruble, 2 A. K. Marsh. (Ky.) 128.

"Where a man of respectable position in society takes advantage of a comparatively unprotected, motherless daughter of a respectable family, to win her affections only to enable him to ruin her, which ruin he accomplishes even in her father's house, in which she is housekeeper, it is very difficult to determine the exact amount that should be paid as 'a compensation for the dishonor and disgrace cast upon' that father, and for his wounded feelings, which compensation he has a right to recover in an action for seduction, as well as that for loss of services." Taylor *v.* Shelkett, 66 Ind. 297.

A verdict will not be set aside for damages given on account of expenses incurred after the commencement of the suit, where the suit was brought after the pregnancy of the daughter, but before the birth of the child. Stiles *v.* Tilford, 10 Wend. (N. Y.) 338; Simons *v.* Busby, 119 Ind. 13.

Examples of Recovery.—Barbour *v.* Stephenson, 32 Fed. Rep. 66 ($15,000). A verdict for $6,750 damages will not be set aside as excessive. Baird *v.* Boehner, 77 Iowa 622; Blagge *v.* Ilsley, 127 Mass. 197; 34 Am. Rep. 361; $5,000 (for mental suffering only); Elliott *v.* Nicklin, 5 Price 641 (£1,000); Ingerson *v.* Miller, 47 Barb. (N. Y.) 47 ($5,000); Watson *v.* Watson, 53 Mich. 169, 51 Am. Rep. 111 ($4,000); Riddle *v.* McGinnis, 22 W. Va. 253 ($3,000); Mulvehall *v.* Millward, 11 N. Y. 343 ($3,000); Travis *v.* Barger, 24 Barb. (N. Y.) 614 ($3,000); Parker *v.* Meek, 3 Sneed (Tenn.) 29 ($2,500); Fry *v.* Leslie, 87 Va. 269 ($2,000); Hatch *v.* Fuller, 131 Mass. 574 ($2,000); Morgan *v.* Ross, 74 Mo. 318 ($1,750); Lavery *v.* Crooke, 52 Wis. 612; 38 Am. Rep. 768; ($1,500); Damon *v.* Moore, 5 Lans. (N. Y.) 454 ($1,500); Russell *v.* Chambers, 31 Minn. 54 ($1,500); Taylor *v.* Shelkett, 66 Ind. 297 ($1,250); Lipe *v.* Eisenlerd, 32 N. Y. 229 ($1,000); Ellington *v.* Ellington, 47 Miss. 329 ($1,090); Kendrick *v.* McCrary, 11 Ga. 603 ($1,049—$49 actual and $1,000 punitive damages); Herring *v.* Jester, 2 Houst. (Del.) 66 ($1,000); Palmby *v.* McCleary, 12 Ont. Rep. 192 ($750); Simons *v.* Busby, 119 Ind. 13 ($500 in a suit by the woman where the defendant was worth only $1,200); Felkner *v.* Scarlet, 29 Ind. 154 ($500); Bennett *v.* Alcott, 2 T. R. 166 (£200); Manvell *v.* Thompson, 2 C. & P. 303; 12 E. C. L. 136; (£400—niece, evidence of service slight); Edmondson *v.* Machell, 2 T. R. 4 (£300).

In Thompson *v.* Clendening, 1 Head (Tenn.) 287, a verdict of $7,500 was set aside as disproportionate to the facts.

In Coupal *v.* Bonneau, 10 Low. Can. Jur. 177, a verdict of £500 was held excessive in absence of evidence that the seducer was wealthy, and of special aggravating circumstances.

In Meyer *v.* Bell, 13 Ont. Rep. 35, a verdict of $1,500 was cut down to $1,000.

wrong, and must vary according as the daughter has been unblemished or profligate. If it is proved that she was notoriously unchaste prior to the defendant's intercourse with her, and had thereby disgraced her family to such an extent that the defendant's conduct added nothing to the parent's suffering or to the danger of corrupting the morals of his family, no damages can be recovered beyond what is suffered by the master as distinguished from the parent. If the proof falls short of that mark, evidence of previous incontinence mitigates the damages, for the defendant is liable only to the extent his act has contributed to the girl's downward tendency.[1] A like rule applies in an action

1. Simpson *v.* Grayson, 54 Ark. 404. "True enough, the parent is entitled to damages for the disgrace brought upon the family by this stain upon the general good character or reputation of the daughter, but is entitled to damages only for the loss of service if her previous reputation for chastity was bad; and this reputation becomes an element in the case." Hoffman *v.* Kemerer, 44 Pa. St. 452; Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522; West *v.* Druff, 55 Iowa 335; Hogan *v.* Cregan, 6 Robt. (N. Y.) 138; Shattuck *v.* Myers, 13 Ind. 46; 74 Am. Dec. 236; Carder *v.* Forehand, 1 Mo. 704; 14 Am. Dec. 317; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

How Proved.—It was proper to refuse to charge that the fact that the daughter was, at the time of the alleged seduction, suffering from a venereal disease, if unexplained, would be in itself sufficient evidence of unchastity to defeat the action. The effect of such evidence was for the jury. Patterson *v.* Hayden, 17 Oregon 238; 11 Am. St. Rep. 822.

The general character of the female cannot be attacked—only her character for chastity. Wallace *v.* Clark, 2 Overt. (Tenn.) 93; 5 Am. Dec. 654; and her character for chastity must be attacked by her general reputation and not by her reputation among a particular class of people. Drish *v.* Davenport, 2 Stew. (Ala.) 266; Hawn *v.* Baughart, 76 Iowa 683. It is not admissible to show by a witness who knows nothing of the girl's general reputation for chastity that he had heard that she and the other females at her home were unchaste. Fry *v.* Leslie, 87 Va. 269.

Specific acts of intercourse with other men may be shown by their testimony or by other evidence, even though these acts were not known to the prejudice of her reputation. Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522; *overruling* Lea *v.* Henderson, 1 Coldw. (Tenn.) 146; Thompson *v.* Clendening, 1 Head (Tenn.) 295; McMahon *v.* Skinner, 2 U. C. Q. B. 272; Wandell *v.* Edwards, 25 Hun (N. Y.) 498. *Compare* McCreary *v.* Grundy, 39 U. C. Q. B. 316; *contra*, on the ground that no one need testify to disgrace himself, Vaughn *v.* Perrine, 3 N. J. L. 299; 4 Am. Dec. 411. "But reputation is a fact that is to be directly proved, and not inferred from special acts. A person may have a very good reputation in his or her neighborhood, notwithstanding acts of indiscretion and error. One is presumed to have that, and this presumption is to be set aside only by proof to the contrary. Proof of acts is not proof of reputation. The law does not require whether the reputation is well founded or not; for, to do so, it would have to investigate the whole life of the person, which is impossible. We take the reputation as we find it in society, when we allow damages for the injury to it." Hoffman *v.* Kemerer, 44 Pa. St. 452.

The female cannot be cross-examined as to her intercourse with other men. Dodd *v.* Norris, 3 Camp. 519; Bamfield *v.* Massey, 1 Camp. 460; Bate *v.* Hill, 1 C. & P. 100; 11 E. C. L. 329; Reed *v.* Williams, 5 Sneed (Tenn.) 582; 73 Am. Dec. 157; Shattuck *v.* Myers, 13 Ind. 46; 74 Am. Dec. 236; Doyle *v.* Jessup, 29 Ill. 460; Hoffman *v.* Kemerer, 44 Pa. St. 452; Vaughn *v.* Perrine, 3 N. J. L. 299; 4 Am. Dec. 411; 1 Whart. Ev., §§ 539 and 541; 1 Greenl. Ev., § 458; Braun *v.* Kingsley, 38 Iowa 220, as exposing her to "public ignominy." (*Iowa* Rev. St., §§ 3988, 3989). In a suit by the female, however, this rule does not seem to obtain. Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522.

In an action by an unmarried woman

by the woman. The mere fact that she has been unchaste does not defeat her action if she can prove that she has been seduced, but the fact of her unchastity will prevent a recovery for injury to her feelings.[1]

Evidence of the good character of the girl is not admissible until her reputation has been attacked;[2] and evidence is inadmissible to prove her bad reputation for chastity after the seduction.[3] Evidence of the defendant's good character is inadmissi-

for her own seduction, it is improper to ask her, on cross-examination, for the purpose of impeaching her character, if she had not had sexual intercourse with other men; but if a child had been born, as the result of the alleged seduction, the inquiry is proper on the question of paternity, in order to mitigate the damages. Smith *v.* Yaryan, 69 Ind. 445; 35 Am. Rep. 232.

But after cross-examination, the female may be impeached by proving statements by her as to her intercourse with other men. Andrews *v.* Askey, 8 C. & P. 7; 34 E. C. L. 270; Carpenter *v.* Wall, 11 A. & E. 803; 39 E. C. L. 234. The girl's answers on cross-examination cannot be contradicted except to show improper conduct. Dalman *v.* Koning, 54 Mich. 320.

It is inadmissible to show that she said she was engaged to another man two or three years before. Burtis *v.* Chambers, 51 Iowa 645. The defendant offered to prove that the person seduced, who, as a witness for the plaintiff, had denied being engaged to one J S, had previously stated the contrary. *Held*, that such testimony was inadmissible as being immaterial. Fisher *v.* Hood, 14 Mich. 189.

"But evidence of mere immodest remarks or the like, not connected with any immoral act, is not within the rule, such evidence being too remote, and therefore incapable of affording any safe or reasonable presumption as to the point involved in the issue which is the previous chastity of the female, and not merely whether she was of a modest and refined nature. A woman may sometimes make immodest remarks without being unchaste." Fry *v.* Leslie, 87 Va. 269.

The defendant may show improper conversations and associations with other men. West *v.* Druff, 55 Iowa 335.

A witness may testify that the girl exposed her person to him. Verry *v.* Watkins, 7 C. & P. 308; 32 E. C. L. 520. A witness can testify to specific acts, but not to general conduct. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273. A witness cannot be asked if the female was "not a pert and forward girl." White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

In an action for the seduction of an adopted daughter, evidence of familiarities which may or may not have been innocent, is admissible. Watson *v.* Watson, 58 Mich. 507.

1. Smith *v.* Milburn, 17 Iowa 30; Stoudt *v.* Shepherd, 73 Mich. 588.

2. Bamfield *v.* Massey, 1 Camp. 460; Bate *v.* Hill, 1 C. & P. 100; 11 E. C. L. 329; Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

In an action for seduction, or for breach of promise of marriage, a witness having testified to an act of impropriety on the part of the plaintiff, evidence of plaintiff's general good character is not admissible in rebuttal. Zitzer *v.* Merkel, 24 Pa. St. 408; Leckey *v.* Bloser, 24 Pa. St. 401.

3. **Reputation After Seduction.**—Morgan *v.* Ross, 74 Mo. 318; Stoudt *v.* Shepherd, 73 Mich. 588; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

"We have no doubt that the court did right in excluding evidence tending to prove that after the seduction of the plaintiff her reputation was bad. If the plaintiff's reputation was good at the time she yielded to the embraces of the defendant, her subsequent downfall cannot affect her right to recover. Her subsequent conduct does not tend to prove that when the defendant seduced her she was not a chaste woman. Her ruined reputation, if it followed the seduction, may well be attributed to the defendant's own wrong, and of that wrong he cannot take advantage." Shewalter *v.* Bergman, 123 Ind. 155; Binford *v.* Young, 115 Ind. 174.

"The necessary result of her seduction would be the ruin of her reputation in the public estimation; and it would be monstrous to hold that the

ble where no attempt has been made to impeach it.[1] An offer of marriage by the defendant is not admissible in mitigation of damages,[2] nor is the defendant's liability to a criminal prosecution,[3] nor the fact that the defendant has made gifts to the girl.[4] The youth of the defendant may or may not be considered a mitigating circumstance, according to the circumstances of the case.[5]

d. AGGRAVATION.—In actions of seduction, the jury is allowed, and even encouraged, to give exemplary damages. The courts, therefore, permit evidence to be given to put the jury in possession of all the facts that will enable them to assess such damages as will not only compensate the plaintiff for the wrong done her, but will deter others from the commission of a like offense. The plaintiff is, therefore, allowed to give evidence of the pecuniary condition of the defendant,[6] and also of his social posi-

defendant might avail himself of that ruined reputation, caused by his own wrong, to lessen the claim of her injured parent to damages. The proposition is too revolting to our reason and sense of justice to admit of discussion. Thompson *v.* Clendening, 1 Head (Tenn.) 287.

"That the first step on the road to ruin is followed by rapid advances in the same direction is only an aggravation of the crime of the seducer." McKern *v.* Calvert, 59 Mo. 243.

1. Delvee *v.* Boardman, 20 Iowa 446; Herring *v.* Jester, 2 Houst. (Del.) 66; Watson *v.* Watson, 53 Mich. 168; 51 Am. Rep. 111.

He cannot show that he is of a modest retiring character. McRae *v.* Lilly, 1 Ired. (N. Car.) 118.

2. White *v.* Murtland, 71 Ill. 250; *compare* Eichar *v.* Kistler, 14 Pa. St. 282.

3. Klopfer *v.* Bromme, 26 Wis. 372. *Compare* Cook *v.* Ellis, 6 Hill (N. Y.) 466; 41 Am. Dec. 757; Hendrickson *v.* Kingsbury, 21 Iowa 380.

4. Russell *v.* Chambers, 31 Minn. 54.

5. Stoudt *v.* Shepherd, 73 Mich. 588.

6. Peters *v.* Lake, 66 Ill. 206; McAulay *v.* Birkhead, 13 Ired. (N. Car.) 28; 55 Am. Dec. 427; Lavery *v.* Cooke, 52 Wis. 612; 38 Am. Rep. 768; Robinson *v.* Burton, 5 Harr. (Del.) 335; Herring *v.* Jester, 2 Houst. (Del.) 66; Applegate *v.* Ruble, 3 A. K. Marsh. (Ky.) 128; Riddle *v.* McGinnis, 22 W. Va. 253; Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56; 3 Am. Dec. 459; Huckle *v.* Money, 2 Wils. 206.

In an action by a father for debauching his daughter, it is competent to show the pecuniary circumstances and position in society of both plaintiff and defendant. But this is not for the purpose of ascertaining what amount of damages the defendant is able to pay, but with a view of ascertaining the extent of the plaintiff's injury, and perhaps of fixing a standard of exemplary damages. White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

Though evidence of defendant's financial condition is admissible, it is error to charge that the pecuniary circumstances of defendant may be considered where there is no evidence on that subject, and, in the face of a verdict of $3,000 against defendant, it cannot be said that the error was harmless. De Haven *v.* Helvie, 126 Ind. 82.

In an action for seduction, evidence of what defendant had told the plaintiff he was worth is incompetent. Watson *v.* Watson, 53 Mich. 168; 51 Am. Rep. 111.

"In all such cases the wrong is aggravated in proportion to the wealth and position and rank of the guilty party, all of which may be the instruments by which he more readily accomplishes his purpose. A verdict which would be absolutely ruinous to a man in moderate circumstances would scarcely be felt by one possessed of a large fortune, and would be but an invitation to a renewal of the offense whenever the opportunity occurred for its commission. If the jury believe the plaintiff is entitled to vindictive damages they will the more

readily give them where they are satisfied the defendant is able to pay, than they would be where the appeal is made that the verdict would reduce the defendant to bankruptcy and ruin. At all events it is better to place the jury in full possession of all the facts as to the condition and circumstances of the parties, than to leave them to grope their way in the dark, and to base their verdict upon fanciful conjectures and rumors." Clem *v.* Holmes, 33 Gratt. (Va.) 722; 36 Am. Rep. 793.

"In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages, for the double purpose of setting an example and of punishing the wrongdoer. For these purposes, proof of the condition in life and circumstances, as well of the father and his family, as of the party committing the injury, is highly proper, and should be given to the jury, and considered by them in estimating damages. The pecuniary ability of the defendant is peculiarly the proper subject of inquiry. If the jury are permitted to awe others, by way of example, and to punish the defendant, his wealth and standing in society will, in a considerable degree, determine the amount of damages. . . . Upon the other point, we are clearly of the opinion the court decided right in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury, as was stated in the argument, for the purpose of exciting their prejudices in favor of the plaintiff because he was a poor man, but to enable them to understand fully the effect of the injury upon him and to give him such damages as his peculiar condition in life and circumstances entitle him to receive. It is easily perceived how a poor man would be more seriously injured by the loss of the service of his daughter, and the payment of expenses necessarily incurred in consequence of her seduction, than the individual more favorably circumstanced as to property. With the one the injury might, for a time, deprive him and his family of many of the necessities and comforts of life; while with the other, no such result would be produced." Grable *v.* Margrave, 4 Ill. 372; 38 Am. Dec. 88 *n.*

"Evidence of the pecuniary condition of the appellant (defendant) was admitted, and this is complained of. The authorities are not uniform upon the subject of the admissibility of such evidence, but the rule as settled in this State (*Indiana*) allows of its reception. The ground upon which such evidence is received is, that actions for seduction are given not only as a means of compensating the injured party, but for the punishment of the seducer as well, and what might be an adequate punishment to one person might be no punishment to another of great wealth. Besides the pecuniary circumstances and station of the seducer may have contributed largely with other artifices, persuasions, promises and professions employed, to accomplish the ruin of his victim. Therefore, where the offense is committed by a married man or other person under such circumstances as do not render the offender amenable to the criminal law, exemplary damages are allowed in the discretion of the jury, and evidence of the pecuniary condition of the defendant is properly received." White *v.* Gregory, 126 Ind. 95.

Evidence of defendant's financial standing is admissible where plaintiff sues for her own seduction. Shewalter *v.* Bergman, 123 Ind. 155; Wilson *v.* Shepler, 86 Ind. 275.

English Doctrine.—The *English* view is *contra* and several American authorities agree with it. Watson *v.* Watson, 53 Mich. 168; 51 Am. Rep. 111; Bennett *v.* Beam, 42 Mich. 346; 36 Am. Rep. 445 *n;* Dain *v.* Wycoff, 7 N. Y. 191.

"I am clearly of the opinion that the first interrogatory, asking the defendant, in effect, 'How rich are you?' is not admissible as in any way assisting the plaintiff's case. The jury, no doubt, would give higher damages against a rich man, and the defendant's means do in general in some way come out at the trial; that we cannot help. The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter; and in an action of tort, it should be immaterial, as Lord Mansfield said, whether the damages came out of a deep pocket or not." Blackburn, J., in Hodsoll *v.* Taylor, L. R., 9 Q. B. 79; Salter *v.* Walker, 21 L. T. N. S. 360; 18 W. R. 65; James *v.* Briddington, 6 C. & P. 589; 25 E. C. L. 553; Ferguson *v.* Veitch, 45 U. C. Q. B. 160.

tion.[1] The plaintiff may also show his own character and social position,[2] and his pecuniary condition,[3] except where the woman herself sues.[4] Proof that the defendant procured an abortion on the girl may be given in aggravation of damages.[5]

e. PROMISE OF MARRIAGE.—In most States, the plaintiff may prove, in aggravation of damages, that the defendant seduced the daughter by a prior promise of marriage.[6] This rule, how-

1. **Social Position.**—White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100; Parker *v.* Monteith, 7 Oregon 227; *compare* Threadgool *v.* Litogot, 22 Mich. 271; Salter *v.* Walker, 18 W. R. 65; 21 L. T. N. S. 360.

2. Rollins *v.* Chalmers, 51 Vt. 592; Wilson *v.* Sproul, 3 P. & W. (Pa.) 49; McAulay *v.* Birkhead, 13 Ired. (N. Car.) 28; 55 Am. Dec. 427; Thompson *v.* Clendening, 1 Head (Tenn.) 287; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100; Parker *v.* Monteith, 7 Oregon 227; Andrews *v.* Askey, 8 C. & P. 7; 34 E. C. L. 270. But evidence of the general good character of the plaintiff's family is not admissible. Haynes *v.* Sinclair, 23 Vt. 108; Thompson *v.* Clendening, 1 Head (Tenn.) 287. But the plaintiff may show of whom his family consists. Gray *v.* Durland, 50 Barb. (N. Y.) 100.

3. **Pecuniary Condition.**—Grable *v.* Margrave, 4 Ill. 372; 38 Am. Dec. 90 *n;* Rea *v.* Tucker, 51 Ill. 110; 99 Am. Dec. 539; *compare* Peters *v.* Lake, 66 Ill. 206; 16 Am. Rep. 593.

4. In West *v.* Druff, 55 Iowa 335, the plaintiff attempted to prove that she was a poor girl, and that her father was poor. The court held this evidence inadmissible, saying: "The right of plaintiff to recover does not depend upon her condition in life, neither is the amount of damages to which she is entitled dependent thereon. The plaintiff does not claim, nor does she attempt to show that the defendant availed himself of her poverty to effect her seduction. We know of no rule of law, or reason, which supports the admissibility of the evidence."

5. **Abortion.**—Klopfer *v.* Bromme, 26 Wis. 372; White *v.* Murtland, 71 Ill. 250; 22 Am. Rep. 100.

6. Conn *v.* Wilson, 2 Overt. (Tenn.) 233; 5 Am. Dec. 663; Franklin *v.* McCorkle, 16 Lea (Tenn.) 609; 57 Am. Rep. 244; Whalen *v.* Layman, 2 Blackf. (Ind.) 194; 18 Am. Dec. 157; Odell *v.* Stephens, 12 Ind. 384; Fox *v.* Stevens, 13 Minn. 272; Mudd *v.* Clements, 3 Cranch (C. C.) 3; Parker *v.* Monteith, 7 Oregon 277; Mains *v.* Cosner, 62 Ill. 465; Giese *v.* Schultz, 69 Wis. 521; Hudkins *v.* Haskins, 22 W. Va. 645; *compare* Burks *v.* Shain, 2 Bibb (Ky.) 341; 5 Am. Dec. 616.

In White *v.* Campbell, 13 Gratt. (Va.) 573, the court, by Moncure, J., said: "These damages are exemplary and whatever evidence tends to aggravate the offender's wrong, and shows the extent of the father's, is legal and proper. Evidence of the means by which the seduction was accomplished is of that character. And upon principle, therefore, it would seem to be very clear that if the wicked act was accomplished by means of a prior promise of marriage, evidence of such promise would be admissible in aggravation of the damages. That such promise is an independent cause of action by the daughter is no good reason why it should not be proved in aggravation of damages in the father's action for seduction. His action is *ex delicto;* her's *ex contractu.* The evidence is merely collateral to this action, while it is the very foundation of her's. Each has a perfect right to recover damages to the extent of the wrong done to each; and in order to do so, may prove whatever may reasonably serve to show the measure of damages sustained by each." A promise by a married man to marry the woman in case "he could get rid of his wife" is admissible. Klopfer *v.* Bromme, 26 Wis. 372.

In Phelin *v.* Kenderdine, 20 Pa. St. 354, the court by Lewis, J., said: "If the defendant, in order to accomplish his outrage upon the rights of the father, has assumed liabilities to the daughter, this is no reason for excluding the evidence in an action by the father. So far as the promise of marriage tends to show the nature of the injury to the parent, or the means by which it was accomplished, the evidence is as pertinent as any other circumstance which gives character to the transaction; and the only instruction which the defendant has the right

ever is repudiated in some States on the ground that the breach of promise is a substantial cause of action accruing to the female, for which the father ought not also to be allowed to recover in the action by him.[1] This rule has been so far modified in *New York*

to require in regard to such evidence, is that the jury must not award to the father any part of the damages which belong to the daughter by reason of the contract of marriage. It is written that 'the way of the transgressor is hard;' but there is no unjust hardship in two punishments where there were two offenses. It is proper that the daughter should have her action on the contract of marriage for the damages which she has sustained; and it is equally just that the contract should be given in evidence in the action by the father where the defendant himself has made use of it as the means of deceiving and injuring the parent." Referring to Tullidge *v.* Wade, 3 Wils. 18, the court said: "In consonance, also, with this view of the question, when it was objected that the defendant might thereby be punished twice, Chief Justice Wilmot answered the objection by saying, that if the daughter 'brings an action for the breach of promise of marriage, so much the better; he ought to be punished twice.' The seducer who commits two offenses, has no better right to escape with a single punishment than the burglar who murders the servant in order that he may rob the house of the master without opposition."

"If the daughter was so loose as to yield to one whose avowed object was illicit gratification, or if the parent was so regardless of his duty and of her honor, as knowingly to expose her to such temptations, it is clear that the proof of such circumstances would be very material evidence for the defendant. If this be so, it is but just that proof of the opposite state of facts should be received as material circumstances in favor of the plaintiff."

Action by the Woman.—This is true in a suit by the woman. Lee *v.* Hefley, 21 Ind. 98; Gover *v.* Dill, 3 Iowa 337.

The learned editor of the American Decisions in his note to Gillet *v.* Mead, 7 Wend. (N. Y.) 193; 22 Am. Dec. 579, says of this view: "This view seems to us conformable to justice, and entirely consonant with reason. If it be conceded that the *gravamen* of the father's action for the seduction of his daughter is the injury done to his feelings as a man, and to his honor as the head of a household, it seems that this injury must be the greater where it is inflicted through the violation of a confidence reposed by the father in one who has promised to wed his daughter; of course, to warrant the giving of increased damages for this outraged trust, it must appear that the trust had been placed in the defendant, that is, a father could not claim to have had his feelings and his honor wounded under cover of a relation of which he was not aware. If the father did not know that the defendant had promised to marry the daughter, it cannot be urged that the father had extended on account of that promise a confidence which had been violated."

1. Comer *v.* Taylor, 82 Mo. 341; Haynes *v.* Sinclair, 23 Vt. 108; Kip *v.* Berdan, 20 N. J. L. 239; Drish *v.* Davenport, 2 Stew. (Ala.) 266; Herring *v.* Jester, 2 Houst. (Del.) 66; Gillet *v.* Mead, 7 Wend. (N. Y.) 193; 22 Am. Dec. 578, and note; Clark *v.* Fitch, 2 Wend. (N. Y.) 457; 20 Am. Dec. 659.

"The law is settled that in a suit by the father for debauching his daughter, the daughter cannot be a witness to prove a promise of marriage, in order to increase the damages, for she has herself a right of action against the defendant. The father's action is for a tort; that of the daughter is for a breach of the contract made between her and the defendant." Foster *v.* Schofield, 1 Johns. (N. Y.) 297.

The plaintiff may show that the defendant addressed the girl with professions of honorable intentions. Davidson *v.* Goodall, 18 N. H. 423; Stevenson *v.* Belknap, 6 Iowa 97; 71 Am. Dec. 392; Dodd *v.* Norris, 3 Camp. 579.

In Brounell *v.* McEwen, 5 Den. (N. Y.) 367, the court, after stating the general rule in *New York*, as above laid down, added the qualification that it was competent to show that the defendant paid the daughter such attentions as are usual when the addresses are of an honorable character, and said: "It is usual to give such evi-

and elsewhere that if the defendant in any way attempts to mitigate the damages on the ground that the father had not exercised proper care in the protection of his daughter's virtue, then the fact of a pending engagement of marriage between the parties is admissible.[1] In an action for breach of promise

dence to show the character of the affair, and that she did not readily yield to the arts of the seducer. All these are proper circumstances to show, in an action in which damages are given as a reparation to the injured honor and feelings of the father rather than for the mere technical loss of the daughter's services."

The distinction between admitting evidence of attentions of an honorable character under cover of which seduction is accomplished, and excluding evidence of a promise of marriage which is certainly an attention of an honorable character, is not clear, especially as a promise of marriage may be inferred from attentions of such a character. This rule perhaps grew out of a remark by Garrow, B., in Elliott *v.* Nicklin, 5 Price 641: "I remember the case of Dodd *v.* Norris (3 Camp. 519) well; I was of counsel for the plaintiff in that case; and the sole objection to the question put to the witness in that case was founded on the impropriety of making the breach of a promise of marriage an item in the account in an action for the seduction. But Lord Ellenborough on that occasion did not, according to my recollection, lay it down as an inflexible rule that she could not in any case, be asked, or that the fact might not be got at by other more indirect questions, as if she had been asked whether he had not sent her a ring, or her sister had been called to prove that she had been requested to prepare herself for the part of bridesmaid. The distinction is where the actual promise of marriage is not relied on as a prominent part of the case, but is merely collateral to the main object of the action, as to vindicate the character of the young woman, when assailed by the defense set up, as was the case here."

1. Robinson *v.* Burton, 5 Harr. (Del.) 335; Odell *v.* Stephens, 12 Ind. 384.

"According to the case, the evidence was offered in chief by the plaintiff, and admitted as general evidence in the cause, without qualification or limitation. If it appeared that any position had been taken, or might have been taken by the defendant, looking towards a mitigation of damages, upon the ground that the father, by neglect of the proper care and protection of his daughter, had recklessly exposed her virtue to temptation or assault, and thus in some measure contributed to the injury of which he complained, the fact of a pending engagement of marriage between the parties might have been admissible under some circumstances." Whitney *v.* Elmer, 60 Barb. (N. Y.) 250. The New York courts adhere to the earlier rule, however; and in Whitney *v.* Elmer, the court, by Talcott, J., says: "It is perfectly well settled that evidence of a promise of marriage to the daughter is inadmissible in an action by the father. A moment's consideration of the theory upon which the action by the father is maintained is sufficient to show the inadmissibility of the evidence objected to. The ground of the action by the father is the loss of service of the child, by reason of the sickness and inability to labor induced by her pregnancy. It is manifest that whether there has been a promise of marriage or not, is wholly immaterial to any question legally pertinent to the ground of the action or the amount of the damages sustained by sickness. The promise of marriage and the breach of it, are the subjects of an action by the daughter. The promise is made to her, and, in judgment of law, for her benefit. As a chose in action, it is her sole property, in which the father has no legal interest. Of course there is manifest danger, if such evidence is allowed to be given in an action by the father, that damages may be given in that action, based to some extent upon the breach of the marriage promise. Although the moral guilt of such a transaction is very much enhanced where advantage has been taken of the relations created by an engagement of marriage to overcome the scruples of a virtuous female, followed by a repudiation of the contract, yet the guilty party is liable in this as in all other cases of wrongs, to one recov-

of marriage, seduction may be proved in aggravation of damages.[1]

II. CRIMINAL OFFENSE[2]—1. The Crime.—Most of the States of the Union have enacted statutes making seduction a criminal offense. The crime of seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and which result in her ultimately submitting herself to the sexual embraces of the person accused.[3] The courts do not undertake to lay down any legal standard by which to determine what false promises, artifices, and deception are sufficient to

ery of damages in a civil action for the same act. The authorities are very clear in rejecting this species of evidence in a father's action."

1. Seduction in Action for Breach of Promise.—See BREACH OF PROMISE, vol. 2, p. 527.

In addition to the cases there cited, see Conn *v.* Wilson, 2 Overt. (Tenn.) 223; 5 Am. Dec. 663; Foster *v.* Schofield, 1 Johns. (N. Y.) 297; Wilds *v.* Bogan, 57 Ind. 453; Williams *v.* Hollingsworth, 6 Baxt. (Tenn.) 12; Sherman *v.* Rawson, 102 Mass. 395; Kelley *v.* Riley, 106 Mass. 339; 8 Am. Rep. 336; Bennett *v.* Beam, 42 Mich. 346; 36 Am. Rep. 442; Gilmore *v.* Dewar, 1 Thom. (Nov. Sco.) 101; Embree *v.* Wood, 20 Nov. Sco. Rep. 40; Leavitt *v.* Cutler, 37 Wis. 46.

An instruction that damages can scarcely be too heavy is not erroneous. Hattin *v.* Chapman, 46 Conn. 607.

A promise of marriage in consideration of intercourse is void. Steinfield *v.* Levy, 16 Abb. Pr. N. S. (N. Y.) 26; Hanks *v.* Naglee, 54 Cal. 51; 35 Am. Rep. 67; Boigneres *v.* Boulon, 54 Cal. 146.

2. See also ABDUCTION, vol. 1, p. 21.

3. Definition.—People *v.* Gibbs, 70 Mich. 425; People *v.* Clark, 33 Mich. 112; 1 Am. Cr. Rep. 660; Patterson *v.* Hayden, 17 Oregon 238; 11 Am. St. Rep. 822; Bowers *v.* State, 29 Ohio St. 542; Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474; State *v.* Bierce, 27 Conn. 319; Croghan *v.* State, 22 Wis. 444; State *v.* Brinkhaus, 34 Minn. 285; Wilson *v.* State, 73 Ala. 527; O'Neill *v.* State, 85 Ga. 383; People *v.* Royal, 53 Cal. 62; State *v.* Crawford, 34 Iowa 40; Putnam *v.* State (Tex. 1891), 16 S. W. Rep. 97.

"The word 'seduce,' though a general term, and having a variety of meanings, according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a woman, a precise and definite signification, and is universally understood to mean an enticement of her on his part to surrender her chastity by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated." State *v.* Patterson, 88 Mo. 88; 57 Am. Rep. 374.

"Generally, in order to establish the charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception; and it is held that something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for the crime." State *v.* Fitzgerald, 63 Iowa 268.

"The offense consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse, by promises made at the time. . . . The promise, and yielding her virtue in consequence thereof, is the gist of the offense. If she resists, but finally assents or yields, induced thereto or in reliance upon the promise made, the offense is committed." People *v.* De Fore, 64 Mich. 693.

"To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her under a solemn repetition of the engagement vow, is to employ persuasion as well as promises of marriage." Wilson *v.* State, 58 Ga. 328.

constitute seduction;[1] that is for the jury,[2] but no conviction can be had unless some such promises or artifices are proved.[3] Where violence is used the crime is rape and not seduction, and no conviction can be had for the latter offense;[4] but there is no antagonism between seduction and fornication or adultery.[5]

The statutes generally provide that the seduction must be accomplished under promise of marriage; that the woman must have been of previous chaste character, and that no conviction shall be had upon her uncorroborated testimony.[6]

1. "There is no legal standard by which to determine what false promises, artifices, and deception are sufficient to constitute the crime of seduction. Of course, mere unlawful commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous woman is induced to surrender her person to the accused. What would be sufficient to overpower the mind of one woman would be insufficient to lead away another of more mature mind and discretion." State *v.* Fitzgerald, 63 Iowa 268.

"The exact amount, or what kind of seductive arts is necessary to establish the offense charged, cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties." State *v.* Higdon, 32 Iowa 262.

2. State *v.* Higdon, 32 Iowa 262.

3. State *v.* Higdon, 32 Iowa 262; State *v.* Fitzgerald, 63 Iowa 268.

4. State *v.* Horton, 100 N. Car. 443: 6 Am. St. Rep. 613; State *v.* Lewis, 48 Iowa 578; 30 Am. Rep. 407; State *v.* Kingsley, 39 Iowa 439; Croghan *v.* State, 22 Wis. 444; *compare* People *v.* Royal, 53 Cal. 62; People *v.* DeFore, 64 Mich. 693. See also RAPE.

5. Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664; Hopper *v.* State, 54 Ga. 389; Nicholson *v.* Com., 91 Pa. St. 390; Dinkey *v.* Com., 17 Pa. St. 126; 55 Am. Dec. 542.

6. **The Statutes.**—Criminal Code *Alabama*, § 4015: "Any man, who by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried woman in this State, must, on conviction, be imprisoned in the penitentiary for not less than one, nor more than ten years, but no indictment or conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had, if on the trial it is proved that such woman was, at the time of the alleged offense, unchaste." 31 Cent. L. J. 44.

Arizona Rev. St. Cr. Code, § 431, (promise of marriage); *Arkansas* Dig. of Stats. 1884, § 1587 (promise of marriage). See Cheaney *v.* State, 36 Ark. 74; *Colorado* acts of 1885, p. 16 (promise of marriage); *Connecticut* Gen. Stat., § 1526; *Dakota* Pen. Code, 1883, § 331 (promise of marriage); *Georgia* Code, § 4371 (promise of marriage); *Indiana* Code, § 1992 (promise of marriage); *Iowa* Code, § 3867; *Kentucky* Gen. St., ch. 29, p. 493 (promise of marriage); *Minnesota* Sts. 1891, § 6198 (promise of marriage); *Michigan* How. Sts., § 9283. See People *v.* Gould, 70 Mich. 240; *Mississippi* Rev. Code, § 2754; *Missouri* Rev. Stat., § 3486; *New Jersey* Rev. St., p. 1295, §§ 3 & 4 (promise of marriage). *Compare* Pub. Laws, 1876, ch. 65; *New York* Penal Code, §§ 284, 286 (promise of marriage); *North Corolina* Stats., 1885, ch. 248 (promise of marriage); *Oklahoma* Stats., § 2181 (promise of marriage); *Ohio* Rev. Sts., § 7022 (promise of marriage); *Oregon*, Hill's Code, § 647 (promise of marriage); *Pennsylvania* Purdon's Dig., p. 413, § 56 (promise of marriage); *Rhode Island* Pub. Stat., ch. 244, § 3 (promise of marriage); *Texas* Pen. Code, art. 814 (promise of marriage); *Virginia* Code, § 3677; *Wisconsin* Annot. Stats., § 4581 (promise of marriage).

Commenting on the penalty imposed by statute for the crime of seduction the court by McCay, J., in Wood *v.* State, 48 Ga. 192, said: "If the crime be in fact committed, this is a most just and salutary law, since it is hardly possible to conceive of a more base and dastardly deed. It is a grievous wrong done by a selfish, heartless villain against a helpless and innocent victim, and is most justly denounced by all good people as a fiend-

2. The Indictment.—The indictment need not necessarily be in the words of the statute, but the essential elements of the offense must be alleged.[1] The precise time of the seduction need not be alleged.[2] Where there are several counts in the indictment, the prosecution cannot be compelled to elect upon which it will proceed.[3]

3. Evidence.—The courts allow considerable latitude in the evidence to show that seductive arts or promises were used by the defendant,[4] but the general rules of evidence will not be set aside

ish offense against God and society. The man who is guilty of it has betrayed and ruined a woman—has, by artful and fraudulent practices, seduced her from the paths of virtue, inspired her with lustful desires, and, finally, led her, perhaps, at last, a willing victim into crime. It is this deliberate, fraudulent, artful leading into crime of a trusting, pure-minded girl from chaste thoughts and pure desires, that gives such moral turpitude to the offense. Of the actual fornication, both are guilty—guilty even under human laws—and both are subject to the same penalty. It is the seduction of the woman by the man that gives the gist of, gives the name to, and makes the heinousness of this offense."

1. Wilson *v.* State, 73 Ala. 527; State *v.* Curran, 51 Iowa 112; 3 Am. Rep. 405; State *v.* Abrisch, 41 Minn. 41; State *v.* Stogdel, 13 Ind. 565.

An indictment for seduction need not state the facts constituting the seduction. State *v.* Conkright, 58 Iowa 338.

An indictment for seduction is not defective because it charges that the seduction was "by means of a promise of marriage," instead of using the words of the statute, "under a promise," etc. Stinehouse *v.* State, 47 Ind. 17; Callahan *v.* State, 63 Ind. 198; 30 Am. Rep. 211.

The word "seduce," when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and it is not necessary, in an information for the crime of seduction, to charge the offense in any other language. State *v.* Bierce, 27 Conn. 319.

Under a statute, providing that "if any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute, under twenty-one years of age, he shall be deemed guilty of a felony," etc., the indictment need not allege that defendant was unmarried, nor that the person seduced agreed to marry him, nor that she was of sufficient age to negotiate marriage. State *v.* Primm, 98 Mo. 368.

In an indictment for seduction, under the statute of *Wisconsin*, the unmarried condition of the female is an essential element to constitute the offense charged, and must be proved by the government. West *v.* State, 1 Wis. 209; Mesa *v.* State, 17 Tex. App. 395; State *v.* Bryan, 34 Kan. 63.

As to the form of an indictment under the *New York* statute, for the offense of seduction under promise of marriage, see Grant *v.* People, 4 Park. Cr. Rep. (N. Y.) 527.

2. State *v.* McClintic, 73 Iowa 663; State *v.* Moore, 78 Iowa 494; State *v.* Dieirick, 51 Iowa 467; State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234.

3. Hausenfluck *v.* Com., 85 Va. 702; People *v.* Bristol, 23 Mich. 118; Armstrong *v.* People, 70 N. Y. 38; Cook *v.* People, 2 Thomp. & C. (N. Y.) 404.

Introduction of evidence on one offense is a sufficient election. People *v.* Clark, 33 Mich. 112.

4. The jury may consider the defendant's conduct to the prosecutrix before and after the seduction to determine whether her consent was obtained by seductive arts. State *v.* Curran, 51 Iowa 112; 3 Am. Cr. Rep. 405; Lewis *v.* People, 37 Mich. 518; 2 Am. Cr. Rep. 75.

Evidence of declarations of defendant, about the time of the alleged seduction, of an intention to marry the prosecutrix, is properly admitted. Munkers *v.* State, 87 Ala. 94.

Evidence is admissible that defendant had boasted to his friends that he had had illicit intercourse with the prosecuting witness, as tending to show, not only an illicit connection, but also, in view of the circumstances under which the admissions were made, the deceptive practices by which it was

to favor the prosecutrix.[1] The defendant's admissions are admissible against him,[2] and it is open to the prosecution to prove that the woman had given birth to a child.[3] A previous conviction of the defendant upon a charge against him by the prosecuting witness is not admissible,[4] but the defendant may show a conspiracy between the woman and her parents to force him to marry her.[5]

4. Chaste Character.—The statutes generally require that the woman seduced must have had a previous chaste character, and that must be alleged in the indictment.[6] Probably this averment must be made even though the statute makes no mention of chastity, as that, as has been stated, is regarded by the courts as an essential feature of the offense;[7] but it is generally held that

brought about. State *v.* Hill, 91 Mo. 423.

A conversation between the complaining witness, her mother and sister, explanatory of testimony drawn from the sister on cross-examination by the defense, as to occurrences on the alleged occasion of seduction, and tending to disprove the defendant's *alibi*, is admissible. People *v.* Gibbs, 70 Mich. 425.

"In all such cases, the age, experience, artfulness, and blandishments of the offender, and the youthfulness, innocent, guileless and confiding nature of the injured party, will always be found to enter largely into the consideration of the acts of the parties involved in the investigation; and the largest latitude consistent with safety should be allowed in taking the testimony having any tendency to develop the material facts in the case. A proper regard for the protection of female virtue, and the welfare of society can never require less." People *v.* Gibbs, 70 Mich. 425.

Evidence of continuation of illicit intercourse after termination of the employment is admissible as tending to prove the offense charged. State *v.* Young, 99 Mo. 284.

1. On indictment for seduction, testimony of the prosecutrix that she understands that defendant has other living children is incompetent. State *v.* Thompson, 79 Iowa 703.

Evidence that the woman had been seen frequently going home with another man than defendant is immaterial, even to contradict her testimony that she had never "kept company" with any other man than defendant. State *v.* Payson, 71 Iowa 542.

It will be presumed that the testimony of the prosecutrix will be given, as far as possible, with the purpose of shielding herself; and her language, therefore, should not receive a strained construction, in order to sustain a verdict of guilty. State *v.* Haven, 43 Iowa 181.

It is not admissible for the girl to testify that she yielded in consequence of the promise to marry, as that is a matter of inference for the jury. Wilson *v.* State, 73 Ala. 527. *Compare* Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177; Armstrong *v.* People, 70 N. Y. 38.

A witness may not testify that defendant acted toward the girl as a suitor or as a lover. Carney *v.* State, 79 Ala. 14.

2. State *v.* Hill, 91 Mo. 423; State *v.* Bell, 79 Iowa 117; *compare* State *v.* Moore, 78 Iowa 494; but see State *v.* Thompson, 79 Iowa 703.

3. Cunningham *v.* State, 73 Ala. 51; but see People *v.* Kearney, 110 N. Y. 188; State *v.* Richards, 72 Iowa 17.

4. State *v.* Wenz, 41 Minn. 196.

5. People *v.* Clark, 33 Mich. 112; 1 Am. Cr. Rep. 660; but evidence is inadmissible that the girl offered to compromise the case after the arrest of the defendant. State *v.* Dietrick, 51 Iowa 467; *compare* Wilson *v.* State, 73 Ala. 527.

6. 2 Whart. Cr. L. (9th ed.), § 1757; State *v.* Stogdel, 13 Md. 565; State *v.* Gates, 27 Minn. 52.

An instruction, that evidence of previous unchaste conduct with another man than defendant should be considered against her is misleading; such conduct, if believed, should secure an acquittal. State *v.* Carr, 60 Iowa 453.

7. Polk *v.* State, 40 Ark. 482; 48 Am.

"character," as used in these statutes, means actual personal virtue and not merely reputation,[1] and that what was the previous character of the prosecutrix for chastity is a question for the jury.[2] Chastity is always in issue,[3] but, on the other hand, it is always presumed, and the burden is on the defendant to impeach it.[4]

Rep. 17; People *v.* Roderigas, 49 Cal. 9; People *v.* Clark, 33 Mich. 112; *compare* State *v.* Jones, 16 Kan. 608.

1. The term "character" signifies that which the person really is, in contradistinction to that which she may be reputed to be. State *v.* Andre, 5 Iowa 389; State *v.* Boak, 5 Iowa 430; 68 Am. Dec. 708.

In a trial for seduction, a question asked of a witness for the prosecution, as to the complainant, whether he knew "what her character for chastity was in the neighborhood," held, open to objection, in that "general" character was not called for. State *v.* Clark, 9 Oregon 466; State *v.* Shean, 32 Iowa 88; State *v.* Painter, 50 Iowa 317; State *v.* Prizer, 49 Iowa 531; 31 Am. Rep. 155; Crozier *v.* People, 1 Park. Cr. Rep. (N. Y.) 453; Kenyon *v.* People, 26 N. Y. 203; 68 Am. Dec. 177; Cook *v.* People, 2 Thomp. & C. (N. Y.) 404; Hussey *v.* State, 86 Ala. 34; State *v.* Brassfield, 81 Mo. 158; 51 Am. Rep. 235; O'Niell *v.* State, 85 Ga. 383; People *v.* Brewer, 27 Mich. 134. And see Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474; Carpenter *v.* People, 8 Barb. (N. Y.) 603; Kauffman *v.* People, 11 Hun (N. Y.) 82.

It was held in State *v.* Brinkhaus, 34 Minn. 285 that "although a female may, from ignorance or other causes, have so low a standard of propriety as to commit, or permit indelicate acts or familiarities, yet if she have enough of the sense of virtue that she would not surrender her person, unless seduced to do so under a promise of marriage, she cannot be said to be a woman of unchaste character within the meaning of the statute."

But proof of actual sexual intercourse is not necessary. State *v.* Andre, 5 Iowa 389; 68 Am. Dec. 708. "Virtuous" in a statute punishing the seduction of a virtuous unmarried female, means something more than a woman who has not had illegal sexual intercourse; a conviction is not warranted if the character of the woman for chastity and purity of heart and feeling has been successfully impeached. Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664.

2. State *v.* Carron, 18 Iowa 372; 87 Am. Dec. 401; State *v.* Andre, 5 Iowa 389; 68 Am. Dec. 708; Mann *v.* State, 34 Ga. 1.

But it is error to leave to the jury to determine what a virtuous woman is. O'Neill *v.* State, 85 Ga. 383. A reasonable doubt as to chastity is fatal to conviction. Wilson *v.* State, 73 Ala. 527; State *v.* Dietrick, 51 Iowa 467. *Compare* State *v.* Wells, 48 Iowa 671.

"The statute is for the protection of the pure in mind—for the innocent in heart—who may have been led astray, seduced from the path of rectitude; and the jury are the sole judges, in each case, who comes within this description. . . . No particular amount or degree of such manners or conversation can be set down as conclusive evidence of an unchaste character; but the jury must determine whether, under the facts shown, the real character be thus. It is not every act of impropriety, nor even of indecency that should affix this stain upon a female, and deprive her of the protection of the law." State *v.* Andre, 5 Iowa 389; 68 Am. Dec. 708.

3. People *v.* Clark, 33 Mich. 112; Wilson *v.* Clark, 73 Ala. 533; Hussey *v.* State, 86 Ala. 34; State *v.* Prizer, 49 Iowa 531; 31 Am. Rep. 155.

4. State *v.* McClintic, 73 Iowa 663; Polk *v.* State, 40 Ark. 482; 48 Am. Rep. 17; Crozier *v.* People, 1 Park. Cr. Rep. (N. Y.) 453; Conkey *v.* People, 5 Park. Cr. Rep. (N. Y.) 31; People *v.* Kane, 14 Abb. Pr. (N. Y.) 15; Wilson *v.* State, 73 Ala. 618; Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664; O'Neill *v.* State, 85 Ga. 383; State *v.* Sutherland, 30 Iowa 570; State *v.* Shean, 32 Iowa 88; State *v.* Higdon, 32 Iowa 262; State *v.* Curran, 51 Iowa 112; 3 Am. Cr. Rep. 405; People *v.* Squires, 49 Mich. 487; People *v.* Clark, 33 Mich. 112.

In Brewer *v.* People, 27 Mich. 134, the court by Cooley, J., said: "The last error which we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumptions of

In doing so he may show specific acts, either of sexual intercourse or obscene talk, indecent conduct, or improper familiarities with other men, prior to the offense;[1] the woman may be cross-examined upon any such charge made against her,[2] and evidence of her character, habits and deportment may be introduced to rebut any such testimony,[3] but evidence of her general reputation for chastity is inadmissible.[4] All evidence of character must be limited to the time prior to the offense,[5] and the term "previous chaste character" is held to refer to the time immediately previous to the offense.[6] It is always open to the woman to show that, although at one time she was unchaste, she had reformed, and at the time of the alleged seduction was leading a virtuous life.[7] Where the statute uses the words chaste

law should be in accordance with the general fact; and whenever it shall be true of any country that the women, as a general fact, are not chaste, the foundations of civil society will be broken up. Fortunately in our country, an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it."

Wisconsin, *contra*, West *v.* State, 1 Wis. 209.

"It is true, as a general proposition, that chastity is presumed. But the presumption can hardly survive the person's confession in her testimony of unchastity. The statute as to this offense, as construed by this court, requires proof and corroboration of the woman's testimony as to previous chaste character. This excludes, in indictments for seduction, the ordinary presumption of chastity." State *v.* Wenz, 41 Minn. 196. *Compare* Kauffman *v.* People, 11 Hun (N. Y.) 82; People *v.* Roderigas, 49 Cal. 9.

1. Polk *v.* State, 40 Ark. 482; 48 Am. Rep. 17; State *v.* Sutherland, 30 Iowa 570; State *v.* Bell, 49 Iowa 440; State *v.* Shean, 32 Iowa 88; People *v.* McArdle, 5 Park. Cr. Rep. (N. Y.) 180; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177; People *v.* Clark, 33 Mich. 112; People *v.* Brewer, 27 Mich. 134; Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664.

Evidence that before the alleged seduction prosecutrix was often out late at night is admissible on the question of chaste character. State *v.* Clemons, 78 Iowa 123.

It is competent to show that the woman had behaved so on a prior occasion that her stepmother had to reprove her. State *v.* Curran, 51 Iowa 112. But see State *v.* Payson, 71 Iowa 542.

2. A prosecutrix for seduction may be cross-examined upon whether she had not used indecent language with other men, or been found in bed with men whose names are not given. State *v.* Sutherland, 30 Iowa 570.

3. State *v.* Shean, 32 Iowa 88.

4. Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177; State *v.* Prizer, 49 Iowa 531; 31 Am. Rep. 155; *contra*, Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474. *Compare* State *v.* Clark, 9 Oregon 466.

5. State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234; State *v.* Wells, 48 Iowa 671; Boyce *v.* People, 55 N. Y. 644; State *v.* Clemons, 78 Iowa 123; Lewis *v.* People, 37 Mich. 518; People *v.* Clark, 33 Mich. 112.

Upon the trial of an indictment for seduction, evidence of acts of unchastity on the part of the woman seduced, two months subsequent to the date of the offense charged in the indictment, is not admissible in behalf of the prisoner. Mann *v.* State, 34 Ga. 1.

The reputation of the girl at the time of the trial is inadmissible. People *v.* Brewer, 27 Mich. 134.

6. State *v.* Gates, 27 Minn. 52; State *v.* Dietrick, 51 Iowa 467; State *v.* Wells, 48 Iowa 671; Carpenter *v.* People, 8 Barb. (N. Y.) 603.

On the trial of an indictment for seduction, evidence of improper conduct on the part of the prosecutrix eight years before the trial, when she was only fourteen years of age, is inadmissible to prove her character unchaste. State *v.* Dunn, 53 Iowa 526.

7. **Reformation.**—Wilson *v.* State, 73 Ala. 527; Carpenter *v.* People, 8 Barb.

"repute" instead of chaste character, evidence of reputation is admissible,[1] and under such a statute no presumption in favor of the woman exists, but the State must prove her reputation as part of its case,[2] and, on the other hand, as her reputation only is in issue, evidence of her previous conduct is inadmissible.[3]

5. Promise of Marriage.—Where the statutes require that the

(N. Y.) 608; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177; State *v.* Dunn, 53 Iowa 526; State *v.* Moore, 78 Iowa 494; State *v.* Carron, 18 Iowa 372; 87 Am. Dec. 401; Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664; Patterson *v.* Hayden, 17 Oregon 238; 11 Am. St. Rep. 822; People *v.* Clark, 33 Mich. 112; State *v.* Timmens, 4 Minn. 325; Com. *v.* McCarthy, 2 Pa. L. J. 35; State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234; State *v.* Primm, 98 Mo. 368. But when but a short interval has elapsed, clear proof of reformation is necessary, People *v.* Squires, 49 Mich. 487, People *v.* Millspaugh, 11 Mich. 278, at any time within a year; the burden of proving reformation is on the prosecution. People *v.* Clark, 33 Mich. 112. There being no evidence whatever that the prosecutrix had reformed at the time she received defendant's attentions, an instruction in regard to reformation was unwarranted. State *v.* Primm, 98 Mo. 368.

1. Repute.—Bowers *v.* State, 29 Ohio St. 542; 2 Am. Cr. Rep. 592; State *v.* Whaler, 94 Mo. 252; State *v.* Hill, 91 Mo. 423.

On trial of an indictment for "seducing an unmarried female of good repute," the evidence showed that prior to the commission of the offense the prosecuting witness had had sexual intercourse with other men, and was, on numerous occasions, guilty of lewd and indecent conduct, and that her language was that of a person lost to all sense of virtue and propriety; that on one occasion, being asked why she did not resort to prostitution for a living, she replied: "I am not ready yet." *Held*, that a conviction could not be sustained. State *v.* Primm, 98 Mo. 368.

"A woman's reputation for chastity is what the people of her acquaintance generally say of her in this regard; that is, the general credit for chastity that she bears among her neighbors and acquaintances. The best character is generally that which is least talked about; therefore, negative evidence of a witness, that he had never heard anything against the character of the woman for chastity—that is, that he never heard her conduct criticised, condemned or even talked about—is admissible upon the trial." State *v.* Bryan, 34 Kan. 63.

"How can that be destroyed by the seducer's insidious wiles and arts, which, at the time of its supposed destruction, had no existence? Any evidence, therefore, which shows, or materially tends to show that there was, at the time the alleged offense is charged to have been committed, no chastity, in the given case, cannot be otherwise than competent and relevant. I cannot believe that the legislative protection, intended only for the pure and innocent in heart, was designed to be extended over those who, being vile and impure, have nothing left for the law to guard." State *v.* Patterson, 88 Mo. 88; 57 Am. Rep. 374.

2. State *v.* Hill, 91 Mo. 423; State *v.* McCaskey, 104 Mo. 644; Tabriskie *v.* State, 43 N. J. L. 640; 39 Am. Rep. 610.

"If the general reputation of the prosecutrix, for chastity in the neighborhood in which she lived was good—and there is nothing in the case to indicate anything to the contrary—it was the duty of the commonwealth to call witnesses and prove the fact affirmatively, as every ingredient of the offense was required to be proved, instead of asking the jury to infer the fact from casual expressions used by some of the witnesses in the course of their testimony on other branches of the case. Oliver *v.* Com., 101 Pa. St. 215; 47 Am. Rep. 704.

Compare Com. *v.* Whittaker, 131 Mass. 224; People *v.* Roderigas, 49 Cal. 9; Kauffman *v.* People, 11 Hun (N. Y.) 86.

3. State *v.* Bryan, 34 Kan. 63; Bowers *v.* State, 29 Ohio St. 542.

Missouri, contra. State *v.* Hill, 91 Mo. 423; State *v.* Patterson, 88 Mo. 88; 57 Am. Rep. 374. *Compare* State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234. See 31 Cent. L. J. 48.

seduction shall have been accomplished under promise of marriage, considerable latitude is allowed in proving the promise,[1] but it is necessary to show that the seduction was accomplished under reliance on such promise,[2] even though the promise be not technically valid.[3] It is no defense that the promise was made some time prior to the seduction,[4] or that the defendant honestly intended to keep his promise when he made it.[5] It is not necessary that the defendant be of a lawful age to marry.[6] The promise to marry is sufficient even if its fulfillment is conditioned on intercourse,[7] or the birth of a child.[8]

Where the statute speaks of an "unmarried woman," it must be alleged and proved that she was such at the time of the

1. In a prosecution for seduction under a promise of marriage, the promise may be implied from the language used. State *v.* Brinkhaus, 34 Minn. 285.

It may be inferred from circumstances. People *v.* Kane, 14 Abb. Pr. (N. Y.) 15. The defendant may show prior intercourse with the girl to rebut the evidence of reliance on the promise. Bowers *v.* State, 29 Ohio St. 542; State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234.

2. On the trial of an indictment for seduction under promise of marriage, the promise cannot be proved by evidence of attentions, of expressions of contrition for the seduction, and by a promise made after the seduction to marry the girl after a time. Rice *v.* Com., 102 Pa. St. 408; Cole *v.* State, 40 Tex. 147; People *v.* Clark, 33 Mich. 112; People *v.* Millspaugh, 11 Mich. 278.

To sustain a conviction, under an indictment for seduction, the promise of marriage, arts or deception must sustain a relation to the accomplished purpose of the seduction—there must be the relation of cause to effect. Carney *v.* State, 79 Ala. 14; Philips *v.* State, 108 Ind. 406. *Compare* Wilson *v.* State, 58 Ga. 328. The promise must be averred in the indictment. Crozier *v.* People, 1 Park. Cr. Rep. (N. Y.) 453.

3. Crozier *v.* People, 1 Park. Cr. Rep. (N. Y.) 453; People *v.* Alger, 1 Park. Cr. Rep. (N. Y.) 333; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177. If the woman understood it to be valid; otherwise where the woman knew the man to be already married. Callahan *v.* State, 63 Ind. 198; 30 Am. Rep. 211; 3 Am. Cr. Rep. 399; Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664; State *v.* Groome, 10 Iowa 308.

4. Armstrong *v.* People, 70 N. Y. 38. *Contra* O'Neill *v.* State, 85 Ga. 383.

It is not necessary to have the promise formally renewed at the time of the seduction. State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234.

5. State *v.* Bierce, 27 Conn. 319.

6. Polk *v.* State, 40 Ark. 482; 48 Am. Rep. 17; Kenyon *v.* People, 26 N. Y. 203.

7. Seduction is accomplished under promise of marriage, when it is effected by a conditional promise that, if the female will submit to connection, the offender will marry her; and the fact that, after consenting, she endeavored to persuade him to desist, and at a time when it was too late to withdraw without his permission, she besought him to leave her, promising never to ask him to marry her if he would do so, is no excuse of the offense. Boyce *v.* People, 55 N. Y. 644; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177; Callahan *v.* State, 63 Ind. 198; 30 Am. Dec. 211; Phillips *v.* State, 108 Ind. 406; *contra*, Wood *v.* State, 48 Ga. 192; 15 Am. Rep. 664.

"No one can, with any degree of plausibility, contend that a virtuous female can be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in præsenti*, is an announcement that smacks too much of a bargain and barter, and not enough of betrayal. This is hire or salary, not seduction." State *v.* Reeves, 97 Mo. 668.

8. People *v.* Hustis, 32 Hun (N. Y.) 58; 2 N. Y. Cr. Rep. 448. *Compare* Armstrong *v.* People, 70 N. Y. 38; Callahan *v.* State, 63 Ind. 198; 30 Am. Dec. 211.

seduction.[1] The subsequent marriage of the parties constitutes a defense.[2]

6. Corroboration.—The statutes generally require that the evidence of the woman should be corroborated before a conviction can be had, but the statutes and decisions differ widely as to the extent of corroboration necessary.[3] In some jurisdictions every material fact must be corroborated,[4] while in others it is sufficient if the corroboration extends to the promise of marriage and to the intercourse,[5] or to the promise alone.[6]

1. Mesa *v.* State, 17 Tex. App. 395; State *v.* Carr, 60 Iowa 453; Gover *v.* Dill, 3 Iowa 337. *Compare* West *v.* State, 1 Wis. 209; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177.

On a trial for the seduction of an unmarried woman, evidence which shows that the woman lived with her father and bore his name; that she had received the addresses of the defendant for more than three years, and that a marriage engagement existed between them when the crime was committed, is sufficient to warrant the jury in finding that the woman was unmarried. State *v.* Hatherton, 60 Iowa 175.

Where the girl was under thirteen, and the point was not raised at the trial, it was held the error was not prejudicial to the defendant. Lewis *v.* People, 37 Mich. 518; 2 Am. Cr. Rep. 592.

Such a statute dispenses with proof of prior chaste character if it can be shown that the intercourse was induced by promise of marriage. People *v.* Millspaugh, 11 Mich. 278.

A widow cannot be seduced as an "unmarried woman." Kirk *v.* Long, 7 U. C. C. P. 363; Anderson *v.* Rannie, 12 U. C. C. P. 536.

2. Com. *v.* Eichar, 4 Pa. L. J. 326; even though the husband promptly deserts her. People *v.* Gould, 70 Mich. 240; but an offer to marry is no defense where the girl refused. State *v.* Thompson, 79 Iowa 703. Evidence on the part of the people that the prisoner subsequent to the seduction had refused to marry the prosecutrix is inadmissible. Cook *v.* People, 2 Thomp. & C. (N. Y.) 404. This is sometimes provided for by statute.

Indiana Code, § 3868; also in *Kentucky*, *Minnesota*, *New York*, *Colorado*, *Texas*, *Oklahoma*, *Oregon*, *Wisconsin*. In *Georgia* Code, § 4371, the prosecution may be stopped by marriage or a *bona fide* offer to marry.

3. "There must be some evidence of the principal witness as to the promise of marriage. In this case, there is an attempt to evade the plain statutory provision by the principal witness testifying first to the promise of marriage and then to 'the circumstances' that corroborate her. This is clearly not the law. She must be corroborated by 'some witness other than herself." State *v.* McCaskey, 104 Mo. 644; State *v.* Kingsley, 39 Iowa 439.

4. State *v.* Andre, 5 Iowa 389; 68 Am. Dec. 708; State *v.* Kingsley, 39 Iowa 439; State *v.* Timmens, 4 Minn. 325.

For the rule in *Alabama*, see Munkers *v.* State, 87 Ala. 94; Wilson *v.* State, 73 Ala. 527; Leoni *v.* State, 44 Ala. 110.

5. State *v.* Ferguson, 107 N. C. 841; People *v.* Kearney, 110 N. Y. 188; Kenyon *v.* People, 26 N. Y. 203; 84 Am. Dec. 177, note.

Under the provision declaring that a conviction shall not be had upon the testimony of the female unsupported by other evidence, supporting evidence is only required as to the promise of marriage and the connection. As to the promise the provision is satisfied by proof of circumstances which usually attend an engagement of marriage; as to the intercourse and the persuasions and the inducements which led the female to consent, evidence of opportunities, and that the relations of the parties were such as indicated that confidence in and affection for the accused, on the part of the female, which rendered it probable that the act may have been done, are sufficient. Armstrong *v.* People, 70 N. Y. 38. See Polk *v.* State, 40 Ark. 482; 48 Am. Rep. 17.

6. Cunningham *v.* State, 73 Ala. 51; Wilson *v.* State, 73 Ala. 527; State *v.*

The statute sometimes requires the female to be corroborated to the extent required in an indictment for perjury.[1] The corroboration must tend to connect the defendant with the offense,[2] but the courts recognize that direct and positive proof is rarely obtainable,[3] and admit a wide range of circumstantial evidence,[4]

Hill, 91 Mo. 423; State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234; State *v.* McCaskey, 104 Mo. 644.

On the trial of an indictment the corroborating evidence consisted of the defendant's frequent visits to the prosecutrix, escorting her to church, parties and other gatherings, and his admissions of an engagement and intention to marry her, made about the time of the alleged seduction. *Held*, that, as the evidence was corroborative of a promise of marriage testified to by the prosecutrix, it authorized the charge "that if the evidence corroborates the prosecutrix in the material facts, and satisfies the jury that she is worthy of credit, then the corroboration was sufficient." Munkers *v.* State, 87 Ala. 94.

In order to warrant a conviction of seduction under a promise of marriage, there must be evidence to corroborate the testimony of the seduced female that there was a promise to marry. The statute defining the offense is explicit, and the rule is not changed by the fact that a defendant, can now testify in his own behalf. Rice *v.* Com., 100 Pa. St. 28.

1. Zabriskie *v.* State, 43 N. J. L. 640; 39 Am. Rep. 610; State *v.* Reeves, 97 Mo. 668 (under Rev. St., § 4212); State *v.* Hill, 91 Mo. 423. *Compare* State *v.* Ferguson, 107 N. Car. 841.

2. State *v.* Crawford, 34 Iowa 40; State *v.* Wells, 48 Iowa 671; State *v.* Painter, 50 Iowa 417 (under code *Iowa*, § 4560).

3. Boyce *v.* People, 55 N. Y. 644; Polk *v.* State, 40 Ark. 482; 48 Am. Rep. 17; Armstrong *v.* People, 70 N. Y. 38.

4. See also BASTARDY, vol. 2, p. 146; note 1; State *v.* Standley, 76 Iowa 215; State *v.* Brinkhaus, 34 Minn. 285.

The fact that the defendant was the suitor of the prosecuting witness, proven otherwise than by her testimony, tends to corroborate her testimony that her seduction was accomplished by him. State *v.* Curran, 51 Iowa 112; Rice *v.* Com., 100 Pa. St. 28; People *v.* Kearney, 100 N. Y. 188; Boyce *v.* People, 55 N. Y. 644.

Mere proof that defendant had opportunity to employ seductive arts does not constitute evidence corroborative of the prosecuting witness. State *v.* Smith, 54 Iowa 743; State *v.* Araah, 55 Iowa 258; State *v.* Painter, 50 Iowa 317; State *v.* Hill, 91 Mo. 423.

The evidence of the prosecuting witness was corroborated as to defendant's visits to her, and that he was alone with her until a late hour. A witness testified that he had a conversation with defendant, in which he stated that he had fixed the girl up, as the report was; that he would not marry her, and was going away. *Held*, that the jury had a right to infer that the conversation with this witness referred to the prosecutrix, and the evidence was sufficient to warrant a conviction. State *v.* McClintic, 73 Iowa 663; State *v.* Heatherton, 60 Iowa 175.

The relationship existing between a man and a woman living in the same house with his mother and himself, as a friend and sort of housekeeper of the mother, does not tend to show that the man, who paid her but little attention, had gained control of her affections, or that he had so far paved the way for a proposition of marriage as to corroborate her testimony on the trial of an indictment against him for seducing her, that she yielded to him under a promise of marriage, when it appears that the promise was made for the first time in the midst of a physical struggle, of five minutes' duration, for sexual intercourse. State *v.* Richards, 72 Iowa 17.

Letters of the defendant are admissible. State *v.* Bell, 79 Iowa 117.

On an indictment for this offense the sister of the prosecutrix testified that the prosecutrix got a dress ready for her marriage. *Held*, that this is not such corroboration as is required, for it is hearsay, and does not tend to connect defendant with the offense charged. Cooper *v.* State (Ala. 1891), 8 So. Rep. 821.

A wedding ring is not in itself corroborative of the promise of marriage. Com. *v.* Walton, 2 Brewst. (Pa.) 487.

the competency of the corroborative testimony is for the court, but it is for the jury to determine the weight and credit to be given to it.[1]

7. Allied Statutes.[2]—Statutes exist in many States to punish enticing women away for the purpose of prostitution, whether they are adults[3] or of tender age,[4] and to punish any one to whose care a girl is confided by her parents for defiling her,[5] but it is difficult to lay down any general principles applicable to these statutes. The Federal statute prohibiting importation of women for purposes of prostitution applies to importations from foreign lands.[6]

III. CRIMINAL CONVERSATION.[7]—Seduction of a married woman is known in the law as criminal conversation, and the husband

Admissions of defendant are admissible. Hausenfluck *v.* Com., 85 Va. 702; State *v.* Fitzgerald, 63 Iowa 268.

Child. — In corroboration of the testimony of prosecutrix that she had sexual intercourse at the time named, she may testify that afterwards she gave birth to a child, and may state the date of the birth, the evidence not connecting defendant with the crime. She may also state that the child with her is the one alleged to have been begotten by defendant, where the child is not produced to show a resemblance to defendant. State *v.* Klemons, 78 Iowa 123; Cunningham *v.* State, 73 Ala. 51.

In State *v.* Brassfield, 81 Mo. 151; 51 Am. Rep. 234, evidence of the paternity of the child was held immaterial. The child is inadmissible to prove paternity. See BASTARDY, vol. 2, p. 153.

1. State *v.* Brinkhaus, 34 Minn. 285; Crandall *v.* People, 2 Lans. (N. Y.) 309; State *v.* Bell, 49 Iowa 440.

It is natural she should shield herself, and so no strained construction is to be put on her evidence. State *v.* Haven, 43 Iowa 181; 2 Am. Cr. Rep. 594; but it is not error to refuse to caution the jury to that effect. State *v.* Curran, 51 Iowa 112. Guilt should be made out beyond a reasonable doubt. State *v.* Kingsley, 39 Iowa 439.

2. See ABDUCTION, vol. 1, p. 21.

3. State *v.* Stoyell, 54 Me. 24; 89 Am. Dec. 716; Slocum *v.* People, 90 Ill. 274 (married women).

4. People *v.* Bristol, 23 Mich. 118.

Under an indictment under *Indiana* Rev. St., § 2001, which provides a penalty for inducing, decoying, procuring, or compelling any female under 18 years to have sexual intercourse with any person other than the one so inducing or compelling, it is not necessary to show that the purpose of the defendant was to induce or compel the female to have intercourse with a particular person; it is enough to show that his purpose was to induce or compel her to have intercourse with another than himself. Stevens *v.* State, 112 Ind. 433; State *v.* Round, 82 Mo. 679. Consent of the girl is not defense. Tucker *v.* State, 8 Lea (Tenn.) 633. As to what constitutes enticement, see Nash *v.* Douglas, 12 Abb. (N. Y.) Pr. N. S. 187.

5. State *v.* Strattman, 100 Mo. 540; State *v.* Young, 99 Mo. 284; State *v.* Arnold, 55 Mo. 89; State *v.* Sipe, 38 Kan. 201.

Under *Missouri* Rev. St., § 1260, which provides for the punishment of a guardian defiling his ward by carnally knowing her while she remains in his care, custody, or employment, an indictment is insufficient which fails to allege that the act was committed while the female remained in his care, custody, or employment, although such indictment repeats the allegation that she was then and there confided to the care and protection of the defendant. State *v.* Buster, 90 Mo. 514.

It is no defense to a prosecution under the statute that the female was unchaste. State *v.* Strattman, 100 Mo. 540. State *v.* Jones, 16 Kan. 608.

6. U. S. *v.* Johnson, 19 Blatchf. (U. S.) 257.

7. See HUSBAND AND WIFE, vol. 9, p. 834.

has a right of action against the seducer.[1] In *England*, the statute of 20 & 21 Vict., ch. 85, § 59, took away this action from the husband, but allows him damages in a suit for divorce where he joins the adulterer as a co-respondent.[2] The action is founded on the exclusive right of the husband to marital intercourse with his wife, and the loss of *consortium* consequent upon the seduction. A husband is not the master of his wife, and hence loss of service does not enter into the action.[3] Apart from that, the action does not differ greatly from the action for seduction. It may be brought in either trespass or case,[4] and the consent of the wife does not affect the husband's right of action.[5] The declarations of the wife are inadmissible in evidence.[6] It must appear that the plaintiff is actually the husband of the woman, and strict proof of marriage is insisted on;[7] but where that is

1. 2 Greenl. Ev., § 40; Cooley on Torts 224; Conway *v.* Nicol, 34 Iowa 533; Crose *v.* Rutledge, 81 Ill. 266; Ferguson *v.* Smethers, 70 Ind. 519; 36 Am. Rep. 186; Hadley *v.* Heywood, 121 Mass. 236; Egbert *v.* Greenwalt, 44 Mich. 245; 38 Am. Rep. 260; Barber *v.* Armstead, 10 Ired. (N. Car.) 530; 51 Am. Dec. 404; Rabé *v.* Hanna, 5 Ohio 530; Catherwood *v.* Caslon, 13 M. & W. 261; 8 Jur. 1076; 13 L. J. Ex. 334.

2. Quicke *v.* Quicke, 2 S. & T. 419; 31 L. J. Mat. Cas. 28; 10 W. R. 448; Carryer *v.* Carryer, 4 S. & T. 94; 34 L. J. Mat. Cas. 47; 13 L. T. N. S. 250; Pitt *v.* Pitt, 37 L. J. Mat. Cas. 24; L. R., 1 Div. 464; 17 L. T. N. S. 671; Tollemache *v.* Tollemache, 28 L. J Mat. Cas. 2; Evans *v.* Evans, 28 L. J. Mat. Cas. 20.

3. Bigaouette *v.* Paulet, 134 Mass. 123. *Compare* Wood *v.* Mathews, 47 Iowa 409.

4. Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578; Bigaouette *v.* Paulet, 134 Mass. 123.

The intent to seduce a wife is an aggravation of a trespass, as well as an actual seduction would be. Matteson *v.* Curtis, 11 Wis. 424.

5. Wales *v.* Minor, 89 Ind. 118.

6. In an action against one for debauching plaintiff's wife neither the confessions of the wife nor the opinion of a physician who had attended on her, as to her fondness for the defendant, are admissible. McVey *v.* Blair, 7 Ind. 590; Harris *v.* Rupel, 14 Ind. 209; Underwood *v.* Linton, 54 Ind. 468; Dance *v.* McBride, 43 Iowa 624.

In an action by a husband, he may give in evidence the declarations of the wife, made shortly prior to the alleged seduction, in order to show the state of her affections toward him up to the time of the injury complained of; and this, whether such declarations were made prior or subsequent to her marriage with the plaintiff. But it is an abuse of this right to permit statements of the wife to go in evidence, relating to the words and acts of a party defendant, and tending to prove the allegations of the petition against him. Such statements of the wife are mere hearsay, and inadmissible. Preston *v.* Bowers, 13 Ohio St. 1; 82 Am. Dec. 430.

Michigan Acts, 1861, 155, do not abrogate the common-law principle that the testimony of a wife is admissible to disprove intercourse with her husband, for the purpose of imputing illegitimacy to her children. Egbert *v.* Greenwalt, 44 Mich. 245; 38 Am. Rep. 260.

7. **Proof of Marriage Necessary.**— General reputation is not sufficient. Kibby *v.* Rucker, 1 A. K. Marsh. (Ky.) 391; Hutchins *v.* Kimmell, 31 Mich. 126; 18 Am. Rep. 164; Catherwood *v.* Caslon, 13 M. & W. 261; 8 Jur. 1076; Morris *v.* Miller, 4 Burr. 2057; Birt *v.* Barlow, 1 Doug. 171; Hemmings *v.* Smith, 4 Doug. 33.

In an action for criminal conversation with S, alleged to be plaintiff's wife, to prove the marriage, plaintiff offered himself as a witness, but was not admitted. He then offered to show by witnesses that he and S had lived and cohabitated together for a long time as husband and wife; and, lastly, offered in evidence the certificate of a justice of the peace, proved

shown, his loss will be presumed even though he be living apart from her.[1] The sole defense to the action seems to be the connivance of the plaintiff in his wife's adultery.[2] Exemplary dam-

to be dead, setting forth that he (the justice) had, on a certain date, united plaintiff and S in the bonds of matrimony. The certificate did not state that the justice knew the parties, or that they were identified to him, or that they were of sufficient age to marry, and there were no attesting witnesses. *Held*, that the evidence was incompetent to prove the marriage. In cases of criminal conversation an actual marriage must be proved. The husband and wife are not entitled to testify to the fact under the act of 1867, and general reputation of marriage is insufficient. The certificate of the justice offered did not comply with the statute requirements, and was not proof of the marriage. Dann *v.* Kingdom, 1 Thomp. & C. (N. Y.) 492.

It is a sufficient allegation of marriage, in a complaint for criminal conversation with the plaintiff's wife, that, at the time she was debauched, she was his wife. Hauck *v.* Grantham, 22 Ind. 53.

Declarations of the defendant, that he knew A was married to the plaintiff, and that, with full knowledge of that fact, he had debauched her, are admissible in evidence, in proof of the marriage. Forney *v.* Hallacher, 8 S. & R. (Pa.) 159; 11 Am. Dec. 590.

1. "A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove the alienation of the wife's affection, or actual loss of her society and assistance." Bigaouette *v.* Paulet, 134 Mass. 123; Yunat *v.* Hartrunft, 41 Ill. 9; Chambers *v.* Caulfield, 6 East 244. *Compare* Wilton *v.* Webster, 7 C. & P. 198; 32 E. C. L. 491; Weedon *v.* Timbrell, 5 T. R. 357; Harvey *v.* Watson, 7 M. & G. 644; 49 E. C. L. 644.

An action for *crim. con.* cannot be supported by the husband after an agreement of separation made with his wife; provided such agreement was voluntary on the part of the husband. Fry *v.* Derstler, 2 Yeates (Pa.) 278.

Divorce after the adultery does not bar the action. Wood *v.* Mathews, 47 Iowa 409.

2. **Connivance.**—"The plaintiff had the power, and it was his duty as a husband, to interfere and prevent the debauching of his wife. It is a general rule of law that no one can maintain action for a wrong when he has consented, or contributed to the act which occasions his loss. When an action is brought for criminal conversation, the law is now clearly settled to be that if the husband consents to his wife's adultery, it goes in bar of the action. If he be guilty of negligence, or of loose or improper conduct, not amounting to a consent, it goes in reduction of damages." Bunnell *v.* Greathead, 49 Barb. (N. Y.) 106; Duberley *v.* Gunning, 4 T. R. 657; Winter *v.* Henn, 4 C. & P. 498; 19 E. C. L. 491; Walsey *v.* Bissett, 2 T. R. 168, *n*; Foley *v.* Peterborough, 4 Doug. 494.

"But it is now uniformly held to be essentially necessary that the plaintiff should present himself in court with clean hands; that is, without any imputation of having counted his own dishonor, or having been instrumental to his own disgrace; and if the husband has consented to, or provided means for the adulterous intercourse, the ground of the action is removed." Travis *v.* Barger, 24 Barb. (N. Y.) 614.

Contra, Cibber *v.* Sloper, Buller N. P. 27, where the action was allowed although the defendant's privity was clearly proved. If he suffers his wife to live as a prostitute, he can have no action. It is *damnum absque injuria*. Cook *v.* Wood, 30 Ga. 891; 76 Am. Dec. 677; Sherwood *v.* Titman, 55 Pa. St. 77; Sanborn *v.* Neilson, 4 N. H. 501.

But it is no defense that the marriage was kept secret and the husband permitted her to retain her maiden name, and visited her only at intervals. Calcraft *v.* Harborough, 4 C. & P. 499; 19 E. C. L. 494. A husband's cohabitation with his wife after knowledge of her adultery, is not a bar to an action of *crim. con.* brought by him against her paramour. Verholf *v.* Van Houwenlengen, 21 Iowa 429; Stumm *v.* Hummel, 39 Iowa 478. Condonation of a wife's adultery with one person is no defense to an action against another for criminal conversation. Clouser *v.* Clapper, 59 Ind. 548.

ages are permitted,[1] but the defendant may prove in mitigation of damages the previous unchaste character of the wife,[2] or her consent to the adultery,[3] or the plaintiff's cruelty,[4] or immorality,[5] or want of affection for his wife.[6]

1. Damages.—Excessive damages are no ground for a new trial in a suit for criminal conversation with the plaintiff's wife. Torre *v.* Summers, 2 Nott & M. (S. Car.) 267.

Ferguson *v.* Smethers, 70 Ind. 519: 36 Am. Rep. 186; Wilton *v.* Webster, 7 C. & P. 198, 32 E. C. L. 491; Chambers *v.* Caulfield, 6 East 244 (£2,000); Duberley *v.* Gunning, 4 T. R. 651 (£5,000); Jones *v.* Sparrow, 5 T. R. 257; Blunt *v.* Little, 3 Mason (U. S.) 102; Cowing *v.* Cowing, 33 L. J. Mat. Cas. 149; Stumm *v.* Hummel, 39 Iowa 478.

"The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true that, because appellee was absent from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a virtuous and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children." Yundt *v.* Hartrunft, 41 Ill. 9.

2. Clouser *v.* Clapper, 59 Ind. 548; Torre *v.* Summers, 2 Nott & M. (S. Car.) 267; 10 Am. Dec. 597; Davenport *v.* Russell, 5 Day (Conn.) 149; Conway *v.* Nicol, 34 Iowa 533; Sanborn *v.* Neilson, 4 N. H. 501; Foulks *v.* Archer, 31 N. J. L. 58; Love *v.* Masoner, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522.

In an action for criminal conversation with the plaintiff's wife, an instruction that "if her bad conduct was confined exclusively to her intimacy with the defendant, and the plaintiff was induced to marry her by the defendant's recommendation that she was a good girl, and plaintiff believed that she was pure and virtuous, then her bad conduct before marriage, if you find there was such, should not be considered in mitigation of damages." *Held*, to be both sound law and good morals. Stumm *v.* Hummel, 39 Iowa 478.

In an action for criminal conversation, a want of virtue in the plaintiff and his wife does not need to be pleaded in order to authorize evidence of the fact to be produced in mitigation of damages. Harrison *v.* Price, 22 Ind. 165; Harter *v.* Crill, 33 Barb. (N. Y.) 283.

3. "A wife that will go to a cornfield to meet her paramour and have adulterous intercourse with him on the ground in a fence corner, is much less valuable to her husband than one who stays at home and demeans herself becomingly." Ferguson *v.* Smethers, 70 Ind. 519; 36 Am. Rep. 186.

4. Coleman *v.* White, 43 Ind. 429; Hadley *v.* Heywood, 21 Mass. 236.

In an action for criminal conversation with the plaintiff's wife, the plaintiff's general character is not in issue, but only his character as a husband.

Evidence, therefore, that the plaintiff sustains the character of a common drunkard, is inadmissible; but evidence of unkind treatment by him of his wife, produced by drunkenness, or otherwise, is admissible. Norton *v.* Warner, 9 Conn. 172. *Compare* Grider *v.* Dent, 22 Mo. 490.

5. Shattuck *v.* Hammond, 46 Vt. 466; 14 Am. Dec. 631; Bromley *v.* Wallace, 4 Esp. 237; Wyndham *v.* Wycombe, 4 Esp. 16; Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

6. Dance *v.* McBride, 43 Iowa 624; Palmer *v.* Crook, 7 Gray (Mass.) 418; Winter *v.* Wroot, 1 M. & W. 404. But unhappy relations cannot be shown. Dallas *v.* Sellers, 17 Ind. 479; 79 Am. Dec. 489; Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578.

SEEKING.—See note 1.

SEEM.—See note 2.

SEISIN—(See also DISSEISIN, vol. 5, p. 704; TITLE).—Seisin is the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold.[3] In strictness, there is no such thing as seisin of land; the seisin is of an estate in the land, and not of the land itself. And although the expression seised of land is sometimes used, it means only that the party is seised in fact of a present freehold estate, which may be for life or in fee, in the land.[4]

SEIZURE.—See SEARCHES AND SEIZURES.

SELECT—*Compare* APPOINT, vol. 1, p. 631 n.).—See note 5.

SELECTMEN.—See POOR, vol. 18, p. 777; TOWNS.

1. **Seeking a Livelihood.**—See LIVELIHOOD, vol. 13, p. 930.

2. **Seem Best.**—See BEST, vol. 2, p. 184.

3. Towle *v.* Ayer, 8 N. H. 59.

Seisin signifies, in the common law, possession. Co. Litt. 153, a. See also Slater *v.* Rawson, 6 Met. (Mass.) 439.

At common law it imported a feudal investiture of the title by actual possession. Ford *v.* Garner, 47 Ala. 603.

Seisin in Fact, Seisin in Deed, Constructive Seisin.—Seisin denotes, ordinarily, a possession in fact by one having or claiming a freehold interest, which is known as seisin in deed, or a right of immediate possession, which is a seisin in law. There may be a constructive seisin, the equivalent of seisin in deed. Jenkins *v.* Fahey, 73 N. Y. 362.

A seisin, in the sense of the ancient law, was the completion of the feudal investiture by which the tenant was admitted into the feud, and performed the rites of homage and fealty. A seisin in fact is now understood to be a possession with intent on the part of him who holds it to claim a freehold; while a seisin in law is the right of immediate possession, according to the nature of the estate. Upchurch *v.* Anderson, 3 Baxt. (Tenn.) 411.

Seisin is of two kinds: seisin in law arises when the grantor of real estate gives the right of present possession to the grantee. Seisin in deed is the actual possession of freehold estates. Hart *v.* Bean, 2 MacArthur (D. C.) 60.

4. Van Rensselaer *v.* Poucher, 5 Den. (N. Y.) 44.

Covenant of Seisin.—See COVENANT vol. 4, p. 477, *et seq.*; REAL COVENANTS, vol. 19, p. 973.

5. **Exemption.**—An *Illinois* exemption statute after enumerating certain articles to which the exemption applied, added: "And sixty dollars' worth of property suited to his or her condition or occupation in life, to be selected by the debtor." In Cole *v.* Green, 21 Ill. 104, the question considered was, whether it was necessary, when the debtor had but sixty dollars worth of property, for him to make the formal selection. It was held that it was not. The court by Caton, C. J., said: "This is necessarily implied by the meaning of the word 'select,' which is to pick out, or take from among a number. There can be no selection where there is nothing left. One may take the whole, but he cannot select the whole. Where there is but sixty dollars' worth of property this portion of the statute can have no application or meaning." And to the same effect see State *v.* Haggard, 1 Humph. (Tenn.) 392, where it is said: "To 'select and set apart' means the taking one or more articles from other articles of a like character." See generally, upon the selection of property for exemption under the homestead and other exemption laws, EXECUTIONS, vol. 7, p. 142; HOMESTEAD, vol. 9, p. 425.

SELF-DEFENSE.—See also ASSAULT, vol. 1, p. 788; HOMICIDE, vol. 9, p. 529; RECAPTION, vol. 19, p. 1093; SEAMEN; THREATS; TRESPASS.

I. Definition, 1058.
II. Nature of the Right, 1058.
III. Defense of the Person, 1058.
1. *When Assaulted*, 1058.
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IV. Defense of Character (see LIBEL AND SLANDER, vol. 13, p. 422), 1062.
V. Defense of Property, 1062.

I. DEFINITION.—The term "self-defense" may be defined to be a species of redress exercised by one person to protect his person or property from injury by another.[1]

II. NATURE OF THE RIGHT.—The right of self-defense is derived from nature.[2] To repel force by force is the common instinct of every creature that has means of defense. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty. Municipal law has left to individuals the exercise of this natural right of self-defense in all cases in which the law is either too slow or too feeble to stay the hand of violence.[3] The right extends not only to the individual himself but to those who bear the relation to him of parent and wife; and it also extends to his house, called in the law his "castle"; the defense of which he may make effectual from all attacks. And if, in making this defense, it becomes necessary to take the life of the aggressor, it will not be felonious but excusable homicide.[4] At the same time no right is to be abused or made the cloak of wrong, and this right is one easily abused. The law limits the right by necessity.[5] When self-defense is interposed in justification of acts done, the first inquiry is as to the alleged necessity. When such necessity, real or apparent, ceases, the right no longer exists. No power can be used by the party making the defense beyond what will simply prove effectual.[6]

III. DEFENSE OF THE PERSON—1. When Assaulted.—If an assault is made upon one it may be repelled by force sufficient for self-

1. Mr. Wharton defines self-defense as an excuse for the use of force in resisting an attack on the person, and especially for killing an assailant. Whart. Cr. Law, §§ 1019, 1026.

2. 2 Bishop's Cr. L., § 569; Long *v.* State, 52 Miss. 23.

3. 2 Kent's Com. 15; see Com. *v.* Ellenger, 1 Brews. (Pa.) 352.

Blackstone says: "For the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself or to those whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another." 3 Bl. Com., p. 4.

4. 2 Bishop's Cr. L., § 569; see Drysdale *v.* State, 83 Ga. 744; Stoneham *v.* Com., 86 Va. 523.

5. Pollock on Torts 147; see Combs *v.* Com. (Ky. 1888), 9 S. W. Rep. 655.

6. Hawthorne *v.* State, 28 Tex. App. 212; Barnards *v.* State, 88 Tenn. 183.

A person has no right to beat one

defense. The party making the first assault is liable not only for a breach of the peace but for all the personal injuries he has inflicted.[1] But the law requires that no more violence be used in self-defense than appears to the person defending his rights to be reasonable under the circumstances to repel the assault.[2] Thus, it is not justifiable to use a deadly weapon to repel a push or blow with the hand.[3] If the person assaulted uses excessive force beyond what is necessary for self-defense, he not only deprives himself of the right to maintain an action for the assault,[4] but is liable for the excess.[5] If the assault is of such a nature as to afford reasonable ground to believe that the design is to destroy life or commit a felony upon the person assaulted, killing of the assailant will be excusable homicide in self-defense.[6] But the

who has assaulted him, except as necessary for his own defense. People *v.* McGrath, 47 Hun (N. Y.) 325.

1. Dole *v.* Erskine, 35 N. H. 503.

2. State *v.* Brooks, 99 Mo. 137.

The law abhors the use of force either for attack or defense, and never permits its use unnecessarily. A person assaulted cannot use force if he can otherwise protect himself if he has other means of avoiding the assault that are available and that appear to him at the time sufficient and are in fact available. Howland *v.* Day, 56 Vt. 318; People *v.* McGrath, 47 Hun (N. Y.) 325.

While the law abhors force and never sanctions its use beyond what is naturally provoked, it does not keep all its tenderness for the wrongdoer who begins the mischief. A person violently and causelessly assaulted by another is not limited to the use of force so long as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received and will not thereby be guilty of assault and battery. People *v.* Pearl, 76 Mich. 207.

When Rape Attempted.—A woman is justified in repelling an attempted rape by the use of a deadly weapon, but, if indicted for so using such weapon, she must show, by way of defense, that the circumstances were such as to justify her, as a reasonable person, in believing that she was actually in danger of being ravished. People *v.* De Los Angeles, 61 Cal. 188.

3. Pollock on Torts, p. 148.

Where A and B engaged in mutual combat, and A first struck B with his fists, who, without attempting to withdraw, struck back with a deadly weapon, it was held that B's act was not justifiable on the ground of self-defense. Presser *v.* State, 77 Ind. 274.

As a general rule, the law will not justify a man who repels a blow with the fist by stabbing his assailant. Floyd *v.* State, 36 Ga. 91; 91 Am. Dec. 760.

One acting in self-defense is not justified in using a knife or other dangerous weapon where the circumstances do not show any reasonable apprehension of great bodily harm. Close *v.* Cooper, 34 Ohio St. 98.

4. Elliott *v.* Brown, 2 Wend. (N. Y.) 497; 20 Am. Dec. 644.

5. Elliott *v.* Brown, 2 Wend. (N. Y.) 497; 20 Am. Dec. 644; Philbrik *v.* Foster, 4 Ind. 442; Hazel *v.* Clark, 3 Harr. (Del.) 22; Com. *v.* Ellenger, 1 Brews. (Pa.) 352; Scribner *v.* Beach, 4 Den. (N. Y.) 448; 47 Am. Dec. 265; State *v.* Sherman, 16 R. I. 631.

6. Kirby *v.* State, 89 Ala. 63; Com. *v.* Ware, 137 Pa. St. 465; State *v.* Peterson, 41 La. Ann. 85; State *v.* Evans, 33 W. Va. 417; Higgins *v.* Minaghan, 76 Wis. 298. See State *v.* Fraunburg, 40 Iowa 555; People *v.* Bruggy (Cal. 1891), 26 Pac. Rep. 756; State *v.* Harrod, 102 Mo. 590; Palmer *v.* State (Tex. 1890), 15 S. W. Rep. 286; People *v.* Adams, 85 Cal. 231; State *v.* Shreves, 81 Iowa 615; Perkins *v.* State, 78 Wis. 551; State *v.* Murdy, 81 Iowa 603; Watson *v.* Com., 87 Va. 608; People *v.* Olsen, 4 Utah 413; Gonzales *v.* State, 28 Tex. App. 130; Cochran *v.* State, 28 Tex. App. 422; State *v.* Jackson, 32 S. Car. 27; State *v.* Evans, 33 W. Va. 417; High *v.* State, 26 Tex. App. 545; Miller *v.* State, 27 Tex. App. 63; Kelly *v.* State, 27 Tex. App. 562; Squire *v.* State, 87 Ala. 114; Stanley *v.* Com., 86 Ky. 440; State *v.* Jones, 29 S. Car. 201;

accused, to avail himself of the plea of self-defense, must have been free from fault in provoking or bringing on the difficulty which resulted in the killing. It is not enough that in the course of the difficulty it became necessary for him to kill the deceased in order to save his own life or prevent great bodily harm.[1] It

Allen *v.* State, 24 Tex. App. 216; Chittenden *v.* Com. (Ky. 1888), 9 S. W. Rep. 386.

In Morris *v.* Platt, 32 Conn. 75, it was held in an action of trespass for assault by shooting that a man who is assaulted under such circumstances as to authorize a reasonable belief that the assault is made with the design to take his life or inflict extreme bodily injury, will be justified in both civil and criminal law if he kill or attempts to kill his assailant.

A charge in regard to self-defense, that the jury should ask themselves what they would have done under the circumstances surrounding the accused at the time, and should "place themselves in the shoes of defendant," was properly rejected. The true questions for them to determine were whether defendant believed he was in such imminent danger of his life, or of serious bodily harm, as to require taking the life of his assailant, and whether the circumstances were such as to justify that belief in the mind of a person of ordinary fairness and reason. State *v.* Wyse, 33 S. Car. 582. See Pinder *v.* State, 27 Fla. 370; Burgess *v.* Territory (Mont. 1888), 19 Pac. Rep. 558; State *v.* Donahoe, 78 Iowa 486; Smith *v.* State, 25 Fla. 517.

In *Tennessee* the law of self-defense under the decisions is that "if, at the time of the killing, the defendant was in danger of death or great bodily harm, or honestly believed, upon reasonable grounds, that he was in such danger, then the killing would not be murder or manslaughter, but would be self-defense." Held, that a charge on self-defense which used the term "great or enormous bodily harm," instead of "great bodily harm," was prejudicial error. McDonald *v.* State, 89 Tenn. 161.

An instruction that if the accused had reasonable ground for believing that the deceased designed to kill him, or to inflict on him great bodily harm, and there was imminent danger of carrying such design into immediate execution, the killing was excusable, although it may have turned out afterwards that deceased had no such design, is correct. It is not necessary that there should have been actual danger to justify the homicide. Brown *v.* Com., 86 Va. 466; State *v.* Jones, 29 S. Car. 201; Thompson *v.* State, 24 Tex. App. 383; Bonnard *v.* State, 25 Tex. App. 173; Humphries *v.* State, 25 Tex. App. 126; State *v.* Keasling, 74 Iowa 528; Vollmer *v.* State, 24 Neb. 838; U. S. *v.* King, 34 Fed. Rep. 302.

The mere fact that a person assailed with threats and offensive language puts his hand in his pocket, does not authorize the inference by the assailant that he is about to draw a weapon, so that acts of violence committed against him are justified as in self-defense. Mitchell *v.* State, 41 Ga. 527. See State *v.* Bryant, 102 Mo. 24; Turner *v.* State, 89 Tenn. 547; Gibson *v.* State (Ala. 1891), 9 So. Rep. 171.

1. Ranes *v.* State, 88 Ala. 91; Kirby *v.* State, 89 Ala. 63; People *v.* Adams, 85 Cal. 231; People *v.* O'Brien, 78 Cal. 41; Parker *v.* State, 88 Ala. 4; People *v.* Bruggy (Cal. 1891), 26 Pac. Rep. 756; Felker *v.* State, 54 Ark. 489; Hash *v.* Com. (Va.), 13 S. E. Rep. 398; Cotten *v.* State (Ala. 1891), 9 So. Rep. 287; Lewis *v.* State, 88 Ala. 11; Farris *v.* Com. (Ky. 1886), 1 S. W. Rep. 729; State *v.* Bodie, 33 S. Car. 117; Rutledge *v.* State, 88 Ala. 85; Gonzales *v.* State, 28 Tex. App. 130; State *v.* Hawkins, 18 Oregon 476; State *v.* Murrell, 33 S. Car. 33; Crane *v.* Com. (Ky. 1890), 13 S. W. Rep. 1079; Oakley *v.* Com. (Ky. 1889), 11 S. W. Rep. 72; Williams *v.* State, 83 Ala. 16; Fallin *v.* State, 83 Ala. 5; People *v.* Macord, 73 Mich. 15; State *v.* Herrell, 97 Mo. 105.

Anyone who brings on or provokes a personal encounter cannot rely on the plea of self-defense. Page *v.* State, 69 Ala. 229; Johnson *v.* State, 69 Ala. 253; Com. *v.* Hourigan (Ky.), 12 S. W. Rep. 550; State *v.* Bryson, 2 Winst. (N. Car.) 86; People *v.* Giancoli, 74 Cal. 642; State *v.* Scott, 41 Minn. 365; State *v.* McDaniel (Mo. 1887), 7 S. W. Rep. 634; State *v.* Davidson (Mo. 1888), 8 S. W. Rep. 413; State *v.* Gilmore (Mo. 1888), 8 S. W. Rep. 359; Robinson *v.* Com. (Ky. 1889), 11 S. W. Rep. 81; Jackson *v.*

is even said that a man attacked with a deadly weapon must retreat as far as he safely can before he is justified in defending himself by like means.[1]

The question of how much force the person assaulted has a right to use in repelling the assault must be passed upon by the jury.[2] And where a man kills an assailant under the belief that his life is in danger, the question whether the belief is reasonable under the circumstances of the case must also be determined by the jury.[3]

As to injuries received by an innocent third person from an act done in self-defense, they must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It is to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as if he had time to act deliberately.[4] See also HOMICIDE, vol. 6, pp. 593–605.

State, 28 Tex. App. 108; State *v.* Hardy (Mo. 1888), 8 S. W. Rep. 416.

In an action for an assault and battery, the defendant cannot invoke the doctrine of self-defense where the evidence shows that he provoked and brought on the difficulty and committed the battery on the prosecuting witness by placing a pistol against his chin in an angry and insulting manner. Johnson *v.* State, 69 Ala. 253.

One who provokes and brings on an affray cannot claim that he beat an adversary in self-defense, however imminent the danger to which he was exposed during the affray. Jones *v.* Gale, 22 Mo. App. 637.

Where the defendant sought out the deceased and by insulting language intentionally provoked the assault of the deceased and with the purpose of using his weapon in an emergency, he cannot plead the law of self-defense. State *v.* Scott, 41 Minn. 365; State *v.* Herrell, 97 Mo. 105; Allen *v.* State, 66 Miss. 385; Hassen *v.* Com. (Ky. 1889), 11 S. W. Rep. 286; State *v.* Rider (Mo. 1888), 8 S. W. Rep. 723.

A defendant may justify homicide on the ground of self-defense, though he himself brought on the quarrel, provided that in so doing he was not actuated by a design to kill the deceased or to do him great bodily harm; State *v.* Parker (Mo. 1888), 9 S. W. Rep. 728; or provided he abandoned the difficulty and was afterwards attacked in such a manner as to give him reasonable ground to believe that the deceased intended to kill him. Allen *v.* Com. (Ky. 1888), 9 S. W. Rep. 703; Fitzgerald *v.* Com. (Ky. 1887), 6 S. W. Rep. 152; Bean *v.* State, 25 Tex. App. 346; Allen *v.* State, 24 Tex. App. 216.

1. Shell *v.* State, 88 Ala. 14; Rutledge *v.* State, 88 Ala. 85; Watkins *v.* State, 89 Ala. 82; Hammil *v.* State, 90 Ala. 577; Blackburn *v.* State, 86 Ala. 595; Morrison *v.* State, 84 Ala. 405; Fallin *v.* State, 83 Ala. 5; Brown *v.* State, 83 Ala. 33; Davis *v.* State, 92 Ala. 20; Squire *v.* State, 87 Ala. 114; Poe *v.* State, 87 Ala. 65; Campbell *v.* Com. (Ky. 1891), 16 S. W. Rep. 127. See Com. *v.* Ware, 137 Pa. St. 465; Perkins *v.* State, 78 Wis. 551; State *v.* Roberts, 63 Vt. 139; Ball *v.* State, 27 Tex. App. 107; Hudson *v.* State, 28 Tex. App. 323; People *v.* Macord, 73 Mich. 15; Single *v.* Com. (Ky. 1889), 11 S. W. Rep. 812; Duncan *v.* State, 49 Ark. 543.

It is error to charge the jury, upon a trial for murder, that to justify homicide, on the plea of self-defense, it must appear that the slayer had no other possible, or at least probable, means of escaping. Babcock *v.* People, 13 Colo. 515.

2. Edwards *v.* Leavitt, 46 Vt. 128.

It is for the jury to determine when and with what force the assaulted party may strike,—whether immediately, or after retreating. Gallagher *v.* State, 3 Minn. 270.

3. Morris *v.* Platt, 32 Conn. 75; State *v.* Littlejohn, 33 S. Car. 599; Nalley *v.* State, 28 Tex. App. 387; State *v.* Scheele, 57 Conn. 307.

4. Morris *v.* Platt, 32 Conn. 75; Scott *v.* Shepherd, 2 W. Bl. 892. See Whalley *v.* Lancashire, etc., R. Co., 13 Q. B. Div. 131.

2. Resisting Arrest.—Resistance to unlawful arrest is justifiable.[1] An arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm is held even to justify the killing of an officer.[2] But no more force must be used than is necessary; if one uses greater force than is necessary in resisting an arrest he will be guilty of an assault though the attempted arrest be unlawful.[3]

IV. DEFENSE OF CHARACTER.—See LIBEL AND SLANDER, vol. 13, p. 422.

V. DEFENSE OF PROPERTY.—The right to defend one's person has also been extended to the right to protect one's possessions.[4] A man may defend or regain his momentarily interrupted possession by the use of reasonable force short of wounding or the employment of a dangerous weapon.[5] To justify a resort to force in defense of property the danger should be such as to induce one exercising a reasonable and proper judgment to interfere to pre-

1. Massie *v.* State, 27 Tex. App. 617.

2. Jones *v.* State, 26 Tex. App. 1.

On a trial for murder by killing one of the constable's *posse* while resisting arrest, an instruction that, if defendants believed the arrest a pretext by deceased and the others to disarm them, and inflict bodily harm, they might resist by any means in their power, was held defective in not saying that if the jury found deceased was present in good faith, under a lawful summons to assist in the arrest, but defendants had reason to believe the constable and some others of the *posse* were making the arrest with such intent, and that deceased, with such others present as were lawfully disposed, would fail to protect them, then defendants might resist, and, if necessary, kill the constable or other unlawful assailants, and that if, in using such right with reasonable precaution, they accidentally killed deceased, they should be acquitted. Minniard *v.* Com., 87 Ky. 213.

3. People *v.* Murray (Supreme Ct.), 7 N. Y. Supp. 548.

4. Com. *v.* Donahue, 148 Mass. 529; Thompson *v.* Berry, 1 Cranch (C. C.) 45; Com. *v.* Goodwin, 3 Cush. (Mass.) 154; Gyre *v.* Culver, 47 Barb. (N. Y.) 592; State *v.* Lazarus, 1 Mill (S. Car.) 34; Davis *v.* Whitridge, 2 Strobh. (S. Car. 232; McIlroy *v.* Cockran, 2 A. K. Marsh. (Ky.) 271; Robinson *v.* Hawkins, 4 T. B. Mon. (Ky.) 135; Baldwin *v.* Hayden, 6 Conn. 453; Souther *v.* State, 18 Tex. App. 352.

The owner of land may, by the use of reasonable and necessary force, resist an attempt by the former occupant to retake possession. Bliss *v.* Johnson, 73 N. Y. 529.

The rightful owner of a house having obtained possession thereof peaceably and having the right to the possession, will not be guilty of an assault and battery in using all necessary force to defend his possession. Corey *v.* People, 45 Barb. (N. Y.) 262.

A obtained in a divorce suit an order for the custody of his child. Held, that he might be convicted of assault and battery for using force in overcoming the resistance interposed by the owner of the house in which the child was to his entry for the purpose of taking the child. Com. *v.* Beals, 133 Mass. 396.

Protection of Gambling Room.—The law knows no reasonable rule for the protection of a gambling room or games played in violation of law; hence, a gambler on trial for assault cannot justify on the ground that the assault was committed in ejecting the person assaulted from a gambling room for disorder. Pierce *v.* State, 21 Tex. App. 540.

5. Com. *v.* Donahue, 148 Mass. 529; Com. *v.* Lynn, 123 Mass. 218; Com. *v.* Kennard, 8 Pick. (Mass.) 133; See Johnson *v.* State, 26 Tex. App. 631.

Where plaintiff went on defendant's land, and loaded certain slabs without right or license, held, in an action for assault, that defendant could use sufficient force to retake them. Johnson *v.* Perry, 56 Vt. 703; 48 Am. Rep. 826.

An execution purchaser of goods going on the lands of the execution debtor, with a pistol, to seize the

vent a consummation of the injury.[1] The amount of force used must not be more than is necessary under the circumstances.[2]

The article HOMICIDE contains a complete discussion of the right of one man to kill another in the protection of his property.[3] Cases have arisen on the killing of animals in defense of one's property. Here, as elsewhere, the test is whether the party's act was such as he might reasonably in the circumstances think necessary for the prevention of harm which he was not bound to suffer.[4] In determining the question of the reasonableness of resorting to extreme measures to protect property, the value of the animal doing the mischief, the disturbance and mischief likely to be wrought, the probability of less severe measures being unsuccessful, and the necessity for immediate action, are all elements to be considered in reaching a conclusion.[5]

goods, the sale being illegal, or the goods having before the levy been sold by the debtor to a third person for whom he was holding them, held that the debtor might lawfully resist him with a deadly weapon if he had a reasonable apprehension of danger from him. People *v.* Dann, 53 Mich. 490; 51 Am. Rep. 151.

1. Hill *v.* Rogers, 2 Iowa 67. A mere suspicion or fear of encroachment is not a justification for the use of force. McAuley *v.* State, 3 Greene (Iowa) 435.

2. Thompson *v.* Berry, 1 Cranch (C. C.) 45; Bliss *v.* Johnson, 73 N. Y. 529; U. S. *v.* Bartle, 1 Cranch (C. C.) 236; Tiffany *v.* Com., 112 Pa. St. 565.

3. See HOMICIDE, vol. 9, pp. 606, 607.

4. Simmonds *v.* Holmes, 61 Conn. 1; Lipe *v.* Blackwelder, 25 Ill. App. 119; Dunning *v.* Bird, 24 Ill. 270; Boecher *v.* Lutz, 13 Daly (N. Y.) 28; Braner *v.* English, 21 Mo. App. 490; Thompson *v.* State, 67 Ala. 106; 42 Am. Rep. 101; Davis *v.* State, 12 Tex. App. 11.

At the trial of an action for killing the plaintiff's dog, the judge, who tried the case without a jury, found that the dog came upon the defendant's premises, and there killed and maimed some of his hens, which were in his hen-house; that the dog, after having been driven away, came upon the defendant's premises again, and was killed by him while running towards his hen-house, he having reasonable cause to believe that the dog was proceeding to maim and kill others of his hens. *Held*, that, as it was not found that the defendant had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens, the defendant had no ground of exception to a ruling that the killing of the dog was not justifiable. Livermore *v.* Batchelder, 141 Mass. 179.

An action was brought to recover damages for killing a dog which was trespassing late at night destroying property on the defendant's premises. In rendering judgment in the case, Wilkin, J., said: "That appellant was bound to only use such force as was necessary to drive him away, taking chances on his immediate return when he had again retired, and look to an unknown owner for compensation for damages sustained, cannot be law, and we hold that when he found him coming out of his building, where he had property which he knew the animal would, by instinct, destroy, it being at a late hour of night, having no means of knowing his owner, and knowing the disposition of such an animal under such circumstances to return to the place where he was found, he had a right to shoot him, in the reasonable necessary defense of his property. It is no answer to say that it was the duty of appellant to so construct his building that the dog could not get into it. The dog was a trespasser and it does not lie in the mouth of his owner to say that the building was insecure." Dunning *v.* Bird, 24 Ill. App. 270.

5. Lipe *v.* Blackwelder, 25 Ill. App. 123.

The fact that a dog is trespassing in a garden in which he has trespassed before and that the owner of the garden believes that the dog will damage his garden, will not justify him in killing it, whether it was actually doing damage or not. Sosst *v.* State (Ind.), 28 N. E. Rep. 1017.

SELL—(See also CARRY, vol. 3, p. 19; CONVEY, vol. 4, p. 131; SALE; SOLD).—See note 1.

SEMBLE.—It appears; it seems. Used in the reports in quoting a *dictum* (*q. v.*), or a case which only indirectly bears on a point.[2]

SEMICOLON.—According to well-established grammatical rules, a semicolon is a point only used to separate parts of a sentence more distinctly than a comma.[3]

SEMINARY—(See also SCHOOLS; UNIVERSITIES AND COLLEGES).—The word seminary has not acquired any definite and fixed legal meaning, though occasionally used in a general way to designate institutions for the promotion of learning.[4]

SEND—(See also INDICTMENT, vol. 10, p. 599*d*; LETTER, vol. 13, p. 231; THREATS).—See note 5.

SENIOR—(See also NAME, vol. 16, p. 121).—As an adjective, Webster defines senior as one more advanced in life; one older in office or dignity; prior in age or rank, older; and as a noun, one older in office, or whose entrance upon an office was anterior to that of another.[6]

1. For the construction of powers to "sell" real property, see POWERS, vol. 18, p. 877.

Sell and Mortgage.—An inhibition upon the board of trustees of a corporation by one of the articles of its incorporation, to "sell" real estate, is not necessarily an inhibition upon the power to mortgage. Krider *v.* Western College, 31 Iowa 547.

"Sell" in a statute making it a felony to fraudulently sell or dispose of land after having once sold it, does not include a mortgage. People *v.* Cox, 45 Cal. 342.

And that power to sell does not include power to mortgage, see POWERS, vol. 18, p. 940. *Compare* CORPORATIONS, vol. 4, pp. 219, n. 3; 236, n. 2.

Sell and Exchange.—See EXCHANGE, vol. 7, p. 115.

Sell Lottery Tickets.—See LOTTERIES, vol. 13, p. 1176.

2. Rap. & Law. L. Dict.

3. Lambert *v.* People, 76 N. Y. 220; 32 Am. Rep. 293. And see the case for a discussion of the effect of a semicolon.

Compare INTERPRETATION, vol. 11, p. 521.

4. Chegaray *v.* Mayor, etc., of N. Y., 13 N. Y. 229. In Hennepin Co. *v.* Grace, 27 Minn. 503, a parish school was held a "seminary" within an exemption statute. The court by Cornell, J., said: "The word 'seminary' has no fixed legal meaning. Abb. L. Dict. 'Seminary.' It is defined by Webster to be 'a place of training; institution of education; a school, academy, college, or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments.' The original of the word would seem to imply a place where the seeds of education are sown and implanted. It is neither a strained nor unnatural construction to hold that it was used in the clause under consideration in its broadest sense, to denote any and every place of training or institution of learning not already specifically named."

5. An *Indiana* statute provides that one who "sends" a claim out of that State with intent to deprive a debtor of the benefit of the exemption laws, shall be guilty of an offense. In State *v.* Dittmar, 120 Ind. 54, it was held that one who himself takes a claim out of the State is within the statute. The court by Elliott, C. J., said: "The appellee did send the claim into Kentucky within the meaning of the law, for among other meanings assigned to the word 'send' are these: 'To cause to be conveyed or transmitted,' 'to cause to be,' 'to cause to do the act.' Encyclopædic Dict. The appellee unquestionably caused the claim to be conveyed to Kentucky, and caused the act to be done, although he caused himself to do it."

6. State *v.* Hueston, 44 Ohio St. 6.

Taking this language alone, it may be construed to mean, not one who entered upon his present term of office first, but one who has been longest in the office. But in that case it was held that, as applied to a judge, the word means he who has served the longest under his present commission, rather than he who had been longest in continuous service. The court by Spear, J., said: "Reference to the definitions given by lexicographers scarcely aids in getting at the meaning of the word 'senior' in this statute, for it is hardly probable that the legislature gave much attention to the study of etymology in the adoption of the word, or to the definition given in the dictionaries. The meaning is given by Webster, as adjective, 'one more advanced in life; one older in office or dignity; prior in age or rank; elder;' and as noun, 'one older in office, or whose entrance upon an office was anterior to that of an another.' Taking this language alone, it may be construed to mean, not one who entered upon his present term of office first, but one who has been longest in the office. But no meaning of a word which has received a construction, by law or uniform custom, can be adopted from the dictionaries in conflict with that construction. And where a word is reconcilable with law or established custom in the particular manner in which it is used, a different meaning cannot be given to it upon the authority of a lexicographer. Hence if we can ascertain that this word has a meaning in Ohio in reference to the judiciary, understood by custom and the provisions of the law relating to courts, it is reasonable to assume that the legislature made use of it intending it should receive that meaning in any construction of the law.

"It is believed that neither in our present constitution nor laws is importance attached to the length of service of a judge beyond that of his existing term."

But in the Opinion of the Justices, 126 Mass. 603, where a statute provided that upon a vacancy in the office of sheriff the "senior deputy sheriff in service" should perform the duties, it was said that the legislature "has not, by the words 'the senior deputy sheriff in service,' designated the deputy sheriff in office when the vacancy occurs, who is oldest in years only; nor the one whose original appointment was of the earliest date, but who has not since remained continuously in office; nor yet the one who has served for the greatest number of years, but not continuously; but has designated, as the officer to perform the duties of sheriff during vacancy, the deputy sheriff 'senior in service' when the vacancy occurs—that is to say, the one who has been longest in office continuously."

In State *v.* Hueston, 44 Ohio St. 9, the court, by Spear, J., said of this case: "The opinion of the justices to the governor and council, cited above, was cited by counsel for defendant. The opinion quotes from the Massachusetts statute: 'Whenever a vacancy occurs in the office of sheriff in any county, the senior deputy sheriff in service shall perform all the duties required by law to be performed by the sheriff, until the office is filled in the manner required by law.' In the opinion the court say, that the legislature has, by the use of the words 'senior deputy sheriff in service' designated the one who has been longest in office continuously. How the deputies were appointed is not shown to us, nor is it shown whether they continued under their original appointment until removed, or their appointment died with their principal, and they were reappointed with each new sheriff. The use by the legislature of the words 'in service' would imply that, standing alone, the word 'senior' would not mean oldest in service; if the word 'senior' alone implied longest in continuous service, then the words 'in service' would be clearly superfluous, and we are not swift to charge the general court of Massachusetts with embodying words in the statutes which have no meaning. In the language of Judge Thurman, in Bloom *v.* Richards, 2 Ohio St. 402, 'mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided.' But though this opinion be as strong for the defendant as is claimed, yet while considering the weight to be given to it we should keep in mind that in Massachusetts the policy of the law has been from colonial days, and is now in a large measure, to continue men in office for long periods; the courts are supplied with judges for life, and in many respects the reverse of the Ohio policy is favored there. This is believed to be true of the State of Connecticut and of others of the older States."

SENTENCE.—(See also CONFLICT OF LAWS, vol. 3, p. 536; CONSTITUTIONAL LAW, vol. 3, p. 670; CONVICTION, vol. 4, p. 140; CRIMINAL LAW, vol. 4, p. 641; CRIMINAL PROCEDURE, vol. 4, p. 729; HABEAS CORPUS, vol. 9, p. 161.)

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I. DEFINITION.—A sentence is the final determination of a criminal court—the conclusion of law formally pronounced by a criminal court declaring the consequences to a defendant of the fact of guilt, confessed or ascertained by verdict.[1]

As a result of this final character of the sentence, it may be said, speaking generally, that when a sentence has been once ren-

1. See Com. *v.* Lockwood, 109 Mass. 323; And. L. Dict.; Black's Dict.

The term "sentence" is sometimes used to denote a final determination by a court of admiralty. And. L. Dict.

The term "judgment" is sometimes used as a synonym for sentence. And. L. Dict.

Under the *Texas* Code of Crim. Proc., there is both a judgment and sentence; the sentence following the judgment. Arcia *v.* State, 26 Tex. App. 193.

"A sentence is the order of the court, made in presence of the defendant, and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law." Clark's Crim. Laws of Texas 580.

Conviction.—The popular use of the term conviction signifies the confession of the accused in court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt. And this is its ordinary legal meaning. And. L. Dict. See JEOPARDY, vol. 11, p. 956; U. S. *v.* Watkinds, 7 Sawy. (U. S.) 91; Quintard *v.* Knoedler, 53 Conn. 485; 55 Am. Rep. 149; Com. *v.* Lockwood, 109 Mass. 323; Bishop Stat. Crimes, § 348. But the term is also used in a manner which implies the rendition of sentence or judgment. Bishop Stat. Crimes, § 348; Dwar. Stat. (2d ed.) 683; Faunce *v.* People, 51 Ill. 311; Nason *v.* Staples, 48 Me. 123; Com. *v.* Gorham, 99 Mass. 420; Keithler *v.* State, 10 Smed. & M. (Miss.) 192; Marion *v.* State, 16 Neb. 349; Schiffer *v.* Pruden, 64 N. Y. 52; Blaufus *v.* People, 69 N. Y. 107; 25 Am. Rep. 148. See CONVICTION, vol. 4, pp. 140, 146.

dered, the court has no power to disregard it and impose a new one.[1]

II. RENDITION—1. Time.—The sentence is rendered usually immediately after a plea or verdict of guilty,[2] unless rendition is stayed by a motion in arrest of judgment,[3] or other step involving delay and which the practice of the court allows.[4] But the court, on cause shown, or for its own convenience and in the interest of justice, may postpone the sentence to a future day, during the same term,[5] or even to a subsequent term.[6] Sentence, however, may not be deferred in part, and the defendant allowed to depart subject to rearrest and further sentence on a future day.[7] A prisoner may waive a statutory right that sentence be passed within a specified time after plea or verdict of guilty,[8] or that a specified time elapse before sentence.[9]

2. Place; by Whom Pronounced.—The sentence must be given in open court and not privately in the judge's chamber[10] by one of the several judges before whom the trial was had.[11] It has

1. Hanrahan *v.* People, 95 Ill. 165; State *v.* Davis, 31 La. Ann. 249; Com. *v.* Foster, 122 Mass. 317; 23 Am. Rep. 326; People *v.* Meservey, 76 Mich. 223; People *v.* Kelley, 79 Mich. 320; State *v.* Addy, 43 N. J. L. 113. But see *infra*, this title, *Amendment or Alteration.*

2. See 1 Bish. Crim. Proc., § 1291; 1 Archb. Crim. Prac. and Pl. 180; 1 Chit. Crim. L. 699; State *v.* Snyder, 98 Mo. 555.

3. See CRIMINAL PROCEDURE, vol. 4, p. 882, n. 1; JUDGMENT, vol. 12, p. 147*b*.

4. **Certiorari.**—See People *v.* Yates, General Sessions, 5 Wend. (N. Y.) 110; CERTIORARI, vol. 3, p. 66, n. 3.

New Trial.—See People *v.* Felix, 45 Cal. 163; State *v.* Hoyt, 46 Conn. 330.

5. 1 Bishop's Crim. Proc. (3d ed.), § 1291, n. 4, *citing* Rex *v.* Haydon, 1 W. Bl. 351; *nom.* Rex *v.* Haydon, 3 Burr. 1387; State *v.* Brinyea, 5 Ala. 241; Rex *v.* Southampton, 2 Chit. 215.

6. Thurman *v.* State (Ark. 1891), 15 S. W. Rep. 84; People *v.* Felix, 45 Cal. 163; *Ex parte* Williams, 26 Fla. 310; State *v.* Ray, 50 Iowa 520; Easterling *v.* State, 35 Miss. 210; Gibson *v.* State, 68 Miss. 241; State *v.* Watson, 95 Mo. 411; State *v.* Guild, 10 N. J. L. 163; 18 Am. Dec. 404; Williams *v.* Com., 29 Pa. St. 102; State *v.* Miller, 6 Baxt. (Tenn.) 513. See People *v.* Kennedy, 58 Mich. 372.

In Sturgeon *v.* Gray, 96 Ind. 166, a delay of a month was held not to vitiate the judgment.

A convicted person under bail had his sentence twice postponed. When he appeared the second appointed time the court was not in session. It was held that he could not be sentenced afterwards, nor could his sureties be held. People *v.* Kennedy, 58 Mich. 372.

A defendant who has been found guilty generally upon an indictment containing several counts for distinct offenses, and who has been sentenced upon some of the counts to imprisonment, and imprisoned under such sentence, cannot be brought up at a subsequent term to which the case had not been continued, and sentenced anew upon another count in the same indictment, even if the first sentence was erroneous. Com. *v.* Foster, 122 Mass. 318; 23 Am. Rep. 326.

7. Gray *v.* State, 107 Ind. 177; People *v* Felker, 61 Mich. 110; State *v.* Addy, 43 N J. L. 113.

8. People *v.* Everhardt, 104 N. Y. 591.

9. People *v.* Robinson, 46 Cal. 94; People *v.* Mess, 65 Cal. 174; People *v.* Barton, 88 Cal. 176; People *v.* Johnson, 88 Cal. 171.

And, under such statutory provision, pronouncing judgment within the prescribed time is a mere irregularity, and no ground for *habeas corpus*. *In re* Barton (Utah, 1889), 21 Pac. Rep. 998. But it is error. O'Brian *v.* Com. (Ky. 1889), 12 S. W. Rep. 471.

10. Anonymous, T. Raym. 68.

11. U. S. *v.* Gordon, 5 Blatchf. (U. S.) 18.

been held that a judge may pronounce sentence in a case tried before his predecessor in office, in case of omission of the trial judge to pronounce it.[1]

3. Formalities—*a.* IN GENERAL; PRESENCE IN COURT.—When any corporal punishment is to be inflicted, the defendant must be personally before the court at the time of pronouncing the sentence.[2] But it is discretionary with the court to require his presence if a fine is to be imposed,[3] even though the offense is punishable by fine and imprisonment.[4] Although two or more

1. State *v.* Shea, 95 Mo. 85. It was so held in a case where, upon appeal, it was decided that the sentence was so defective as to not constitute a judgment, and was, therefore, remanded to the circuit court with direction to proceed and render judgment upon the verdict. But, before this direction could be complied with by the lower court, the judge, before whom the plaintiff in error was tried and convicted, had gone out of office, but his successor in office rendered judgment in compliance therewith. Pegalow *v.* State, 20 Wis. 61. See People *v.* Bork, 96 N. Y. 198.

But this power of a succeeding judge must be limited to supplying the omissions of his predecessor in office. Where the law fixed the maximum, but not the minimum punishment, and sentence had been suspended by the trial judge under circumstances indicating his opinion that no punishment should be inflicted, as, *e. g.*, where he had discharged the prisoner on his own recognizance in a nominal amount, a subsequent sentence by a different judge was held erroneous. Weaver *v.* People, 33 Mich. 296; 15 Am. L. Reg. N. S. 531. See 1 Chit. Crim. L. 697; People *v.* Blackburn (Utah, 1890), 23 Pac. Rep. 759.

2. 1 Chit. Crim. L. 695; Rex *v.* Harris (Duke's case), 1 Ld. Raym. 267; Comb. 447; Holt. 339; 1 Salk. 400; Skin. 684; Anonymous, Lofft 400; Rex *v.* Haun, 3 Bur. 1716; Ball *v.* U. S., 140 U. S. 118; Peters *v.* State, 39 Ala. 681; Gibson *v.* State, 39 Ala. 693; Graham *v.* State, 40 Ala. 659; Cole *v.* State, 10 Ark. 318; Kelly *v.* State, 3 Smed. & M. (Miss.) 518; Rolls *v.* State, 52 Miss. 391; West *v.* State, 22 N. J. L. 212; Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474; People *v.* Winchell, 7 Cow. (N. Y.) 525; Hamilton *v.* Com., 16 Pa. St. 129; 55 Am. Dec. 485; Dun *v.* Com., 6 Pa. St. 384.

The judgment to abate a nuisance may be rendered only when the defendant is present. Reg. *v.* Chichester, 2 Den. C. C. 458; 8 Eng. L. & Eq. 294.

But it seems that the prisoner may waive his right to be present at the rendition of sentence by voluntary absence. Middlebrook *v.* State, 43 Conn. 257; 21 Am. Rep. 650 (a case of contempt of court); Lynch *v.* Com., 88 Pa. St. 189; 32 Am. Rep. 445.

In Fielden *v.* People, 128 Ill. 595, the court, by Scholfield, J., in deciding that the common-law right of the defendant to be present when sentence is pronounced did not mean that the defendant must be present when the appellate court renders judgment in affirmance of the sentence of the court below, on the ground that the reasons on which the right was founded did not apply in that case, states those reasons as follows: "That the defendant may be identified by the court as the real party adjudged to be punished (Holt 399); that the defendant may have a chance to plead a pardon (3 Mod. 265); that he may have a pardon to plead or move in arrest of judgment (Rex *v.* Speke, 3 Salk. 358); that he may have an opportunity to say what he can say why judgment should be not given against him (2 Hale's Pleas of the Crown 401, 402); and that the example of the defendants, who have been guilty of misdemeanors of a gross and public kind, being brought up for the animadversion of the court and the open denunciation of punishment, may tend to deter others from the commission of similar offenses. 1 Chitty's Crim. Law (5th ed.) 693, *696." The same point was held in Schwab *v.* Berggren, 143 U. S. 442; State *v.* Overton, 77 N. Car. 485; Donnelly *v.* State, 26 N. J. L. 463.

3. 1 Chit. Crim. L. 695; Reg. *v.* Templeman, 1 Salk. 55; Son *v.* People, 12 Wend. (N. Y.) 344. See FINE, vol. 7, p. 993, note.

4. Com. *v.* Crump, 1 Va. Cas. 172;

persons have been indicted together, they must be sentenced severally.[1] It is, therefore, proper to pronounce the sentence of one of several defendants jointly indicted without the presence of the others, and subsequently bring the others into court to receive judgment.[2] Before the sentence of death was passed, it was once customary for the crier to make proclamation of silence.[3] But this practice need not be observed.[4] After asking the prisoner if he has anything to say why sentence should not be pronounced, when that is necessary,[5] the court proceeds to give sentence. The judge may precede the sentence by such remarks for the benefit of the prisoner or for the general good as he deems appropriate.[6]

b. ALLOCUTUS, OR QUERY OF "ANYTHING TO SAY."—It is considered by most courts to be indispensably necessary that before sentence is pronounced in a capital case the defendant should be asked by the clerk[7] or court if he has anything to say why judgment should not be pronounced on him.[8] But the

People *v.* Clark, 1 Park. Cr. Rep. (N. Y.) 360; People *v.* Taylor, 3 Den. (N. Y.) 98.

In People *v.* Taylor, 3 Den. (N. Y.) 98, note a, the court, in regard to an objection by the defendant's counsel, that sentence could not be rendered in the defendant's absence, said, in substance, that when corporal punishment is to be inflicted, then the rule is, that such a sentence should not be imposed in his absence; but that if the court meant to impose a fine only, that rule would not apply, although the offense was such that the court in its discretion might fine or imprison.

1. State *v.* Hopkins, 7 Blackf. (Ind.) 493; Caldwell *v.* Com., 7 Dana (Ky.) 229; State *v.* Gay, 10 Mo. 440; State *v.* Berry, 21 Mo. 504; Waltzer *v.* State, 3 Wis. 785. See CRIMINAL CONSPIRACY, vol. 4, p. 641; CRIMINAL LAW, vol, 4 p. 727, n. 13; INTOXICATING LIQUORS, vol. 11, p. 771, n. 6; FINE, vol. 7, p. 993, n.

But formerly this seems not to have been necessary, nor observed in practice. 1 Chit. Crim. L. 700, *citing* 6 Harg. St. Trial 833; 11 Harg. St. Trial 294.

2. Sturgeon *v.* Gray, 96 Ind. 166; State *v.* Bradley, 30 La. Ann. 326.

3. Rex *v.* White, 17 How. St. Tr. 1091.

4. 1 Chit. Crim. L. 699; Rex *v.* Ward, 2 Ld. Raym. 1461.

5. See *infra*, this title, *Allocutus, or Query of "Anything to Say."*

6. 1 Chit. Crim. L. 700; Rex *v.* Kenworthy, 1 B. & C. 711; 3 D. & R. 173; 8 E. C. L. 300.

So it was held not to be a ground for a new trial that the judge in the court below, while passing sentence upon another person who had been tried and convicted of murder on the day before the trial of this defendant, and found guilty with a recommendation to mercy, said to that person in presence of the jurors who had been summoned for the term: "The court questions very seriously whether, had it been left to the court, you would have gotten off as lightly as you have. I solemnly believe in the divine law which says: 'Whoso sheddeth man's blood, by man shall his blood be shed;' and when a plain case of murder is established, without mitigating circumstances, my judgment approves the penalty of death." Walton *v.* State, 79 Ga. 446.

7. The clerk of the court may, and generally does, make the interrogatory. State *v.* Ross, 32 La. Ann. 854.

8. Ball *v.* U. S., 140 U. S. 118; Keech *v.* State, 15 Fla. 591; James *v.* State, 45 Miss. 572; West *v.* State, 22 N. J. L. 212; Graham *v.* People, 63 Barb. (N. Y.) 468; Messner *v.* People, 45 N. Y. 1; State *v.* Johnson, 67 N. Car. 55; Hamilton *v.* Com., 16 Pa. St. 129; 55 Am. Dec. 485; Dougherty *v.* Com, 69 Pa. St. 286; McCue *v.* Com., 78 Pa. St. 185; 21 Am. Rep. 7; State *v.* Trezevant, 20 S. Car. 363; 47 Am. Rep. 840.

But it has been held that the omission of this formality, even in capital

courts differ as to the necessity of this practice in cases where the prosecution is for a felony not capital. Although some courts hold that this address to the prisoner, or *allocutus*, must be made in all cases of felony,[1] other authorities consider it a mere formality, which, though a commendable practice, may be observed or not, according to the discretion of the judge, if the punishment to be imposed is not for a capital felony.[2] By statute, in some States, it is necessary that this interrogatory be made, even in the case of sentence for misdemeanors.[3] But there is a growing tendency in the later decisions to limit this requirement to capital cases, and, in some States, even to do away with it in every case.[4] Some of the cases seem to take the ground

cases, is not error. State *v.* Hoyt, 47 Conn. 518; 36 Am. Rep. 89; State *v.* Smith, 33 La. Ann. 1414.

1. Perry *v.* State, 43 Ala. 21; Crim *v.* State, 43 Ala. 53; Mullen *v.* State, 45 Ala. 43; 6 Am. Rep. 691; Crocker *v.* State, 47 Ala. 568; Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 474; Dent *v.* People, 46 How. Pr. (N. Y.) 264.

2. State *v.* Taylor, 27 La. Ann. 393; 21 Am. Rep. 561; State *v.* Bradley, 30 La. Ann. 326; Jones *v.* State, 51 Miss. 718; 24 Am. Rep. 658; State *v.* Ball, 27 Mo. 324; Jeffries *v.* Com., 12 Allen (Mass.) 145. See also Bressler *v.* People, 117 Ill. 422.

3. Carper *v.* State, 27 Ohio St. 572.

But, in the absence of statute so requiring, it is not necessary that the interrogatory be made where the conviction is for a misdemeanor. State *v.* Stiefle, 13 Iowa 603.

4. The inquiry whether a convicted person has anything to say "why sentence should not be passed" upon him is supposed to have originated at a time when prisoners were not allowed counsel, in order to enable them to move in arrest of judgment any matter sufficient to stay sentence. Recent cases have denied that the rule, which was founded upon the practice of the courts prevalent when it was established, should receive recognition under the modern practice. Thus, in discussing the question as to whether or not the omission of this interrogatory is fatal to the validity of the sentence, the court, in State *v.* Hoyt, 47 Conn. 518; 36 Am. Rep. 89, by Loomis, J., said: "In this connection it is also to be considered that anciently in *England* a person on trial for a felony was not allowed counsel. The presiding judge in theory was his counsel, but did not represent the accused in the sense that counsel do with us. If, therefore, the judge omitted anything which was the right or privilege of the accused, it was considered the act of the court, which could in no wise prejudice the prisoner, and the rights of the latter could not be waived as may now be done. If we compare the rules and practice that obtained in *England* with our own it will readily be suggested that the reasons that made the inquiry of the prisoner so essential do not apply at all in this State. Here the accused has always had counsel to represent him, vigilant to guard every right and claim every privilege deemed essential to his deliverance. The counsel well know that the verdict does not conclude the prisoner—they know all the remedies for ulterior relief, and when and how they must be instituted. They are present when the prisoner, on motion of the attorney for the State, is set at the bar to receive his sentence. They know that the court is open to hear any request, motion or objection, and that if the accused desires to say anything the court will grant him the privilege if he or they should so indicate. Under our practice what possible harm can be occasioned to the prisoner by such an omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for. If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take on some other legal form and be filed within the time prescribed. If he should in a capital case urge mitigating circumstances and put himself on the mercy of the court, it would avail nothing, because

that this interrogatory is unnecessary if the prisoner has moved in arrest of judgment or for a new trial, or if it is otherwise shown that he knew what his rights were, and was in no wise prejudiced by the omission.[1]

When this interrogation is made the prisoner may then move in arrest of judgment,[2] if it has not already been done,[3] or may plead a pardon;[4] or, if he has nothing to urge in bar, evidence and arguments may then be produced for and against a mitigation of punishment.[5]

c. EFFECT OF FAILURE TO OBSERVE.—Although the presence of the defendant in court at the time of pronouncing sentence, and the inquiry of whether he has anything to say why sentence should not be pronounced, may be necessary to the validity of the sentence, an omission of these formalities, like a defect in the style of the sentence itself,[6] will not be a ground for a new trial or the discharge of the prisoner, but the appellate court will remand the case with directions to render judgment according to law.[7]

III. THE SENTENCE—1. Form and Style.[8]—As expressed in the definition, a sentence is a conclusion of the law and not of the judge. Its proper form has, therefore, by long usage, been established to be that "it is considered" (*consideratum est per*

the court would have no discretion to exercise in regard to the punishment."

In State *v.* Smith, 33 La. Ann. 1414, the court by Bermudez, C. J., said: "The more recent and considerate authorities and rulings on this point are that it is not sacramental that the prisoner should be thus interrogated. 28 Ga. 576; State *v.* Ball, 27 Mo. 324." See also Gannon *v.* People, 127 Ill. 507.

1. 1 Bish. Crim. Proc. § 1293; Abbott's Tr. Br. (Crim. Caus.), § 858; State *v.* Hoyt, 47 Conn. 518; 36 Am. Rep. 89; Jeffries *v.* Com., 12 Allen (Mass.) 145; Edwards *v.* State, 47 Miss. 581; State *v.* Johnson, 67 N. Car. 55.

2. Popish Lords' Case, 7 How. St. Tr. 1554.

3. See *supra*, this title, note 3, p. 1067.

4. 4 Bl. Com. 376; Rex *v.* Garside, 2 A. & E. 266; 29 E. C. L. 84.

5. 1 Chit. Crim. L. 700; 1 Bish. Crim. Proc., § 1294, *citing* Rex *v.* Sharpness, 1 T. R. 228; Rex *v.* Withers, 3 T. R. 428; Rex *v.* Wilson, 4 T. R. 487; Reg. *v.* Dignam, 7 A. & E. 593; 34 E. C. L. 166; Rex *v.* Cox, 4 Car. & P. 538; 19 E. C. L. 516; Reg. *v.* Gregory, 1 C. & K. 228; 47 E. C. L. 228; Rex *v.* Turner, 1 Stra. 139; Reg. *v.* Clueworth, Holt 339; Kistler *v.* State, 54 Ind. 400; Eastman *v.* State, 54 Ind. 441; State *v.* Smith, 2 Bay (S. Car.) 62; Lewis *v.* State, 3 Head (Tenn.) 127.

6. See *infra*, this title, *Form and Style*, note 3, p. 1072.

7. **In Case of Absence of Prisoner.**—Cole *v.* State, 10 Ark. 318. See Jewell *v.* Com., 22 Pa. St. 94. But see *infra*, this title, *Effect of Error in Sentence.*

In Case of Omission of Allocutus.—Keech *v.* State, 15 Fla. 591; Gannon *v.* People, 127 Ill. 509; Dodge *v.* People, 4 Neb. 220; McCue *v.* Com., 78 Pa. St. 185; 21 Am. Rep. 7; State *v.* Trezevant, 20 S. Car. 363; 47 Am. Rep. 840; Kinsler *v.* Wyoming Ter., 1 Wyoming 112. See HOMICIDE, vol. 9, p. 751, n. 4. But see *infra*, this title, *Effect of Error in Sentence.*

8. For form of sentence, see 4 Cooley's Bl. Com., Appendix; Bishop's Directions and Forms, § 1070. See also the following cases: Hawkins *v.* State, 9 Ala. 137; 44 Am. Dec. 431; State *v.* Stanford, 20 Ark. 145; People *v.* Johnson, 88 Cal. 171; Barth *v.* State, 18 Conn. 432; Rawlings *v.* State, 2 Md. 201; Easterling *v.* State, 35 Miss. 210; Johnson *v.* State, 26 N. J. L. 313; Shultz *v.* State, 13 Tex. 403; Burrell *v.* State, 16 Tex. 147; Calvin *v.* State, 23 Tex. 578; Mayfield *v.* State, 40 Tex. 289; Butler *v.* State, 1 Tex. App. 638; Whitney *v.* State, 6 Lea (Tenn.) 247.

curiam), and not, "it is ordered," "the court is of opinion," etc.[1] And, as it is the conclusion of law delivered by the court, it should, in itself, purport to be the sentence or adjudication pronounced by the court upon the premises.[2] Upon proceedings on appeal for reversal, if these requirements of form and style have been so insufficiently complied with that there is no sentence or judgment, the practice is to issue a writ of *procedendo* to the court below directing it to give judgment according to law.[3]

2. Contents—*a.* IN GENERAL.—As a general rule, the sentence must be responsive to the verdict of the jury or plea of the defendant;[4] on a finding or plea of guilty of a particular crime the court must impose the punishment provided for that crime,[5] or if it is within the province of the jury to fix the punishment, the

1. See Reg. *v.* King, 7 Q. B. 782; 53 E. C. L. 780.

It has been held that when the style used is "it is ordered" there is no judgment, for then the judgment might be that of the court. Baker *v.* State, 3 Ark. 491. See Rex *v.* Kenworthy, 1 B. & C. 711; 8 E. C. L. 300. But in later cases, it has been held that the words "it is considered" are not sacramental and essentially necessary. State *v.* Lake, 34 La. Ann. 1069; State *v.* Bassett, 34 La. Ann. 1108. In a later *Arkansas* civil case it was doubted that in Baker *v.* State, 3 Ark. 491, the court meant to decide that no other words could be substituted for "*consideratum est per curiam*," and it was held that the following wording of a judgment was sufficient: "It is therefore ordered, adjudged and decreed, by the court," etc. Ware *v.* Pennington, 15 Ark. 226.

It is not sufficient that a justice merely gives it as his opinion that the defendant is guilty, and that he pay a fine. Knowles *v.* State, 2 Root (Conn.) 282.

2. So a record that sets forth what purports to be merely a memorandum or recital of the clerk will be considered insufficient. Benedict *v.* State, 12 Wis. 313. See also Wheeler *v.* Scott, 3 Wis. 362; McEntee *v.* State, 24 Wis. 43; State *v.* Huber, 8 Kan. 447.

A statement in the record in these words: "Prisoner in court and sentenced by the court as follows: That the said F——— P——— be sentenced to State prison," etc., being merely a recital or memorandum of the clerk, it was held that it could not be regarded as a record of a judgment of the court. Peglow *v.* State, 12 Wis. 534.

But a sentence in these words: "The court sentenced the prisoner as follows: That the said F——— F——— be punished by confinement in the State prison," etc., though lacking in formality, purports to be the judgment of the court, and is sufficient. Franz *v.* State, 12 Wis. 536.

3. Rex *v.* Kenworthy, 1 B. & C. 711, 8 E. C. L. 300; Reg *v.* Holloway, 5 Eng. L. & Eq. 310; Baker *v.* State, 3 Ark. 491; Benedict *v.* State, 12 Wis. 313; Peglow *v.* State, 12 Wis. 534.

This proceeding has also been adopted where the sentence was not pronounced by the proper judge. State *v.* Shea, 95 Mo. 85.

4. Baker *v.* State, 4 Ark. 56; Woodford *v.* State, 1 Ohio St. 427.

Where the indictment was in two counts, the first count charging the defendant with theft, the second charging him with receiving stolen goods, and the judgment recited that the verdict was on the second count, it was held that the defendant could not be sentenced for theft. Such sentence would be without the support of a verdict. Gaither *v.* State, 21 Tex. App. 527.

5. Com. *v.* Kingsbury, 5 Mass. 106; Purcelley *v.* State (Tex. 1890), 13 S. W. Rep. 993; State *v.* Hupp, 31 W. Va. 355; State *v.* Bloedow, 45 Wis. 135.

Where the accused waived a jury, a sentence that he was found guilty, as charged, of having, "with a dangerous weapon and with intent to kill, inflicted a wound less than mayhem," held, not to be responsive to the decree signed by the parish judge, declaring him "guilty of the crime of wounding less than mayhem;" and the judgment therefore reversed. State *v.* Williams, 30 La. Ann. 1162. See VERDICT.

judgment must impose the punishment properly assessed by the jury.[1]

The sentence must be absolute, and not dependent upon any contingency.[2] It must, of course, be expressed in such terms that its meaning can be understood,[3] and must be reasonably certain and accurate in all its material terms, showing the kind of punishment to be imposed;[4] if a fine, the amount thereof;[5] if imprisonment, the duration of the term.[6]

1. Cain *v.* State, 20 Tex. 355.

But, in *Missouri* under a statute which provided that "if the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence and render judgment according to lowest limit prescribed by law in such case." Where the jury assessed $300 in a case, where the lowest fine provided by law was $500, it was held not to be error for the court to sentence the prisoner to pay a fine of $500. State *v.* McQuaig, 22 Mo. 319. See VERDICT.

2. Morris *v.* State, 1 Blackf. (Ind.) 37; State *v.* Bennett, 4 Dev. & B. (N. Car.) 43. See also Strickland *v.* Cox, 102 N. Car. 411, where the requirement of conclusiveness and certainty was exacted of a judgment in a civil action.

3. 1 Bish. Crim. Proc., § 1297; *citing* Reg. *v.* Woodside, 7 Cox C. C. 238.

4. See *infra*, this title, *The Punishment.*

5. 1 Bish. Crim. Proc., § 1300.

To Whom Payment Directed to be Made.—It would seem that the hands into which payment of the fine is to be made ordinarily need not be specified in the sentence. Where the court, after a verdict of guilty against the accused, rendered judgment, that he "pay a fine of thirty dollars, which is to be paid to the treasury of New Haven county," it was held that although the fine was payable into the town, and not into the county treasury, yet as the town was entitled to it by virtue of the statute, and not by the judgment of the court, and as the court had properly no control over the disposition of it, and the judgment was complete without any direction on the subject, the direction given was not a sufficient ground of reversing the judgment. Barth *v.* State, 18 Conn. 432.

Where a statute directed that a penalty recovered upon an indictment should go to the county, a sentence directing it "to be disposed of according to law" is not erroneous. Com. *v.* Horton, 9 Pick. (Mass.) 206.

A justice of the peace, in imposing a fine, which by law was to go to the treasurer of the town, rendered judgment that the defendant pay it to the treasurer of the town. *Held*, to mean only that the fine was to be paid over ultimately to the treasurer of the town, and not that the defendant was himself to pay it into the hands of the treasurer. State *v.* Harding, 39 Conn. 561.

The judgment in a criminal prosecution where the informer is entitled to one-half of the fine, must be in the name of the State, and not in the names of the State and informer; but it would be convenient in practice that an order be made of record directing one-half of the fine to be paid to the informer, if there be one. But a failure to observe that practice is not a matter which concerns the defendant. State *v.* Stanford, 20 Ark. 145; Rawlings *v.* State, 2 Md. 201. See Com. *v.* Howard, 13 Mass. 221. See INFORMERS, vol. 10, p. 711; PENALTIES, vol. 18, p. 269.

6. Respublica *v.* De Longchamps, 1 Dall. (U. S.) 116. See also, Evans *v.* Com., 3 Met. (Mass.) 453.

A sentence to a workhouse "until released by order of law," is erroneous, as being for an indefinite time. Washburn *v.* Belknap, 3 Conn. 502.

Where a term of imprisonment at hard labor is to be imposed for the non-payment of a fine and costs, under a statute providing that the rate at which such imprisonment for the costs shall discharge the indebtedness, shall be not less than thirty cents per day, and in cases of misdemeanor the imprisonment is not to exceed eight months, the judgment should specify either the length of the additional term of hard labor for costs, or the rate *per diem;* and where the judg-

Under the common-law practice, the time and place when the sentence of death, or other corporal infliction, is to be carried into effect is generally not specified in the judgment.[1] When the sentence is imprisonment, the time when the imprisonment is

ment is only for "such additional term as may be necessary to pay the court costs and officers' fees, not to exceed eight months," it will be reversed for correction in the court below. Armstrong *v.* State, 83 Ala. 49.

In one part of his sentence for the payment of costs the prisoner was condemned to hard labor for a term not exceeding eight months, the costs being $124.60, and the compensation for labor being fixed at forty cents per day. The concluding clause condemned him to hard labor for 311 days. *Held*, that though the last clause was in excess of law and might be regarded as void, yet in its connection it had the effect to render the whole sentence uncertain and erroneous. Bradley *v.* State, 69 Ala. 318.

But in *Iowa*, under a statute which fixes the limit of the imprisonment to be imposed on the non-payment of a fine, it was held that a judgment of a justice of the peace committing a defendant to prison until the payment of a fine imposed, was not void because it did not specify the extent of the imprisonment. Jackson *v.* Boyd, 53 Iowa 536.

In *Louisiana* it has been held that the sentence should limit the time of imprisonment. State *v.* Prince, 42 La. Ann. 817.

It has been held that it is not necessary, when it is ordered that the defendant stand committed, if the fine is not paid, that the sentence should fix a definite period of imprisonment in the event of the non-payment of the fine, where there is a statute which fixes the rate at which such imprisonment shall serve to discharge the fine imposed. Foster *v.* Territory, 1 Wash. 411.

It has been held that the judgment of the court need not specify the period of imprisonment, where that is fixed by statute. People *v.* Degnen, 54 Barb. (N. Y.) 105; 6 Abb. Pr. N. S. (N. Y.) 87.

A sentence to hard labor for non-payment of costs, "for such period, not exceeding eight months, at a rate of not less than thirty cents per day," as may be necessary to pay costs, is sufficiently definite and certain if it afterwards recites that the costs amount to $145, and adjudges hard labor for 435 days. Gady *v.* State, 83 Ala. 51.

Thus, a sentence to pay a fine of $250, and in default of payment to "be imprisoned in the county jail . . . at the rate of one day for each $1 of fine until such fine is satisfied, was held to sufficiently fix the duration of the term of imprisonment. *Ex parte* Sing Ah Tong, 84 Cal. 165.

It seems that the court in sentencing a defendant "to an additional term of hard labor for the costs, not exceeding eight months, at 30 cents a day," did not commit reversible error by failing to ascertain and insert in the judgment the sum of the costs for which the additional labor was imposed, although the desirable practice is for the court to do so. Tolbert *v.* State, 87 Ala. 27.

1. 4 Bl. Com. 404, Appendix, § 3; 1 Chit. Crim. L. 782.

Time.—Rex *v.* Doyle, 1 Leach (C. C.) 67; Atkinson *v.* Reg., 3 Bro. P. C. 517; Rastell's Entries, 2 Hale P. C. 399; Coke's Entries 352; Rex *v.* Rogers, 3 Burr. 1812. See Russell *v.* State, 33 Ala. 366; Webster *v.* Com., 5 Cush. (Mass.) 386; 52 Am. Dec. 711; Cathcart *v.* Com., 37 Pa. St. 108. See CRIMINAL LAW, vol. 4, p. 728, n. 8.

But it has been held, in *Alabama*, that a sentence must fix the day of execution or it will be defective. Aaron *v.* State, 40 Ala. 307.

In some States the time when a sentence to capital punishment is to be carried into effect is to be fixed by the governor, and cannot, of course, be made a part of the sentence. Webster *v.* Com., 5 Cush. (Mass.) 386; 52 Am. Dec. 711.

In *California* it is not in keeping with the Criminal Practice Act to designate the day for carrying the sentence into effect in the judgment of death; the day should be designated in warrant for execution. People *v.* Bonilla, 38 Cal. 699; People *v.* Murphy, 45 Cal. 137.

Place.—Webster *v.* Com., 5 Cush. (Mass.) 386; 52 Am. Dec. 711; 1 Bish. Crim. Proc., § 1311.

to begin or end ordinarily need not be, and, according to the better practice, is not specified in the sentence.[1] But where the defendant is already in execution on a former sentence, or is to be sentenced on two or more indictments on which he has been found guilty, sentence of imprisonment and other penalties may be given against him on each successive conviction,[2] to commence from the expiration of the term of imprisonment next preceding.[3]

In such case, if the term is to begin at the expiration of the former term, the sentence must so state, otherwise it will run concurrently with it.[4] It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit.[5] It has

The time and place of execution are no part of the judgment; and a convict is still subject to execution, though the day appointed by the tribunal has passed. State *v.* Oscar, 13 La. Ann. 297.

1. *Ex parte* Gibson, 31 Cal. 619; 91 Am. Dec. 546; People *v.* Burgess, 35 Cal. 115; Johnson *v.* People, 83 Ill. 431; Clifford *v.* State, 30 Md. 575; *Ex parte* Turner, 45 Mo. 331; State *v.* Smith, 10 Nev. 106. See also Cole *v.* State, 10 Ark. 318; People *v.* King, 28 Cal. 265; People *v.* Hughes, 29 Cal. 257; and Rex *v.* Woodell, Trem. P. C. 132; Rex *v.* Baxter, Trem. P. C. 265. But see Kelly *v.* State, 3 Smed. & M. (Miss.) 518.

The term of imprisonment will ordinarily commence to run on the day of sentence. Migotti *v.* Colville, 4 C. P. Div. 233; 30 Moak's Eng. Rep. 507, note; IMPRISONMENT, vol. 10, p. 199, n. 2; HABEAS CORPUS, vol. 9, p. 222, n. 2.

2. Kennedy *v.* Howard, 74 Ind. 87.

So a person serving a term of imprisonment may be tried for murder committed during his confinement and sentenced to be hung before the expiration of his term. Thomas *v.* People, 67 N. Y. 218; State *v.* Wilson, 38 Conn. 126.

3. 1 Chit. Crim. L. 718; 1 Bish. Crim. L., § 953; Rex *v.* Wilkes, 4 Burr. 2575; 4 Bro. P. C. 360; State *v.* Smith, 5 Day (Conn.) 175; 5 Am. Dec. 132; Fitzpatrick *v.* People, 98 Ill. 269; Mims *v.* State, 26 Minn. 498; Mills *v.* Com., 13 Pa. St. 631; Russel *v.* Com., 7 S. & R. (Pa.) 489; Brown *v.* Com., 4 Rawle (Pa.) 259; 26 Am. Dec. 130; Com. *v.* Leaths, 1 Va. Cas. 151; Petition of McCormick, 24 Wis. 492; 1 Am. Rep. 197. *Contra*, Miller *v.* Allen, 11 Ind. 389; James *v.* Ward, 2 Metc. (Ky.) 271; Prince *v.* State, 44 Tex. 480; Hannahan *v.* State, 7 Tex. App. 664; Baker *v.* State, 11 Tex. App. 262. See HABEAS CORPUS, vol. 9, p. 232, n. 1.

In many States cumulative sentences are provided for by statute. See *Idaho* Rev. Stat., § 7237; *In re* Esmond, 42 Fed. Rep. 827; *Kentucky* Crim. Code, § 288; Evans *v.* Com. (Ky. 1889), 12 S. W. Rep. 768; *New York* Crim. Code, §§ 694, 695; *Texas* Crim. Code, art. 800; Shumaker *v.* State, 10 Tex. App. 117.

But in *Indiana*, under a statute providing that "the term of service and imprisonment of every convict shall commence from the day of his conviction and sentence" (1 *Indiana* Rev. St. 1876, p. 646, § 6), it was held that the courts of that State have no authority to adjudge, on several convictions, that one term of imprisonment shall commence to run at the expiration of another; they will run concurrently. Kennedy *v.* Howard, 74 Ind. 87.

Sentence on Conviction on More Counts than One.—The text must be understood as referring to sentences on conviction on distinct indictments or actions. As to the rule when there are convictions on several counts of the same indictment, see *infra*, this title, *When Conviction is on More Counts Than One.*

4. 1 Bish. Crim. Proc., § 1310; U. S. *v.* Patterson, 29 Fed. Rep. 775; *In re* Jackson, 3 McArthur (D. C.) 24; People *v.* Whitson, 74 Ill. 20; *Ex parte* Hunt, 28 Tex. App. 361. See *Ex parte* Kirby, 76 Cal. 514. But under *Missouri* statute (Rev. Stat. 1889, § 3954), see *Ex parte* Durbin, 102 Mo. 100.

5. *Ex parte* Fry, 3 Mackey (D. C.) 135; Kite *v.* Com., 11 Met. (Mass.) 581; Mims *v.* State, 26 Minn. 498; *Ex parte* Ryan, 10 Nev. 261. But see *In re* Bloom, 53 Mich. 597; *In re* Lam-

been said that the sentence should state the place of imprisonment.[1]

b. THE PUNISHMENT.—The punishment pronounced by the sentence must, of course, be that which the law provides for the particular crime of which the defendant is found guilty.[2]

phere, 61 Mich. 105; *Ex parte* Roberts, 9 Nev. 44; 16 Am. Rep. 1. See HABEAS CORPUS, vol. 9, p. 221, note 3.

In Kite *v.* Com., 11 Met. (Mass.) 585, the court, by Shaw, C. J., said: "Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect." So, in the case of Brown *v.* Com., 4 Rawle (Pa.) 259; 26 Am. Dec. 130, it was held that when the first sentence was reversed, the second imprisonment began from that time. The expiration of the first sentence occurred upon its reversal. *Ex parte* Jackson, 96 Mo. 116.

Where a sentence directed that the prisoner be imprisoned "for five (5) years upon each of the three indictments above named, said terms not to run concurrently," the words "said terms not to run concurrently" were considered uncertain and incapable of application, in that it was not specified upon which indictment either of the terms of imprisonment was to be undergone, and it was held that the sentences commenced to run at once, and ran concurrently. U. S. *v.* Patterson, 29 Fed. Rep. 775.

A sentence to a term of years "to commence after the expiration of former sentences," or, "to commence at the expiration of the sentence aforesaid," but containing nothing which shows to what the terms "former sentence" or "sentence aforesaid" relate, has been held void for uncertainty. Williams *v.* State, 18 Ohio St. 47; Picket *v.* State, 22 Ohio St. 405; Larney *v.* Cleveland, 34 Ohio St. 599. See Lockhart *v.* State (Tex. 1890), 13 S. W. Rep. 1012.

1. *Ex parte* Gibson, 31 Cal. 619; 91 Am. Dec. 546; State *v.* Smith, 10 Nev. 106. But, under provisions of U. S. Rev. St., §§ 5541, 5542, 5546, 5548, relating to "prisoners and their treatment," a distinction is recognized between the sentence and the order of execution of the sentence. The place of imprisonment is designated in the order (§ 5541), which is not necessarily a part of the judgment of the court, and may be made *in absentem*. *Ex parte* Waterman, 33 Fed. Rep. 29.

A mere misnomer of the place of confinement, when there is no doubt about the place meant will be immaterial. So, where the judgment of the court was that the defendant be imprisoned in "the House of Correction at Ionia," whereas the only place in which such convicts could be imprisoned at Ionia was the "State House of Correction and Reformatory at Ionia," it was held that the place of confinement was sufficiently designated to preclude any mistake. *In re* Burger, 36 Mich. 203.

It seems that, where a statute directs in what prison persons sentenced to imprisonment in the State prison in the several judicial districts shall be confined, the omission to designate the prison in the sentence is not error, although it was said that the better practice is to do so. Weed *v.* People, 31 N. Y. 465. But this was under statutes which did not require that the sentence should specify the prison. It is now provided by the *New York* Pen. Code, § 705, that the sentence must name the place of imprisonment.

2. Brown *v.* State, 74 Ala. 478; State *v.* Haynes, 74 Me. 161; Shepherd *v.* Com., 2 Met. (Mass.) 419; People *v.* Carter, 48 Hun (N. Y.) 165; State *v.* Crumpler, 90 N. Car. 701.

Where by two different statutes, jurisdiction of the same offense is given to different courts, and different degrees of punishment prescribed, only the lesser degree can be ordered by either court. Scrinegrour *v.* State, 1 Chand. (Wis.) 48.

Unless the accused makes the election provided for by *Texas* Penal Code, § 14, as to the penalty prescribed by the law in force when the offense was committed, his trial under the law inflicting the milder penalty follows as a legal consequence—the penalty can be less, but never greater. Maul *v.* State, 25 Tex. 166.

(1) *Fine.*[1]—When a fine is imposed as a punishment, it is within the common-law authority of the court to incorporate in the sentence a provision that the defendant stand committed until it is paid.[2] This practice is now commonly fixed by statute,[3] but is generally modified by provisions fixing the duration of such imprisonment,[4] or prescribing the rate at which such imprisonment shall serve to discharge the fine.[5] This is a proper means for the collection of the fine, and is not to be regarded as a part of the punishment.[6] It is not, therefore, open to the objection that the magistrate has no jurisdiction of offenses which are punishable by imprisonment,[7] nor that it is inconsistent with a constitutional or statutory prohibition of imprisonment for debt.[8] Nor is a sentence directing commitment of the defendant until the fine is satisfied contrary to a constitutional provision against indefinite imprisonment.[9] But the sentence must show that such imprisonment is imposed as a means of collecting the fine; sentences directing the alternative punishments of fine or imprisonment will be inconsistent with the requirement of certainty.[10] But there are

What Punishment May be Pronounced.—As to the punishment which may be imposed, see CRIMINAL LAW, vol. 4 pp. 721–728, and the different articles dealing with specific crimes. See also FINE, vol. 7, pp. 991–993.

1 See FINE, vol. 7, p. 991.

2. 1 Bish. Crim. Proc., § 1301; Rex *v.* Hood, Sayres 176; Rex *v.* Rayton, 1 Salk. 353; Godfrey's Case, 11 Coke 42 a; Rex *v.* Sterling, 1 Lev. 125; Rex *v.* Bethel, 5 Mod. 19; Reg. *v.* Dunn, 12 Q. B. 1026; Cagle *v.* State, 6 Humph. (Tenn.) 391. See FINE, vol. 7, p. 992, note, *Sentence and Collection of Fine.*

3. See *In re* Jackson, 96 U. S. 727; *Ex parte* Chin Yan, 60 Cal. 78; *In re* Miller, 82 Cal. 454; *Ex parte* Peacock, 25 Fla. 478; Faris *v.* Com., 3 B. Mon. (Ky.) 79; State *v.* Peterson, 38 Minn. 143; INTOXICATING LIQUORS, vol. 11, p. 722, n. 3. See JUSTICE OF THE PEACE, vol 12, p. 411, n. 3.

It has been held in *California* that a statute which provided for imprisonment as a means of collecting a fine, extended only to cases where a fine alone was imposed, and not to cases where both imprisonment and fine were denounced as a punishment. *In re* Rosenheim, 83 Cal. 388; *In re* Collins (Cal. 1890), 23 Pac. Rep. 374; People *v.* Hamberg, 84 Cal. 468. See also *In re* Neustadt, 82 Cal. 273; People *v.* Reghetti, 66 Cal. 184, *overruled.* But in *Minnesota* the application of such statute is not so limited. A sentence to imprisonment in the county jail for thirty days, and for the payment of a fine of $75 and costs, and to stand committed to the county jail until such fine and costs should be paid, not exceeding thirty days in addition to the thirty days' imprisonment, was held legal. State *v.* Peterson, 38 Minn. 143; State *v.* Olson, 38 Minn. 150; State *v.* Sannerud, 38 Minn. 229.

4. See *Ex parte* Ellis, 55 Cal. 204; *Ex parte* Erdman, 88 Cal. 579; Sheffield *v.* O'Day, 7 Ill. App. 339: Gurney *v.* Tufts, 37 Me. 130; 58 Am. Dec. 777; *In re* Sweetman, 1 Cow. (N. Y.) 144.

5. See *Ex parte* Ellis, 54 Cal. 204; *Ex parte* Casey, 85 Cal. 36; Galles *v.* Wilcox, 68 Iowa 664; State *v.* Boynton, 75 Iowa 753; People *v.* Risely, 38 Hun (N. Y.) 281; 4 N. Y. Crim. Rep. 110; *Ex parte* Dampier, 24 Tex. App. 561.

6. See State *v.* Baxter, 41 Kan. 516; CONTEMPT, vol. 3, p. 796, n. 3.

7. Brown *v.* People, 19 Ill. 613; *Ex parte* Bollig, 31 Ill. 88; Newton *v.* Locklin, 77 Ill. 106.

8. State *v.* Mace, 5 Md. 337; Dixon *v.* State, 2 Tex. 481. See FINE, vol. 7, p. 993, note *New Statutes Abolishing Imprisonment for Debt;* IMPRISONMENT FOR DEBT, vol. 10, p. 220, note *Execution to Recover Fine.*

9. Morgan *v.* State, 47 Ala. 34; *Ex parte* Bryant, 24 Fla. 278; 12 Am. St. Rep. 200, note; *Ex parte* Peacock, 25 Fla. 478; *In re* Beall, 26 Ohio St. 195.

10. *Ex parte* Baldwin, 60 Cal. 432; *Ex parte* Bollig, 31 Ill. 88; Brownbridge *v.* People, 38 Mich. 751; Donnoly *v.* Peo-

statutes which permit the sentence to be in the alternative, to pay a particular fine, or to be imprisoned for a time specified.[1]

According to the better authority the defendant cannot avoid a sentence because it omits this provision that the defendant stand committed till the fine be paid,[2] though the State might be entitled to resort only to his goods for payment.[3]

(2) *Corporal Punishment*—(a) **Imprisonment.**—The general rules to which a sentence which inflicts imprisonment as the punishment must conform, have already been stated.[4]

(b) **Capital Punishment.**[5]

(3) *Bond to Keep the Peace.*—The court may, in certain cases, and as a part of the sentence, require the defendant to furnish bonds to keep the peace.[6] When that is done the sentence may add that he stand committed until he gives such surety.[7]

(4) *When Conviction Is on More Counts than One.*—When an indictment has several counts, which either charge the same offense in different counts, to guard against insufficiency of allegation,[8] or which in fact as well as form, refer to and charge separate and distinct offenses,[9] the sentence to be imposed upon a conviction grounded on such indictment will depend upon whether the use of the multiplicity of counts was for one or the other of these purposes. It is true that the indictment may not, upon its face, show whether it charges one offense in different ways or more than one, and how many; but, "in principle, the judge pronouncing the sentence should inform himself from the minutes of the trial, and, when

ple, 38 Mich. 756; *In re* Hoffman, 1 N. Y. Crim. Rep. 484; State *v.* Perkins, 82 N. Car. 681; *In re* Deaton (S. Car.), 11 S. E. Rep. 244. See *In re* Bray, 34 N. Y. St. Rep. 643. But see INTOXICATING LIQUORS, vol. 11, p. 772, n. 4.

1. Bish. Crim. Proc., § 1307, *citing* Broomhead *v.* Chisolm, 47 Ga. 390; State *v.* Markham, 15 La. Ann. 498. See Reg. *v.* Green, Gilb. Cas. 231; Douglas *v.* Reg., 13 Q. B. 74.

Under such statutes, upon the defendant's failure to pay the fine imposed, the court may sentence the defendant to a term of imprisonment. In such case, it has been held that the sentence to pay the fine is superseded, and the liability to imprisonment becomes absolute for the time fixed, and the convict cannot discharge himself by paying the fine. Harris *v* Com., 23 Pick. (Mass.) 280; Wilde *v.* Com., 2 Met. (Mass.) 408.

Where a prisoner was sentenced to pay a fine or be imprisoned, it was held that he had a reasonable time within which to pay the fine. Broomhead *v.* Chisolm, 47 Ga. 390.

2. 1 Bish. Crim. Proc., § 1301; Kane *v.* People, 8 Wend. (N. Y.) 204. Mr. Bishop cites Rex *v.* Hood, Say. 176, as authority for deeming a sentence, which omits this order, voidable. 1 Bish. Crim. Proc., § 1301.

3. 1 Bish. Crim. Proc., § 1301.

4. See *supra*, this title, *The Sentence —Contents—In General.* See also IMPRISONMENT, vol. 10, pp. 197, *et seq.*; IMPRISONMENT FOR DEBT, vol. 10, pp. 212, *et seq.*

5. See *supra*, this title, *The Sentence —Contents — In General.* See also CRIMINAL LAW, vol. 4, p. 728.

6. Reg. *v.* Dunn, 12 A. & E. N. S. 1026. See CRIMINAL LAW, vol. 4, p. 727, n. 1; BREACH OF THE PEACE, vol. 2, pp. 516–520; JUSTICE OF THE PEACE, vol. 12, pp. 419–421. In *New York*, see 2 *New York* Rev. Stat. 737, § 1.

7. 1 Bish. Crim. Proc., § 121, *citing* Dunn, *v.* Reg., 12 Q. B. 1031; Anonymous, Fort. 242; Rex *v.* Hart, 30 How. St. Tr. 1322. See JUSTICE OF THE PEACE, vol. 12, p. 420, n. 4.

8. See INDICTMENT, vol. 10, p. 599*b*.

9. See INDICTMENT, vol. 10, p. 599*a*.

necessary, from testimony; then, on a writ of error," this should be presumed to have been done, and "the judgment should be held good if it conforms to any permissible theory of the numbers and natures of the offenses."[1]

(a) **Which Charge the Same Offense.**—Where the different counts in an indictment refer to and charge the same offense, the practice in rendering the sentence is by no means uniform. The modern *English* practice is to render sentence on each count to run concurrently.[2] This, it will be observed, is most in accord with the fiction which permits the allegation in the indictment of the same offense in different counts. Another method is to render judgment on that count which charges the highest offense.[3] And yet another practice, and the one which seems to be favored by eminent authority because it, unlike the other two forms, is not based on a fiction,[4] is the rendition of a consolidated sentence upon all the counts and for the one entire offense.[5]

Whichever of these forms is adopted, if any of the counts in the indictment are defective, it is the practice to render sentence on the good counts only.[6] If the sentence is on the good and bad counts together but greater than can be supported by the good counts alone, it will be erroneous.[7] But if the good counts will support the sentence rendered, it is immaterial that sentence is not expressly limited on those counts.[8]

(b) **Which Charge Different Offenses.**—The object of permitting several distinct offenses to be charged in the same indictment by means of separate counts is to avert from both parties the burden of two or more trials by permitting them to be tried together.[9] When this has been done—*i. e.*, the single trial had—the purpose

1. 1 Bish. Crim. Proc., § 1325.
In State *v.* Hood, 51 Me. 363, the court by Barrows, J., said: "The judge who tries the case must necessarily know whether the counts and the evidence offered in support of them, relate to one or more offense; and when sentence has been passed, it is to be presumed that the proper punishment was afforded." To the same effect, see Crowley *v.* Com., 11 Met. (Mass.) 575; People *v.* Shotwell, 27 Cal. 394; State *v.* Tuller, 34 Conn. 299; Dean *v.* State, 43 Ga. 218; Booth *v.* Com., 5 Met. (Mass.) 535; State *v.* Core, 70 Mo. 491; Com. *v.* Birdsall, 69 Pa. St. 482; 8 Am. Rep. 283.

2. Archib. Crim. Pl. & Ev. (13th Lond. ed.) 62.

3. 2 Whart. Crim. L. (5th ed.), § 3048; State *v.* Hood, 51 Me. 363; Manley *v.* State, 7 Md. 135; State *v.* Core, 70 Mo. 491; Conkey *v.* People, 1 Abb. App. Dec. (N. Y.) 418. See Henwood *v.* Com., 52 Pa. St. 424.

4. 1 Bish. Crim. Proc., § 1329. Mr. Bishop says: "It conforms precisely to the facts; and, on writ of error namely, that there was only one offense—is the exact truth."

5. 1 Bish. Crim. Proc., § 1329, *citing* Ryalls *v.* Reg., 11 Q. B. 795; 3 Cox C. C. 254; O'Brien *v.* Reg., 2 Cox C. C. 122.

6. See Shaw *v.* State, 18 Ala. 457; State *v.* Brown, 35 La. Ann. 1058; Manley *v.* State, 7 Md. 135; Wash *v.* State, 14 Smed. & M. (Miss.) 120.

7. 1 Bish. Crim. Proc., § 1332.

8. State *v.* Coleman, 5 Port. (Ala.) 32; State *v.* Mathias, 3 Ark. 84; State *v.* Stebbins, 29 Conn. 463; 79 Am. Dec. 223; Frain *v.* State, 40 Ga. 529; People *v.* McKinney, 10 Mich. 54; Josslyn *v.* Com., 16 Met. (Mass.) 236; State *v.* Watson, 31 Mo. 361; State *v.* Bean, 21 Mo. 269; Stephens *v.* State, 53 N. J. L. 245; Buck *v.* State, 1 Ohio St. 61; Boose *v.* State, 10 Ohio St. 575.

9. 1 Bish. Crim. L., § 422.

of the practice is accomplished, and the court may proceed to sentence as if the defendant had had a separate trial for each offense.[1] If, then, the office of the multiple counts in an indictment is, as a matter of fact, to charge more than one distinct offense, there may be a separate sentence for each offense charged and on which the defendant is convicted, each sentence based on its corresponding count or counts.[2] The punishment for each offense should not be consolidated into one sentence, making the punishment imposed equal to the sum of all the punishments which might be inflicted for each offense of which the defendant was convicted.[3] Thus, if imprisonment is to be awarded, it should be for a specified time under each count, or group of counts, charging a distinct offense, the term under the second to commence when the first ends, that under the third to commence on the expiration of the second, and so on; the imprisonment on the several counts or group of counts to commence on the expiration of each preceding term of imprisonment.[4] This practice has received general approval as being in accord with common-law principles,[5] but would not, of course,

1. For the practice in such case, see *supra*, this title, notes 2–4, p. 1075.

2. Barnes *v.* State, 19 Conn. 398; Kroer *v.* People, 78 Ill. 294; Teerney *v.* People, 81 Ill. 411; State *v.* Ambs, 20 Mo. 214; Com. *v.* Sylvester, Bright (Pa.) 331; Com. *v.* Birdsall, 69 Pa. St. 482; 8 Am. Rep. 283. See also State *v.* Peck, 51 Mo. 111. See *supra*, this title, note 2, p. 1075.

Where in an indictment consisting of twelve counts, the first six counts were regularly numbered in numerical order, but the last six counts instead of being numbered in continuation of the preceding six, were numbered in the same manner, and the judgment referred to the counts by their numbers, it was held that it was to be taken as referring to them in the order in which they were placed in the indictment, without reference to the numerals that had been prefixed. Teerney *v.* People, 81 Ill. 411.

3. Rex *v.* Robinson, 1 Moody 413; Bolun *v.* People, 73 Ill. 488; Mullinix *v.* People, 76 Ill. 211; Martin *v.* People, 76 Ill. 499; Stack *v.* People, 80 Ill. 32; Fletcher *v.* People, 81 Ill. 116. *Contra*, Carlton *v.* Com., 5 Met. (Mass.) 532; Booth *v.* Com., 5 Met. (Mass.) 535.

4. Johnson *v.* People, 83 Ill. 431. See Rex *v.* Robinson, 1 Moody 413; Bolun *v.* People, 73 Ill. 488; Mullinix *v.* People, 76 Ill. 211; Stack *v.* People, 80 Ill. 32; Fletcher *v.* People, 81 Ill. 116. See *supra*, this title, note 4, p. 1075.

5. Douglas *v.* Reg., 13 Q. B. 74; Rex *v.* Robinson, 1 Moody 413; Rex *v.* Jones, 2 Campb. 131; Campbell *v.* Reg., 1 Cox C. C. 269; 2 Cox C. C. 463; 11 Q. B. 799; Gregory *v.* Reg., 15 Q. B. 957; Castro *v.* Reg., L. R., 6 App. Cas. 229; 44 L. T. 350; 11 Cent. L. J. 291; 34 Moak's Eng. Rep. 399; *Ex parte* Fry, 3 Mackey (D C.) 135; 12 Wash. L. Rep. 388; U. S. *v.* Bennett, 17 Blatchf. (U. S.) 357; *Ex parte* Peters, 12 Fed. Rep. 461; People *v.* Forbes, 22 Cal. 135; *Ex parte* Dalton, 49 Cal. 463; State *v.* Robinson, 40 La. Ann. 730; Crowley *v.* Com., 11 Met. (Mass.) 575; Com. *v.* Tuttle, 12 Cush. (Mass.) 505; Eldredge *v.* State, 37 Ohio St. 191; Com. *v.* Birdsall, 69 Pa. St. 482; 8 Am. Rep. 283. See *In re* Haynes, 30 Fed. Rep. 769; Parker *v.* People, 13 Colo. 155; State *v.* Tuller, 34 Conn. 280; *In re* Donnelly, 30 Kan. 424; State *v.* Hood, 51 Me. 365; Com. *v.* Foster, 122 Mass. 317; 23 Am. Rep. 326; Buck *v.* State, 1 Ohio St. 61; Woodford *v.* State, 1 Ohio St. 428; Williams *v.* State, 18 Ohio St. 47; Article in 3 South. L. Rev. N. S. 50. In *Arkansas* and *Kansas* there are statutes to this effect. Toliver *v.* State, 35 Ark. 395; *Kansas* Crim. Co., § 250; State *v.* Carlyle, 33 Kan. 716.

Doctrine of the Tweed Case.—In the case of People *v.* Liscomb (Tweed's case), 60 N. Y. 559; 19 Am. Rep. 211, it was held that the court has no power, upon conviction of several

be permitted in those States which do not permit cumulative sentences where a person in execution on a sentence is tried and convicted on another indictment; the fact that each count or group of counts in which charges the same offense is in effect a distinct indictment will in those jurisdictions operate against the practice, and preclude its adoption.[1]

c. COSTS.—It is quite commonly required by statute that a person convicted of a crime shall bear the cost of the prosecution.[2] It seems that, in analogy to the practice adopted when the defendant is required to pay a fine or provide surety to keep the peace,[3] the sentence, when a defendant is liable for the costs of prosecution, should direct that he stand committed until payment of the costs.[4] And this is, perhaps, the practice in most of the States,[5] though deemed unauthorized in others.[6] It does not violate the constitutional provisions against imprisonment for debt.[7]

misdemeanors, charged in separate counts of the same indictment, to impose cumulative sentences exceeding in the aggregate the maximum punishment prescribed by statute for one offense of the character charged, although the sentences are separate, and though one imprisonment or fine may lawfully begin when another has ended. This doctrine has met with universal disapproval. See article by Mr. Bishop in 3 So. L. Rev. N. S. 50; note in 58 Am. Dec. 250; Whart. Crim. Pl. & Pr., § 910; *Ex parte* Hibbs, 26 Fed. Rep. 421; Tweed's case, 10 Am. L. Rev. 168; *Ex parte* Fry, 3 Mackey (D. C.) 135; 12 Wash. L. Rep. 388; Parker *v.* People, 13 Colo. 155; Eldredge *v.* State, 37 Ohio St. 191; Castro *v.* Reg., L. R., 6 App. Cas. 229; 44 L. T. 350; 34 Moak's Eng. Rep. 399. Mr. Bishop speaks of it as a doctrine elsewhere never heard of before, and generally rejected since. 1 Bish. Crim. Proc., § 1327. Even in *New York* decisions the case has been referred to with disapproval. In Dunn *v.* People, 27 Hun (N. Y.) 272, the court, by Davis, P. J., refers to the case in a dissenting opinion as the "much overruled and now universally discarded case." See also Polinsky *v.* People, 11 Hun (N. Y.) 392.

1. James *v.* Ward, 2 Metc. (Ky.) 271; Prince *v.* State, 44 Tex. 480. See *supra*, this title, *The Sentence—Contents—In General*, cases cited *contra* in note 3, p. 1075.

2. See COST, vol. 4, pp. 323, 324.

3. See *supra*, this title, *Fine; Bond to Keep the Peace.*

4. 1 Bish. Crim. Proc., § 1321.

5. Sheehy *v.* Professional L. Assur. Co., 2 C. B., N. S. 211; 88 E. C. L. 211; Downing *v.* Herrick, 47 Me. 462; Johnson *v.* State, 26 N. J. L. 313; Keefhaver *v.* Com., 4 P. & W. (Pa.) 240; Schuylkill Co. *v.* Reifsnyder, 46 Pa. St. 446; Hill *v.* State, 2 Yerg. (Tenn.) 247; Eaton *v.* State, 15 Lea (Tenn.) 200; *In re* Howard, 26 Vt. 205.

In *Alabama* a person may be imprisoned at hard labor in satisfaction of costs of prosecution. Nelson *v.* State, 46 Ala. 186; Bailey *v.* State, 87 Ala. 44; *Ex parte* State, 87 Ala. 46.

In *Connecticut* where a person convicted of an offense is sentenced to imprisonment for a certain term of time, "and until he shall pay costs," the payment of the costs is a part of the punishment; and, until such payment is made, the continued imprisonment, after the expiration of the term, is of the same character as that before. Riley *v.* State, 16 Conn. 47.

It was held that one convicted of a crime cannot be held in custody until he pays, or secures, or works out his own costs; after paying the costs of the State, he is entitled to his discharge. Knox *v.* State, 9 Baxt. (Tenn.) 202.

6. State *v.* Gray, 35 Iowa 503; Gray *v.* Ferreby, 36 Iowa 146; State *v.* Erwin, 44 Iowa 637; State *v.* Brannon, 34 La. Ann. 942. See Naper *v.* Bowers, Wright (Ohio) 692; Whaley *v.* State, 11 Ga. 128.

7. Morgan *v.* State, 47 Ala. 34; Bailey *v.* State, 87 Ala. 44; Kennedy

3. Effect of Error in Sentence.—A distinction has been made between a sentence which has a defect in its form or style of such a nature that there is no judgment at all,[1] and an erroneous sentence, as one which imposes a punishment not authorized by law, and it has been held that, in the latter case, the reviewing court may neither remit the case back to the court below for judgment nor itself pronounce the proper judgment, but must reverse the judgment and order the prisoner to be discharged.[2] But, although that is undoubtedly the established common-law practice in the jurisdictions where those decisions were made, the practice upon an appeal from an erroneous judgment of this kind, which has been adopted in some of our States and maintained upon common-law principles, is to remit the cause to the lower court with directions to pronounce the proper judgment.[3] This has also been done where the sentence of the court below was irregular for uncertainty.[4] But, sometimes, the appellate court will itself make the proper amendment.[5] It has been declared as a general rule that one of these two courses will be pursued in all cases where a judgment is reversed for any error subsequent to the verdict.[6]

v. People, 122 Ill. 649. See IMPRISONMENT FOR DEBT, vol. 10, p. 219, n. 2.

1. As to the effect of such defect, see *supra*, this title, note 3, p. 1072.

2. Rex *v.* Ellis, 5 B. & C. 395; 8 D. & R. 173; 11 E. C. L. 259; Rex *v.* Bourne, 2 Nev. & P. 248; 7 Ad. & E. 58; 34 E. C. L. 36; Silversides *v.* Reg., 2 G. & D. 617; McDonald *v.* State, 45 Md. 90; Shepherd *v.* Com., 2 Met. (Mass.) 419; Tully *v.* Com., 4 Met. (Mass.) 357; Christian *v.* Com., 5 Met. (Mass.) 530; Sumner *v.* Com., 3 Cush. (Mass.) 521; Elliott *v.* People, 13 Mich. 365.

In one case a new trial was granted. Howell *v.* State, 1 Oregon 241.

3. Beale *v.* Com., 25 Pa. St. 11; Lacy *v.* State, 15 Wis. 13. See also Herrington *v.* State, 87 Ala. 1; People *v.* Riley, 48 Cal. 549; State *v.* Shaw, 23 Iowa 316; State *v.* Child, 42 Kan. 611; State *v.* Nicholson, 14 La. Ann. 798; State *v.* Norwood, 93 N. Car. 578. See *supra*, this title, *Formalities—Effect of Failure to Observe.*

4. Kelly *v.* State, 3 Smed. & M. (Miss.) 518; Williams *v.* State, 18 Ohio St. 47; Picket *v.* State, 22 Ohio St. 405; Larney *v.* Cleveland, 34 Ohio St. 599.

5. Oliver *v.* State, 5 How. (Miss.) 14; Drew *v.* Com., 1 Whart. (Pa.) 281; Logan's Case, 5 Gratt. (Va.) 692. See Mims *v.* State, 26 Minn. 496. But see Herrington *v.* State, 87 Ala. 1.

After the decision in the above cited *Pennsylvania* case (decided in 1835), it seems that this proceeding was authorized by statute (16 June 1836); but it was claimed that it was only declaratory of the common law. Daniels *v.* Com., 7 Pa. St. 371. In this case, the court, by Rogers, J., in criticising the cases which hold that the judgment must be reversed and the prisoner discharged, says that the result of such a rule would be "that if, after a fair trial, a mistake is made in the sentence, the prisoner must be discharged, he cannot be again tried for the same offense; whereas if an error occurs in the trial (perhaps upon some immaterial and collateral point), he may be committed for another trial, thereby placing the guilty in a more favorable position than the innocent."

But where a sentence of imprisonment in the penitentiary was reversed on the ground that the imprisonment was illegal, as it should have been in the county jail, but the court deemed that the imprisonment which had already been undergone was a sufficient punishment for the offense, they did not sentence the prisoners *de novo* nor remit the record to the court below for that purpose, but discharged the prisoners. Clellans *v.* Com., 8 Pa. St. 223.

6. See Lacy *v.* State, 15 Wis. 13;

Statutes are now in force in some of the States[1] and in *England*[2] which authorize a new sentence in the appellate court, or a remission of the cause to the lower court for sentence, in cases where an erroneous judgment has been entered upon a lawful verdict.

A sentence may be partly good and partly bad, and when the good and erroneous parts are separable, the reviewing court will reverse the illegal part and affirm the remainder.[3]

IV. SUSPENSION.—That the court has power temporarily to defer the rendition of judgment in order to allow the defendant time to move for a new trial, or the court time to consider and determine the sentence to be imposed, etc., is generally admitted.[4] And the power to grant a reprieve, or delay in the execution of a sentence, for a definite time, is commonly considered to inhere in the judicial discretion of the court.[5] But the right to suspend sentence, or defer the rendition of sentence for an indefinite time, after a regular conviction has been had, has, in some cases, on the ground that the exercise of such a right would be an infringement upon or usurpation of the pardoning power, been declared not to be within the power of the judge.[6] But other authorities have denied that it is a complete objection to the claim of this authority in the courts that its use is equivalent to a pardon, and, in professed pursuance of long-established usage which they declare supportable upon forceful considerations of public policy, hold that its exercise in proper cases is within the judicial discretion of the court.[7]

State *v.* Framness, 43 Minn. 490; Brown *v.* State, 13 Ark. 96. See, also, *supra*, this title, *Effect of Failure to Observe*, and note 3, p. 1072.

1. *Massachusetts* Stats. 1851, ch. 87; Jacquins *v.* Com., 9 Cush. (Mass.) 279; Feeley's Case, 12 Cush. (Mass.) 598; 2 *New York* Rev. Stats. 741, § 25; Ratzky *v.* People, 29 N. Y. 124; McKee *v.* People, 32 N. Y. 239; Harris *v.* People, 59 N. Y. 599; People *v.* Kelly, 97 N. Y. 215. By the *New York* code of Crim. Proc., § 543, the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, amend the judgment to conform to the verdict. See People *v.* Griffin, 27 Hun (N. Y.) 595; People *v.* Palmer, 43 Hun (N. Y.) 408.

2. Stats. 11 and 12 Vict. ch. 78, § 5.

3. *Ex parte* Mitchell, 70 Cal. 1; Lowrey *v.* Hogue, 85 Cal. 600; People *v.* Fick, 89 Cal. 144; Taff *v.* State, 39 Conn. 84; People *v.* Harrington, 75 Mich. 112; *In re* Sweatman, 1 Cow. (N. Y.) 144; People *v.* Sutton, 24 N. Y. St. Rep. 726. See HABEAS CORPUS, vol. 9, p. 221, n. 3; p. 231.

It has been held that when a sentence is imposed in cumulation of a prior valid sentence, the appellate court will not consider and decide on the validity of the second sentence until the first and valid sentence has expired. *Ex parte* Peters, 4 Dill. (U. S.) 169; People *v.* Sutton, 24 N. Y. St. Rep. 726.

4. See *supra*, this title, note 1, p. 1066.

5. See REPRIEVE.

6. People *v.* Brown, 54 Mich. 15; People *v.* Morrisette, 20 How. Pr. (N. Y.) 118; People *v.* Blackburn (Utah, 1890), 23 Pac. Rep. 759. See also People *v.* Reilly, 53 Mich. 262, dissenting opinions by Champlin and Campbell, JJ.

7. People *v.* Mueller, 4 Crim. L. Mag. 725; People *v.* Graves, 31 Hun (N. Y.) 382; 2 N. Y. Crim. Rep. 123; People *v.* Harrington, 15 Abb N. Cas. (N. Y.) 161. See also State *v.* Addy, 43 N. J. L. 113.

In *Massachusetts* it seems to have long been a common practice, when public justice does not require an immediate sentence, for the court to

V. AMENDMENT OR ALTERATION.—Ordinarily the court may amend or modify a sentence[1] at any time during the term at which it was rendered, and before execution has begun.[2] But, where execution has begun, this power has been limited to amendments mitigating the punishment; after the defendant is in execution the punishment may be decreased,[3] but no modification which makes the sentence more severe can be made.[4] Other authorities do not seem to recognize this distinction, but declare it as a general rule that the power of a court to revise a judgment stops at the point of execution.[5] But a sentence cannot be amended after the term in which it was rendered.[6]

VI. EXECUTION—1. Capital Sentence.[7]—The execution of sentence must be performed by the legal officer.[8] This is generally

order, with the consent of the defendant and of the attorney for the commonwealth, that the indictment be laid on file; and this practice has been recognized by statutes (Stats. 1865, ch. 223; 1869, ch. 415, § 60). Such an order is not equivalent to a final judgment or to *nolle prosequi*, or discontinuance by which the case is put out of court, but is a mere suspension of active proceedings in the case, which dispenses with the necessity of entering formal continuance upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass lawful order or judgment therein. Com. *v.* Dowdican's Bail, 115 Mass. 133.

This practice is recognized in *New Hampshire*. Sylvester *v.* State (N. H. 1889), 20 Atl. Rep. 954.

1. McDonald *v.* State, 14 Tex. App. 504; Logan's Case, 5 Gratt. (Va.) 692.

Where the judge failed to ask the prisoner if he had anything to say why sentence should not be pronounced on him, the irregularity may be cured by again calling the prisoner to the bar and putting the question to him. Reynolds *v.* State, 68 Ala. 502.

This practice was recently (Spring, 1892) pursued in a New Hampshire *nisi prius* court, where the defendant (Almy) had been originally sentenced without being present in court. See Boston Transcript of May 5 and 6, 1892.

2. Basset *v.* U. S., 9 Wall. (U. S.) 38; U. S. *v.* Harmison, 3 Sawy. (U. S.) 556; *Ex parte* Casey, 18 Fed. Rep. 86; State *v.* Hughes, 35 Kan. 626; 57 Am. Rep. 195; State *v.* Butler, 72 Md. 98; Com. *v.* Weymouth, 2 Allen (Mass.) 144; 79 Am. Dec. 776; Williams *v.* State (Miss. 1888), 4 So. Rep. 550; Miller *v.* Finkle, 1 Park. Cr. Rep. (N. Y.) 374; Lee *v.* State, 32 Ohio St. 113; Com. *v.* Brown, 12 Phila. (Pa.) 600; *Ex parte* Cox (Tex. 1890), 14 S. W. Rep. 396; Price *v.* Com., 4 Va. L. J. 426; 33 Gratt. (Va.) 819; 36 Am. Rep. 797. See JUDGMENTS, vol. 12, p. 120, n. 5; p. 126, n. 2. See also 1 Am. L. Rev. 762.

3. Plain *v.* State, 60 Ga. 284; *In re* Brittain, 93 N. Car. 587.

4. *Ex parte* Lange, 18 Wall. (U. S.) 176; Brown *v.* Rice, 57 Me. 55; 2 Am. Rep. 11; State *v.* Warren, 92 N. Car. 825; State *v.* Cannon, 11 Oregon 312; 5 Crim. L. Mag. 387.

5. People *v.* Duffy, 5 Barb. (N. Y.) 205; State *v.* Warren, 92 N. Car. 825; Grisham *v.* State, 19 Tex. App. 504. See HABEAS CORPUS, vol. 9, p. 221, n. 3; p. 232, n. 2. See People *v.* Meservey, 76 Mich. 223, and People *v.* Kelley, 79 Mich. 320, *distinguished* in People *v.* Dane, 79 Mich. 361.

6. Rex *v.* Walcot, Comb. 369; 2 Salk. 632; U. S. *v.* Malone, 9 Fed. Rep. 897; U. S. *v.* Pile, 130 U. S. 280; *Ex parte* Friday, 43 Fed. Rep. 916; Com. *v.* Foster, 122 Mass. 317; 23 Am. Rep. 326; People *v.* Whitson, 74 Ill. 20; Parker *v.* State, 51 Miss. 535; State *v.* Addy, 43 N. J. L. 116; Com. *v.* Mayloy, 57 Pa. St. 291; Whitney *v.* State, 6 Lea (Tenn.) 247; Pifer's Case, 14 Gratt. (Va.) 710. See CONTEMPT, vol. 3, p. 796, n. 4; JUDGMENTS, vol. 12, p. 126, n. 4.

7. See REPRIEVE.

8. 1 Chit. Crim. L., p. 784; 2 Hawk., ch. 51, § 6.

If any unauthorized individual take upon himself to execute the sentence, he will be guilty of murder, for the

the officer in whose custody the prisoner is at the time sentence is pronounced against him, commonly the sheriff of the assize or county in which the trial is held, or his deputy.[1] It was anciently the custom, under the common-law practice, for the judge to issue a precept under his hand and seal, called a warrant of execution, directing execution to be done.[2] Later, it was established that the judges might command execution to be done without any writ, and it was considered that a calendar under the hands of the justice that sat in the case was alone sufficient.[3] But, in the common course of things, the officer who brings the prisoner to the bar is the person who is to do execution. From this resulted the common-law practice of dispensing with either writ or calendar; the open pronouncing and entering of judgment is alone considered as sufficient warrant of execution, and the officer having custody of the prisoner is required to inflict the punishment with no other authority or command than is contained in the record of the sentence, unless something therein, or the nature of the case, or an order from the judge, precludes.[4] But if the execution is to be done by some officer other than the one in whose custody the prisoner is, the reason for dispensing with the warrant or command has no application, and there must be a special command to the officer who is to do execution and something to effect transfer of the custody of the prisoner.[5] The calendar is deemed a mere memorandum, and signing a calendar would not constitute such an order;[6] the judgment is that which empowers the officer to execute, and that is only evidenced by the record. Not unfrequently, when sentence has been pronounced, its execution is ordered by rule of court.[7]

person of the party convicted is as much under the protection of the law as that of any other subject. 1 Chit. Crim. L. 784, *citing* 1 Hale 501; 3 Inst. 52; Fost. 267, 268; 1 East P. C. 335. See HOMICIDE, vol. 9, p. 538.

1. 1 Chit. Crim. L. 784; 4 Bl. Com. 402; 2 Hale P. C., ch. 57.

2. 4 Bl. Com. 402.

3. 4 Bl. Com. 410; 1 Chit. Crim. L. 781.

Chitty says: "The practice at the present day, at the assizes, is as follows: When all the other public business of the court is terminated, the clerk of the assizes makes out in writing four lists of the prisoners, with separate columns, containing their crimes, verdicts, and sentences, and a blank column in which the judge writes what is his pleasure respecting those capitally convicted, as to be executed, respited, or transported." 1 Chit. Crim. L. 781. When execution is desired it is written opposite the prisoner's name, "Let him be hanged by the neck;" formerly, in the days of Latin, an abbreviation, "*Sus. per col.*," for "*Suspendatur per collum.*" 2 Bl. Com. 410. This list, called the calendar, is left with the sheriff. If the sheriff afterwards receives no special order from the judge, he executes the judgment of the law in the usual manner, according to the directions of his calendar. 1 Chit. Crim. L. 781.

4. 1 Bish. Crim. Proc., § 1336; 2 Hale P. C. 409; 2 Hawk. P. C., ch. 51, § 4; Rex *v.* Antrobus, 2 A. & E. 788; 4 N. & M. 565; 29 E. C. L. 213.

5. Rex *v.* Antrobus, 2 A. & E. 788; 4 N. & M. 565; 29 E. C. L. 213. See Rex *v.* Garside, 2 A. & E. 266; 4 N. & M. 33; 29 E. C. L. 84; Rex *v.* Rogers, 3 Burr. 1809; 4 Bl. Com., Appendix, § 5.

6. Rex *v.* Antrobus, 2 A. & E. 788; 4 N. & M. 565; 29 E. C. L. 213.

7. 1 Bish. Crim. Proc., § 1336, *citing* Rex *v.* Sayer, 16 How. St. Tr. 93; Rat-

Since it is no part of the sentence,[1] it follows, when no warrant is issued, that the time and place of execution will rest in the discretion of the sheriff.[2] The place of execution ought not to be awarded into a different county from that in which the defendant was convicted.[3]

The officer whose duty it is to inflict the punishment cannot alter the manner of executing it by substituting one kind of death for another without being guilty of felony himself.[4]

If, upon sentence to be hanged by the neck until he is dead, the criminal be not thoroughly killed, but comes to life again, he must be hanged again; for the judgment is not executed until he is dead.[5]

The above is a generalization of the common-law procedure in execution of the sentence of death. But, in *England*, the practice differs somewhat in each court.[6] In the *United States* the practice now depends mostly upon the varying statutes of the different States.[7]

2. Imprisonment—*a.* COMMITMENT.—Since no separate authority is ordinarily necessary at common law to warrant so grave a

cliffe's Case, Fost. 40; Rex *v.* Rogers, 3 Burr. 1809; Holloway's Case, 3 Mod. 42.

1. See *supra*, this title, note 1, p. 1074.

2. 1 Chit. Crim. L. 782.

Under a statute providing that the punishment of death must be inflicted, "at such time, not less than one hundred days after conviction, as the court may adjudge," it was held that the time could not be shortened to less than one hundred days, even by the consent of the prisoner. Koerner *v.* State, 96 Ind. 243.

Practice on Expiration of Day Appointed Without Execution.—Where a prisoner, who has been sentenced to capital punishment, escapes, and is not recaptured until the time appointed for the execution has passed, the practice has been adopted of making a new award of execution after proof of identity. Rex *v.* Okey, 1 Lev. 61; Ratcliff's Case, 18 How. St. Tr. 430; 9 How. St. Tr. 582; 1 Wils. Rep. 150; Fost. 40; Bland *v.* State, 2 Ind. 608; State *v.* Cardwell, 95 N. Car. 643. So where the sheriff has permitted the day assigned for the execution to elapse. *Ex parte* Nixon, 2 S. Car. 4. In *New York* the procedure is prescribed by statute. *New York* Code Crim. Proc., §§ 503, 504.

3. 1 Chit. Crim. L. 783; CHANGE OF VENUE, vol. 3, p. 107, n. 10.

This is a common provision of the statutes of the different States. Dunlop's Laws of *Pennsylvania*, pp. 605, 606, §§ 1, 2; Jackson *v.* People, 18 Ill. 269. The *Massachusetts* Stat. 1852, ch. 274, § 1, providing that persons convicted of a capital offense, "shall be sentenced to hard labor in the State prison until punishment of death shall be inflicted," does not conflict with the Rev. Stat., ch. 139, § 13, requiring the punishment of death to be executed in the county where the conviction is had; and the governor may issue his warrant to the sheriff of the county where the conviction occurred, directing him to take the convict from the State prison, and transport him to the jail of the county where the sentence is to be enforced, there to be executed. Opinion of the Judges, 11 Cush. (Mass.) 604.

In *Michigan* and *Vermont*, the execution is to take place within the walls of the State prison, or within the inclosed yard thereof. *Michigan* Rev. Stats., p. 706, §§ 11, 12; *Michigan* Comp. Laws of 1857, pp. 1600, 1601; *Vermont* Rev. Stats., pp. 568, 569, §§ 6–11.

4. 4 Bl. Com. 404; 1 Chit. Crim. L. 787; HOMICIDE, vol. 9, p. 538.

5. 2 Hale P. C. 412; 2 Hawk., ch. 51, § 8.

6. 1 Chit. Crim. L. 780–781; 1 Archb. Crim. Pl. & Prac. 202–203.

7. See Archb. Crim. Pl. & Prac. (8th ed.), pp. 630–634, Pomeroy's notes; *New York* Code Crim. Proc., §§ 491–509; Clark's Crim. L. of *Texas*, 592–593.

proceeding as the infliction of the death penalty,[1] it would seem that there is less reason for requiring such an order, where the sentence is to imprisonment and the imprisonment is to be undergone in the custody of the officer who brings the prisoner to the bar.[2] And the practice in execution of sentence to imprisonment is analogous to that pursued upon a capital sentence; sometimes a separate warrant is necessary, but not always.[3] In the *United States*, the warrant of commitment is nearly or quite universal,[4] though it has been held, upon *habeas corpus* proceedings, that a certified copy of the sentence of a court of record is sufficient authority for the detention of a convict.[5]

b. PLACE OF IMPRISONMENT.—In *England*, as all prisons within the realm are the queen's, the court of queen's bench may commit an offender to any legal jail within the kingdom.[6] In the *United States*, the place of imprisonment is commonly designated by statute, and imprisonment in any other place will be unlawful.[7]

c. THE IMPRISONMENT.[8]

3. Fine.[9]—As has been said, when the punishment imposes a fine it is usual to incorporate in the sentence a provision that the defendant stand committed until the payment is made.[10] At common law, if the defendant is not in custody at the time when the sentence is rendered, as may well be,[11] this provision may be enforced by issuing a *capias pro fine* upon which he may be imprisoned in pursuance of the sentence.[12] Another mode of col-

1. See *supra*, this title, *Capital Punishment*.

2. It is be observed that at common law the sheriff is *ex-officio* the jailer of his county. See PRISONS, vol. 19, p. 90, n. 3.

3. 1 Bish. Crim. Proc., § 1337; Rex *v.* Clerk, 1 Salk. 349; *In re* Clarke, 2 Q. B. 619; Furlong *v.* Bray, 2 Saund. 182; *In re* Smith, 3 H. & N. 227; State *v.* Heathman, Wright (Ohio) 691. See CONTEMPT, vol. 3, p. 791, note.

4. 1 Bish. Crim. Proc., § 1337.

5. *In re* Wilson, 18 Fed. Rep. 33, *citing* Hurd on Hab. Corp., § 8; People *v.* Nevins, 1 Hill (N. Y.) 154; State *v.* Heathman, Wright (Ohio) 691. See IMPRISONMENT, vol. 10, p. 204, n. 1. See also HABEAS CORPUS, vol. 9, p. 224, n. 1.

6. 1 Chit. Crim. L. 800; Rex *v.* Hart, 30 How. St. Tr. 1131.

7. Swindstead *v.* Lyddal, 1 Salk. 408; Herrington *v.* State, 87 Ala. 1; State *v.* Ellis, 26 N. J. L. 219; State *v.* Norwood, 93 N. Car. 578; State *v.* McNeill, 75 N. Car. 15. See further, as to place of imprisonment, IMPRISONMENT, vol. 10, pp. 198–199; *In re* Hartwell, Low. (U. S.) 536; Revel *v.* State, 26 Ga. 275; Millar *v.* State, 2 Kan. 174; Miltonvale *v.* Lanoue, 35 Kan. 603; Adams *v.* Vose, 1 Gray (Mass.) 51; *In re* Ryan, 45 Mich. 173; People *v.* Cavanagh, 1 Park. Cr. Rep. (N.Y.) 588; Clellans *v.* Com., 8 Pa. St. 223; Barlow *v.* Com., 3 Binn. (Pa.) 1.

Where a person is convicted under a statute which is silent as to the place of imprisonment, the imprisonment should be in the county jail, and not in the penitentiary. End. Interp. Stats., § 330; Homer *v.* State, 1 Oregon 267; Brooks *v.* People, 14 Colo. 413.

8. See IMPRISONMENT, vol. 10, p. 197; ESCAPE, vol. 6, p. 844; PRISONS, vol. 19. p. 85.

9. See JUSTICE OF THE PEACE, vol. 12, p. 412; FINE, vol. 7, p. 991.

10. See *supra*, this title, *The Punishment, Fine*.

11. See *supra*, this title, *Formalities*, note 3, p. 1068.

12. 2 Bish. Crim. Proc., § 1302 See Kane *v.* People, 8 Wend. (N. Y.) 203; *In re* Beall, 26 Ohio St. 195. Mr. Bishop says: "Such is plainly enough the law on an obscure point which does not often arise; but, practically, when the necessity of a step like this is antic-

lecting a fine under the common-law practice is by a *levari facias*, under which it may be collected out of the defendant's property. And this whether the defendant is committed for non-payment of the fine or not;[1] the imprisonment of a defendant in default of payment of a fine being only a means of enforcing the payment, it is not of itself a satisfaction of the judgment and a defense to a proceeding for the collection of the fine.[2]

SEPARATE BUSINESS, TRADE, etc.—See MARRIED WOMEN, vol. 14, p. 670.

SEPARATE EXAMINATION.—In the law of acknowledgment, separate examination is the interrogation of a married woman, who appears before an officer for the purpose of acknowledging a deed or other instrument, conducted by such officer in private or out of the hearing of her husband, in order to ascertain whether she acts of her own will, and without compulsion and restraint of the husband.[3]

SEPARATE MAINTENANCE.—See HUSBAND AND WIFE, vol. 9, p. 829; SEPARATION (HUSBAND AND WIFE), vol. 22, p. 58.

ipated, the court will secure the custody of the defendant before pronouncing sentence."

In *Florida*, the statutes (M'Clel. Dig. 294, § 8) provide for a *capias* against the body of the defendant to secure the execution of a sentence to pay a fine. *Ex parte* Bryant, 24 Fla. 278; *Ex parte* Peacock, 25 Fla. 478.

The defendant may be imprisoned upon failure to pay voluntarily, and before execution issues to collect the fine. Elsner *v.* Shirgley, 80 Iowa 30.

Place of Imprisonment.—It has been held under the statutes of *California* and *Minnesota*, that such imprisonment cannot be in the State's prison. *Ex parte* Arras, 78 Cal. 304; *In re* Wadleigh, 82 Cal. 518; State *v.* Framness, 43 Minn. 490. But see Riley *v.* State, 16 Conn. 47.

1. 1 Bish. Crim. Proc., § 1303, *citing* 1 Chit. Crim. L. 811; Rex *v.* Wolf, 2 B. & Ad. 609; 1 Chit. 428; Rex *v.* Woolfe, 1 Chit. 583; 18 E. C. L. 171; Rex *v.* Carlisle, 1 D. & R. 474; Kane *v.* People, 8 Wend. (N. Y.) 203.

2. Where a statute gave the court or magistrate authority to imprison any person until the payment of the fine and costs imposed, but there was a proviso to the effect that no such imprisonment should exceed six months for any one offense, it was held that the words "such imprisonment" evidently referred to the imprisonment which the court was authorized to inflict, viz., for a failure or refusal to pay the fine, and not by way of punishment to the offender for the offense committed. The proviso was deemed not to change the character of the imprisonment, but to limit the time of its duration. The court by Pillsbury, J., said: "There is certainly nothing in this portion of the statute indicating that the imprisonment of itself is a satisfaction of the judgment. It empowers the court to adopt a very effectual remedy for the collection of the fine and costs. The court derives the power to imprison from the statute itself, and not from any action of the city or village, except in so far as the place of confinement is to be designated by ordinance, and unless the intent to make the imprisonment a satisfaction of the judgment is clearly expressed, we should not attribute to the legislature the design of depriving the municipality of the right to a money satisfaction of its judgment and costs, without any such expressed desire upon his part. What the effect would be in this case, if the municipality had provided for working the offender under the provision of the same statute, does not arise upon this record, as the plea does not aver that the appellant had ever exercised the power conferred, but until it does so provide it cannot be compelled to accept its pay in labor." Sheffield *v.* O'Day, 7 Ill. App. 344.

But in Texas, upon sentencing the defendant to pay a fine, the court cannot commit a person to jail until the fine and costs are paid, and at the same time issue an execution therefor. O'Conner *v.* State, 40 Tex. 27.

3. See ACKNOWLEDGMENT, vol. 1, p. 166, n. 1.

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